critical race theory

the cutting edge

THIRD EDITION

EDITED BY RICHARD DELGADO & JEAN STEFANCIC

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TEMPLE UNIVERSITY PRESS  PHILADELPHIA

TEMPLE UNIVERSITY PRESS
Philadelphia, Pennsylvania 19122
www.temple.edu/tempress

Published 2013

Library of Congress Cataloging-in-Publication Data

Critical race theory : the cutting edge / edited by Richard Delgado and Jean Stefancic. — Third edition.
pages cm
Includes bibliographical references and index.
ISBN 978-1-4399-1060-3 (cloth : alk. paper) —
ISBN 978-1-4399-1061-0 (paperback : alk. paper) —
ISBN 978-1-4399-1062-7 (e-book) 1. Race discrimination—Law and legislation—United States. 2. Race discrimination—United States. 3. Critical legal studies—United States. 4. United States—Race relations—Philosophy. 5. Racism in language. I. Delgado, Richard, editor of compilation. II. Stefancic, Jean, editor of compilation.
KF4755.C75 2013
342.7308′73—dc23

2012043418

♾ The paper used in this publication meets the requirements of the American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48-1992

Printed in the United States of America

2 4 6 8 9 7 5 3 1

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Acknowledgments

We gratefully acknowledge the assistance and cooperation of the many critical race scholars who contributed their work and encouragement. We are especially indebted to the members of the 1993 Critical Race Theory Workshop, where the idea for the first edition of this reader was born. Jason D. MacLeod performed heroic research in preparing the new edition. Our thanks go to Doris Braendel, Janet Francendese, Amanda Steele, and Temple University Press for their continuing support. Nanette Bradshaw prepared the manuscript with intelligence and precision.

Critical Race Theory

Introduction

This book collects the best writing of a new generation of civil rights scholars—the cutting edge of critical race theory (CRT). Here you will find the ironic, challenging Chronicles of the late Derrick Bell, the evocative first-person stories of Patricia Williams, the incisive analysis of the burdens of workplace identity of Devon Carbado and Mitu Gulati. You will read Paul Butler's startling suggestion that black juries acquit black defendants who are not dangers to the community and his even more striking proposal that society adopt a hip-hop theory of criminal justice. Included as well is James Gordon's painstaking historical sleuthing that concludes that the first Justice John Marshall Harlan, author of a remarkable dissent in *Plessy v. Ferguson*, had a black brother. You will read Julie Su's story of how activists successfully confronted garment-district sweatshops in a contemporary city, Gerald López's and Anthony Alfieri's impassioned defenses of engaged lawyering, and Peggy Davis's arresting description of legal "microaggressions"—those stunning, ambiguous assaults on the dignity and self-regard of people of color. You will read about Latino/a critical (Lat-crit) studies, an emerging subdiscipline within CRT, and the debate over whether a black-white binary paradigm of American antidiscrimination law paradoxically discriminates against Latinos and Asians. Lat-crit scholar George Martinez analyzes judicial decisions grappling with whether Mexican Americans are white and concludes that they generally were held to be so when this would hurt the group—but nonwhite when it made no difference. Superstar Ian Haney López weighs in with an analysis of the social construction of race and another piece scolding Latino leaders for cleaving to whiteness.

Are radical law professors who spend their hours in the ivory tower vampires? In a supremely satirical article, American Indian law scholar Robert Williams argues that they are and that they should come down from the tower, roll up their sleeves, and join the fray at street level. And in an essay that rivals the best of Tom Wolfe, you will read the late Trina Grillo and Stephanie Wildman's demonstration of how white people, even ones of goodwill, unconsciously turn discussions about race around so that the conversation ends up being about themselves! You will read about the atrocities of federal Indian law, the problem of statistical discrimination and what to do about racism that seems "reasonable"—based on statistically valid generalizations about a group—and interethnic group alliances and tensions. You will read about black women who chose to wear their hair in braids (and lived to tell the tale) and about those who wear race as a

mask. You will read about what it is like to be a professor of color trying to win an appointment at a major school or a gay or lesbian of color trying to find a place in the larger civil rights movement. Have you ever wondered how the white race created itself? You will read here Ian Haney López's surprising answer that the Supreme Court played a large part in that construction.

This book is for the reader who wishes to learn about critical race theory, a dynamic, eclectic, and growing movement in the law, and about the emerging writers, many but by no means all of color, who have been challenging racial orthodoxy, shaking up the legal academy, questioning comfortable liberal premises, and leading the search for new ways of thinking about our nation's most intractable, and insoluble, problem—race.

Critical race theory sprang up in the mid-1970s with the early work of Derrick Bell (an African American) and Alan Freeman (a white), both of whom were deeply distressed over the slow pace of racial reform in the United States. It seemed to them—and they were quickly joined by others—that the civil rights movement of the 1960s had stalled and indeed that many of its gains were being rolled back. New approaches were needed to understand and come to grips with the more subtle, but just as deeply entrenched, varieties of racism that characterize our times. Old approaches—filing amicus briefs, marching, coining new litigation strategies, writing articles in legal and popular journals exhorting our fellow citizens to exercise moral leadership in the search for racial justice—were yielding smaller and smaller returns. As Freeman once put it, if you are up a tree and a flood is coming, sometimes you have to climb down before finding shelter in a taller, safer one.

Out of this need came critical race theory, now a body of several hundred leading law review articles and dozens of books, many of which are noted or excerpted in this volume. The movement has predecessors: critical legal studies, to which it owes a great debt; feminism; and continental social and political philosophy. It derives its inspiration from the American civil rights tradition, as represented by such leaders as Martin Luther King, Jr., W.E.B. Du Bois, Rosa Parks, and César Chávez, and from nationalist movements, as manifested by such figures as Malcolm X and the Black Panthers. Although its intellectual origins go back much further, as a self-conscious entity the CRT movement began organizing in 1989, holding its first working session shortly thereafter. This book grew out of the 1993 annual summer workshop held at Mills College in Oakland, California, when the group decided to put its energies into producing a reader. The first edition, which appeared in 1995, was adopted in courses in more than one hundred colleges and universities around the world. This third edition builds on the first two but contains much new material, including major sections dealing with crime, gay-lesbian issues, the black-white binary, intergroup tensions, black men who are on the "down low," and critical race practice and activism. It also includes much new writing by young scholars addressing such issues as workplace identities and the relation of CRT to hip-hop culture and music.

CRT begins with a number of basic insights. One is that racism is normal, not aberrant, in American society. Because it is an ingrained feature of our landscape, racism looks ordinary and natural to persons in the culture. Formal equal opportunity—rules and laws that insist on treating blacks and whites alike (color blindness)—can thus remedy only the more extreme and shocking forms of injustice that do stand out. It can do

little about the business-as-usual forms of racism that people of color confront every day and that account for much misery, alienation, and despair.

Critical race theory's challenge to racial oppression and the status quo sometimes takes the form of storytelling, in which writers analyze the myths, presuppositions, and received wisdoms that make up the common culture about race and that invariably render blacks and other minorities one-down. Starting from the premise that a culture constructs its own social reality in ways that promote its own self-interest, these scholars set out to construct a different reality. Our social world, with its rules, practices, and assignments of prestige and power, is not fixed; rather, we construct it with words, stories, and silence. But we need not acquiesce in arrangements that are unfair and one-sided. By writing and speaking against them, we may hope to contribute to a better, fairer world.

A third premise underlying much of critical race theory is interest convergence. Developed by Derrick Bell, this concept holds that white elites will tolerate or encourage racial advances for blacks only when these also promote white self-interest. Other criticalists question whether civil rights law is designed to benefit folks of color and even suggest that it is really a homeostatic mechanism that ensures that racial progress occurs at just the right pace: Change that is too rapid would be unsettling to society at large; change that is too slow could prove destabilizing. Many question whether white judges are likely to propel racial change, raising the possibility that nonjudicial avenues, such as community action and militancy, may prove more promising. A number of writers employ critical tools to address such classic civil rights issues as federal Indian law, remedies for racist speech and hate crimes, and women's reproductive liberty.

In addition to exploring new approaches to racial justice, criticalists have been trying out new forms of writing and thought. Many are postmoderns, who believe that form and substance are closely connected. Accordingly, they have been using biography and autobiography, stories and counterstories to expose the false necessity and unintentional irony of much current civil rights law and scholarship. Others have been experimenting with humor, satire, and narrative analysis to reveal the circular, self-serving nature of particular legal doctrines or rules. Most mainstream scholars embrace universalism over particularity, and abstract principles and the rule of law over perspectivism (an approach characterized by an emphasis on how it was for a particular person at a particular time and place). Clashing with this more traditional view, CRT writers emphasize the opposite, in what has been termed the "call to context." For CRT scholars, general laws may be appropriate in some areas (such as, perhaps, trusts and estates or highway speed limits), but political and moral discourse is not one of them. Normative discourse (which civil rights is) is highly fact sensitive, which means that adding even one new fact can change intuition radically. For example, imagine a youth convicted of a serious crime. One's first response may be to urge severe punishment. But add one fact—he was seen laughing as he walked away from the scene—and one's intuition changes: Even more serious punishment now seems appropriate. But add another fact—he is mentally impaired or was abused as a child—and now leniency seems in order. Because civil rights is more like the latter example than the former (highway law), neutral universal principles like formal equality can sometimes be more of a hindrance than a help in the search for racial justice. For this reason, many CRT writers urge attention to the details of minorities' lives as a foundation for our national civil rights strategy.

Each of the prime critical themes just mentioned—the insistence that racism is ordinary and not exceptional, the notion that traditional civil rights law has been more valuable to whites than to blacks, the critique of liberalism, and the call to context—has come in for criticism. Some mainstream critics challenge the use of stories and parables, warning that they can be employed to mislead as easily as ordinary analysis can. Others charge that the "race-crits" are too negative and that the despairing images of racial progress and regress that they put forward leave too little room for hope. Still others write that we play fast and loose with truth or "play the race card" in trials. Still others question whether mainstays like affirmative action help or hurt minorities. These arguments appear in this volume, particularly in Parts XIII and XV, along with the crits' responses. Ultimately, the reader will have to decide whether our system of civil rights law needs a complete overhaul, as the CRT writers argue, or just a minor tune-up and, if the former, whether the race-crits' suggestions are good places to start. Temple University Press offers this book with the hope that the eighty-two closely edited selections by the enfants terribles (and éminences grises) of the left can help the reader make this decision.

A note about the selections that make up this volume: We chose articles that are original, readable, and illustrative of themes we deemed characteristic of critical race theory. Space considerations prevented us from including many excellent works; these are generally mentioned in the notes or suggested readings. The articles have been edited for length and readability and the number of footnotes radically pruned. Readers desiring to read the complete works will find their citations at the bottom of each article-opening page.

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PART I

CRITIQUE OF LIBERALISM

VIRTUALLY ALL critical race theory is marked by a deep discontent with liberalism, a system of civil rights litigation and activism characterized by incrementalism, a faith in the legal system, and hope for progress, among other things. Indeed, virtually every chapter in this book can be seen as an effort to go beyond the legacy of mainstream civil rights thought to something better.

Part I begins with Derrick Bell's classic racial-realist tale asking his readers to imagine a Space Trader offer to sacrifice all American blacks. Michael Olivas's reflections on his own Latino ethnic history, as well as that of Native Americans and Chinese Americans, lead him to the sobering conclusion that Bell's frightening space trade has indeed happened many times in U.S. history.

This is followed by Devon Carbado and Cheryl Harris's surgical dissection of color-blind admissions policies at colleges and universities and how the race-neutral personal statement can rob minorities of parts of their identities. Mari Matsuda's famous "Quail Calls" chapter draws attention to how law's cold, impersonal rationality can benefit from the multiple consciousness of outsiders. A second critique of color blindness, by Neil Gotanda, follows.

The reader then meets Richard Delgado's analysis of liberal McCarthyism and the unwitting role it played in disseminating critical thought. Charles Lawrence next demonstrates how another liberal mainstay—parental choice—can easily result in segregated schools that impede the quest for community and full citizenship that *Brown* sought to achieve.

Those interested in going further may wish to consult the demanding but original critiques of the current electoral system and democratic process by Lani Guinier; some are listed in the Suggested Readings for Part I.

1. After We're Gone

Prudent Speculations on America in a Postracial Epoch

DERRICK A. BELL, JR.

It is time—as a colloquialism puts it—to "get real" about race and the persistence of racism in America. The very visible social and economic progress made by some African Americans can no longer obscure the increasingly dismal demographics that reflect the status of most of those whose forebears in this country were slaves. Statistics on poverty, unemployment, and income support the growing concern that the slow racial advances of the 1960s and 1970s have ended and retrogression is well under way.

Perhaps Thomas Jefferson had it right after all. When musing on the future of Africans in this country, he expressed the view that blacks should be free, but he was certain that "the two races, equally free, cannot live in the same government."[1] Jefferson suspected that blacks, whether originally a distinct race or made distinct by time and circumstances, are "inferior to the whites in the endowments both of body and mind."[2] Such differences prompted Jefferson to warn that "[i]f the legal barriers between the races were torn down, but no provision made for their separation, 'convulsions' would ensue, which would 'probably never end but in the extermination of the one or the other race.'"[3]

Jefferson's views were widely shared. In his summary of how the Constitution's framers came to include recognition and protection of human slavery in a document that was committed to the protection of individual liberties, Professor Staughton Lynd wrote, "Even the most liberal of the Founding Fathers were unable to imagine a society in which whites and Negroes would live together as fellow-citizens. Honor and intellectual consistency drove them to favor abolition; personal distaste, to fear it."[4]

In our era, the premier precedent of *Brown v. Board of Education* promised to be the twentieth century's Emancipation Proclamation. Both policies, however, served to advance the nation's foreign policy interests more than they provided actual aid to blacks. Nevertheless, both actions inspired blacks to push for long-denied freedoms. Alas, the late Alexander Bickel's dire prediction has proven correct. He warned that the *Brown* decision would not be reversed but "[could] be headed for—dread word—irrelevance."[5]

A version of this chapter previously appeared as Derrick A. Bell, Jr., *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 St. Louis U. L.J. 393 (1990). Originally published in the *St. Louis University Law Journal*.

Given the current tenuous status of African Americans, the desperate condition of those on the bottom, and the growing resentment of the successes realized by those who are making gains despite the odds, one wonders how this country would respond to a crisis in which the sacrifice of the most basic rights of blacks would result in the accrual of substantial benefits to all whites. This primary issue is explored in a fictional story that could prove to be prophetic.

The Chronicle of the Space Traders

The first surprise was not their arrival—they had sent radio messages weeks before, advising that they would land one thousand space ships along the Atlantic coast on January 1, 2000. The surprise was the spaceships themselves. Unlike the Star Wars variety, the great vessels, each the size of an aircraft carrier, resembled the square-shaped landing craft used to transport troops to beachhead invasion sites during World War II.

The great ships entered the earth's atmosphere in a spectacular fiery display that was visible throughout the Western Hemisphere. After an impressive, cross-continental flyby, they landed in the waters just off the Atlantic coast. The lowered bows of the mammoth ships exposed cavernous holds that were huge, dark, and impenetrable.

Then came the second surprise. The welcoming delegation of government officials and members of the media covering the event could hear and understand the crew as they disembarked. They spoke English and sounded like the former president Ronald Reagan, whose recorded voice, in fact, they had dubbed into their computerized language translation system. The visitors, however, were invisible—at least they could not be seen by whites who were present or by television viewers to the special coverage that, despite howls of protest, had preempted football bowl games. American blacks were able to see them all too well. "They look like old-South sheriffs, mean and ugly," some said. They were, according to others, "more like slave drivers and overseers." Particularly frantic reports claimed, "The visitors are dressed in white sheets and hoods like the Ku Klux Klan." In whatever guise they saw them, blacks all agreed that the visitors embodied racist evil. The space visitors cut short the long-winded welcoming speeches, expressed no interest in parades and banquets, and made clear that their long journey was undertaken for one purpose and one purpose only: trade. Here was the third surprise. The visitors had brought materials that they knew the United States needed desperately: gold to bail out the almost bankrupt federal, state, and local governments; special chemicals that would sanitize the almost uninhabitable environment; and a totally safe nuclear engine with fuel to relieve the nation's swiftly diminishing fossil fuel resources.

In return, the visitors wanted only one thing. This demand created more of a shock than a surprise. The visitors wanted to take back to their home star all African Americans (defined as all citizens whose birth certificates listed them as black). The proposition instantly reduced the welcoming delegation to a humbling disarray. The visitors seemed to expect this reaction. After emphasizing that acceptance of their offer was entirely voluntary and would not be coerced, they withdrew to their ships. The Traders promised to give the nation a period of sixteen days to respond. The decision would be due on January 17, the national holiday commemorating the birthday of Dr. Martin Luther King, Jr.

The Space Traders' proposition immediately dominated the country's attention. The president called Congress into special session, and governors did the same for state

legislatures that were not then meeting. Blacks were outraged. Individuals and their leaders cried in unison, "You have not seen them. Why don't you just say no?" Although for many whites the trade posed an embarrassing question, the Space Traders' offer proved to be an irresistible temptation. Decades of conservative, laissez-faire capitalism had taken their toll. The nation that had funded the reconstruction of the free world a half century ago following World War II was now in a very difficult state. Massive debt had debilitated all functioning. The environment was in shambles, and crude oil and coal resources were almost exhausted.

In addition, the race problem had greatly worsened in the last decade. A relatively small group of blacks had survived the retrogression of civil rights protection that marked the 1990s. Perhaps 20 percent managed to make good in the increasingly technologically oriented society. But more than half the group had sunk to an unacknowledged outcast status. They were confined in former inner-city areas that had been divorced from their political boundaries. High walls surrounded these areas, and entrance and exit were carefully controlled. No one even dreamed anymore that this mass of blacks and dark-complexioned Hispanics would ever "overcome."

Supposedly, U.S. officials tried in secret negotiations to get the Space Traders to exchange only those blacks locked in the inner cities, but the visitors made it clear that this was an all-or-nothing offer. During these talks, the Space Traders warned that they would withdraw their proposition unless the United States halted the flight of the growing numbers of blacks who—fearing the worst—were fleeing the country. In response, executive orders were issued and implemented, barring blacks from leaving the country until the Space Traders' proposition was fully debated and resolved. "It is your patriotic duty," blacks were told, "to allow this great issue to be resolved through the democratic process and in accordance with the rule of law."

Blacks and their white supporters challenged these procedures in the courts, but their suits were dismissed as "political questions" that must be determined by coequal branches of government. Even so, forces that supported the proposition took seriously blacks' charges that if the nation accepted the Space Traders' proposition, it would violate the Constitution's most basic protections. Acting swiftly, supporters began the necessary steps to convene a constitutional convention. In ten days of feverish work, the quickly assembled convention drafted and, by a substantial majority, passed an amendment that declared:

> *Every citizen is subject at the call of Congress to selection for special service for periods necessary to protect domestic interests and international needs.*

The amendment was scheduled for ratification by the states in a national referendum. If ratified, the amendment would validate previously drafted legislation that would induct all blacks into special service for transportation under the terms of the Space Traders' offer. In the brief but intense prevoting day campaign, proratification groups' major argument had an appeal that surprised even those who made it. Their message was straightforward:

> *The framers intended America to be a white country. The evidence of their intentions is present in the original Constitution. After more than 137 years of good faith efforts to build a healthy, stable interracial nation, we have concluded that our survival today—as the framers concluded in the beginning—requires that we*

sacrifice the rights of blacks to protect and further the interests of whites. The framers' example must be our guide. Patriotism and not pity must govern our decision. We should ratify the amendment and accept the Space Traders' proposition.

To their credit, many whites worked hard to defeat the amendment. Nevertheless, given the usual fate of minority rights when subjected to referenda or initiatives, the outcome was never really in doubt. The final vote tally confirmed the predictions. By a vote of 70 percent in favor—30 percent opposed—Americans accepted the Space Traders' proposition. Expecting this result, government agencies had secretly made preparations to facilitate the transfer. Some blacks escaped, and many thousands lost their lives in futile efforts to resist the joint federal and state police teams responsible for rounding up, cataloging, and transporting blacks to the coast.

The dawn of the last Martin Luther King holiday that the nation would ever observe illuminated an extraordinary sight. The Space Traders had drawn their strange ships right up to the beaches; had discharged their cargoes of gold, minerals, and machinery; and had begun loading long lines of silent black people. At the Traders' direction, the inductees were stripped of all but a single undergarment. Heads bowed, arms linked by chains, black people left the New World as their forebears had arrived.

And just as the forced importation of those African ancestors had made the nation's wealth and productivity possible, so their forced exodus saved the country from the need to pay the price of its greed-based excess. There might be other unforeseen costs of the trade, but like their colonial predecessors, Americans facing the twenty-first century were willing to avoid those problems as long as possible.

Discussion

It is not a futile exercise to try to imagine what the country would be like in the days and weeks after the last space ship swooshed off and disappeared into deep space—beyond the reach of our most advanced electronic tracking equipment. How, one might ask, would the nation bear the guilt for its decision? Certainly, many white Americans would feel bad about the trade and the sacrifice of humans for economic well-being. But the country has a two-hundred-year history of treating black lives as property. Genocide is an ugly, but no less accurate, description of what the nation did, and continues to do, to the American Indian. Ignoring the Treaty of Guadalupe Hidalgo was only the first of many betrayals by whites toward Americans of Spanish descent. At the time of writing, Japanese Americans who suffered detention during World War II and lost hard-earned property and status were still awaiting payment of the small compensation approved, but not yet funded, by Congress. The country manages to carry on despite the burden of guilt that these injustices impose on our own people. In all likelihood, the country would manage the Space Trader deal despite recriminations, rationalizations, and remorse. Quite soon, moreover, the nation could become preoccupied with problems of social unrest based on class rather than race.

The trade would solve the budget deficit, provide an unlimited energy source, and restore an unhealthy environment. The new resources, however, would not automatically correct the growing income disparities between blacks and whites as reflected in the widening income gap between upper- and lower-income families in the nation as a

whole. According to the Center on Budget and Policy Priorities, "In 1985, 1986 and 1987, the poorest fifth of American families received only 4.6 percent of the national family income."[6] The poorest two-fifths of American families received 15.4 percent of the national family income in 1986 and 1987.[7] In contrast, "the richest fifth of all families received 43.7 percent of the national family income in 1986 and 1987, the highest percentage on record."[8] The top two-fifths of all families' share was 67.8 percent, which broke another record.[9] The poorest two-fifths of American families received a smaller share of the national family income in 1986 and 1987 than in any other year since the Census Bureau began collecting data in 1947.[10] Meanwhile, the richest two-fifths of American families received a larger share of the national income in 1987 than in any year since 1947.[11]

These statistics are shocking, but they are certainly not a secret. Even more shocking than the serious disparities in income is the relative silence of whites about economic gaps that should constitute a major political issue. Certainly, it is a matter of far more importance to voters than the need either to protect the American flag from "desecration" by protesters or to keep the Willie Hortons of the world from obtaining prison furloughs. Why the low level of interest about so critical a pocketbook issue? Why is there no political price to pay when our government bails out big businesses like savings and loans, Chrysler, Lockheed, and even New York City for mistakes, mismanagement, and thinly veiled theft that are the corporations' fault? Why is there no public outrage when thousands of farmers go under because of changes in economic conditions that are not their fault? Why does government remain on the sidelines as millions of factory workers lose their livelihood because of owners' greed—not the workers' fault? Why is there no hue and cry at a tax structure that rewards builders who darken the skies with gigantic, expensive condominiums for the rich while the working class spend up to half their minimum-wage incomes for marginal housing and as our poor live on the streets?

The reasons are likely numerous and complex. One substantial factor, however, seems to be the unstated understanding by the mass of whites that they will accept large disparities in economic opportunity in comparison to other whites as long as they have a priority over blacks and other people of color for access to those opportunities. On any number of occasions in American history, whites have acquiesced in—when they were not pressuring for—policy decisions that subordinated the rights of blacks to further some other interest. One might well ask: What do the masses of working-class and poor whites gain from this continued sacrifice of black rights that justifies such acquiescence when so often the policies limit whites' opportunities as well as those of blacks?

The answer is as unavoidable as it is disturbing. Even those whites who lack wealth and power are sustained in their sense of racial superiority by policy decisions that sacrifice black rights. The subordination of blacks seems to reassure whites of an unspoken, but no less certain, property right in their whiteness. This right is recognized by courts and society as all property rights are upheld under a government created and sustained primarily for that purpose. With blacks gone, the property right in whiteness goes with them. How long will the masses of whites remain silent about their puny share of the nation's wealth?

The film *Resurgence* shows a poor Southern white, mired in poverty, who nevertheless declares, "Every morning I wake up and thank God I'm white." But after we're gone, we can be fairly sure, this individual will not shout, "Thank God, I'm poor." What will he and millions like him shout when the reality of his status hits him? How will the

nation's leaders respond to discontent that has been building for so long and that has been so skillfully misdirected toward a group no longer here? It will be too late to call off the trade—too late to bring back African Americans to fill their traditional role. Indeed, even without an extraterrestrial trade mission, the hour is growing late for expecting that black people will always keep the hope of racial equality alive. For millions in what is now designated the underclass, that hope has already died in the devastation of their lives. The cost of this devastation is not limited to the ghetto. As manifestations of self-hate and despair turn to rage and retaliation against the oppressors, those costs will rise dramatically and frightfully.

When I ask audiences how Americans would vote on the Space Traders' offer, rather substantial majorities express the view that the offer would be accepted. That is a present day measure of an almost certain future decision—one that will be required whether or not we have trade-oriented visitors from outer space. The century-long cycles of racial progress, regression, and reform cannot continue and should not. Those subordinated on the basis of color cannot continue forever in this status, and will not. Politics, the courts, and self-help have failed or proved to be inadequate. Perhaps the prospect of black people removed from the American landscape will bring a necessary reassessment of who has suffered most from our subordination.

NOTES

1. Quoted in Staughton Lynd, *Slavery and the Founding Fathers*, in Black History 115, 129 (M. Drimmer ed., 1968) (citations omitted).

2. Donald L. Robinson, Slavery in the Structure of American Politics, 1765–1820, at 91 (1971) (quoting T. Jefferson, Notes on the State of Virginia (Thomas Abernethy ed., 1964)).

3. *Id*. at 90.

4. Lynd, *supra* note 1, at 129.

5. Alexander Bickel, The Supreme Court and the Idea of Progress 151 (1978).

6. Center on Budget and Policy Priorities, Still Far from the Dream: Recent Developments in Black Income, Employment, and Poverty 21 (Oct. 1988).

7. *Id*.

8. *Id*. at 22.

9. *Id*.

10. *Id*. at 21.

11. *Id*. at 22.

2. The Chronicles, My Grandfather's Stories, and Immigration Law

The Slave Traders Chronicle as Racial History

MICHAEL A. OLIVAS

The funny thing about stories is that everyone has one. My grandfather had them, with plenty to spare. When I was very young, he would regale me with stories, usually about politics, baseball, and honor. These were his themes, the subject matter he carved out for himself and his grandchildren. As the oldest grandson and his first godchild, I held a special place of responsibility and affection. In Mexican families, this patrimony handed to young boys is one remnant of older times that is fading, like the use of Spanish in the home, *posadas* (caroling followed by a traditional dinner) at Christmas, or the deference accorded all elders.

In Sabino Olivas's world, there were three verities, ones that he adhered to his entire life: political and personal loyalties are paramount; children should work hard and respect their elders; and people should conduct their lives with honor. Of course, each of these themes had a canon of stories designed, like parables, to illustrate the larger theme, and like the Bible, to be interlocking, cross-referenced, and synoptic. That is, they could be embellished in the retelling, but they had to conform to the general themes of loyalty, hard work, and honor.

Several examples illustrate the overarching theoretical construction of my grandfather's worldview and show how, for him, everything was connected and profound. Like other folklorists and storytellers, he employed mythic heroes or imbued people he knew with heroic dimensions. This is an important part of capturing the imagination of young children, for the mythopoeic technique overemphasizes characteristics and allows listeners to fill in the gaps by actively inviting them to rewrite the story and remember it in their own terms. As a result, as my family grew (I am the oldest of ten), I would hear these taproot stories retold both by my grandfather to the other kids and by my brothers and sisters to others. The core of the story would be intact but transformed by the teller's accumulated sense of the story line and its application.

One of the earliest stories was about New Mexico's U.S. senator Bronson Cutting and how he had died in a plane crash after attempting to help northern New Mexico

A version of this chapter previously appeared as Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 St. Louis U. L.J. 425 (1990). Originally published in the *St. Louis University Law Journal*.

Hispanics regain land snatched from them by greedy developers. Growing up near Tierra Amarilla, New Mexico, as he did, my grandfather was heir to a long-standing oral tradition of defining one's status by land ownership. To this day, land ownership in northern New Mexico is a tangle of aboriginal Indian rights, Spanish land grants, Anglo and Mexican greed, treaties, and developer domination. Most outsiders (that is, anyone south of Santa Fe) know this issue only by having seen *The Milagro Beanfield War*, the Robert Redford movie based on John Nichols's book. But my grandfather's story was that sinister forces had somehow tampered with Senator Cutting's plane because he was a man of the people, aligned against wealthy interests. Senator Cutting, I was led to believe as I anchored the story with my own points of reference, was more like Jimmy Stewart in *Mr. Smith Goes to Washington* than like the Claude Rains character, who would lie to get his own greedy way.

Of course, as I grew older, I learned that the true story was not exactly as my grandfather had told it. Land ownership in New Mexico is complicated; the senator had his faults; and my grandfather ran afoul of Cutting's political enemy, Senator Dennis Chavez. But the story still held its sway over me.

Another favorite story, which included a strong admonition to me, was about how he and other Hispanics had been treated in Texas on their way to World War I. A trainload of soldiers from Arizona and northern New Mexico, predominantly of Mexican origin (both New Mexico and Arizona had only recently become states), were going to training camp in Fort Hays, Kansas. Their train stopped in a town near Amarillo, Texas, and all the men poured out to eat at a restaurant, one that catered to train travelers. But only to some. A sign prominently proclaimed, "No coloreds or Mexicans allowed," and word spread among them that this admissions policy was taken seriously.

My grandfather, who until this time had never been outside the territory or the state of New Mexico (after 1912) was not used to this kind of indignity. After all, he was from a state where Hispanics and Indians constituted a majority of the population, especially in the north, and it was his first face-to-face encounter with racism, Texas-style. Shamefacedly, the New Mexicans ate the food that Anglo soldiers bought and brought to the train, but he never forgot the humiliation and anger he felt that day. Sixty-five years later, when he told me this story, he remembered clearly how most of the men died in France or elsewhere in Europe, defending a country that never fully accorded them their rights.

The longer, fuller version, replete with wonderful details of how at training camp they had ridden sawhorses with saddles, always ended with the anthem, "Ten cuidado con los Tejanos, porque son todos desgraciados y no tienen verguenza" (Be careful with Texans because they are all sons of bitches and have no shame). To be a *sin verguenza*—a "person who was shameless," or without honor—was my grandfather's cruelest condemnation, reserved for faithless husbands, reprobates, lying grandchildren, and Anglo Texans.

These stories, which always had admonitions about honorable behavior, always had a moral to them, with implications for grandchildren. Thus, I was admonished to vote Democratic (because of Franklin Roosevelt and the Catholic John Kennedy), to support the National League (because the Brooklyn Dodgers had first hired black players and because the relocated Los Angeles Dodgers had a farm team in Albuquerque), and to honor my elders (for example, by using the more formal *usted* instead of the informal *tu*).

People react to Derrick Bell and his storytelling in predictably diverse ways. People of color, particularly progressive minority scholars, have been drawn to his work. The old guard has been predictably scornful, as in Lino Graglia's dyspeptic assessment, "There can be no sin for which reading Professor Derrick Bell is not, for me, adequate punishment. . . . [The Chronicles are] wails of embittered, hate-filled self-pity."[1]

My objection, if that is the proper word, to the "Chronicle of the Space Traders" is not that it is too fantastic or unlikely to occur but rather the opposite: This scenario has occurred, and more than once in our nation's history. Not only have blacks been enslaved, as the "Chronicle" sorrowfully notes, but other racial groups have been conquered and removed, imported for their labor and not allowed to participate in the society they built, or expelled when their labor was no longer considered necessary.

Consider the immigration history and political economy of three groups whose U.S. history predates Bell's prophecy for 2000: Cherokee removal and the Trail of Tears, Chinese laborers and the Chinese exclusion laws, and Mexicans in the Bracero Program and Operation Wetback. These three racial groups share different histories of conquest, exploitation, and legal disadvantage, but even a brief summary of their treatment in U.S. law shows commonalities of racial animus, legal infirmity, and majority domination of legal institutions guised as "political questions."[2] I could have also chosen the national origins or labor histories of other Indian tribes, the Filipinos, the native Hawaiians, the Japanese, the Guamanians, the Puerto Ricans, or the Vietnamese—in other words, the distinct racial groups whose conquest, colonization, enslavement, or immigration histories mark them as candidates for the Space Traders' evil exchange.

Cherokee Removal and the Trail of Tears

Although the Cherokees were, in the early 1800s, the largest tribe in what was the southeastern United States, genocidal wars, abrogated treaties, and Anglo land settlement practices had reduced them to fifteen thousand, predominantly in Georgia, Tennessee, North Carolina, and Alabama, by 1838.[3] During the 1838–1839 forced march of the Cherokees, Seminoles, Creeks, Choctaws, and Chickasaw to the Indian Territory of what is now Oklahoma, a quarter of the Cherokees died on the Trail of Tears. Gold had been discovered on Indian land in Georgia. The newly confederated states did not want sovereign Indian nations coexisting in their jurisdiction; President Andrew Jackson, engaged in a bitter struggle with Chief Justice John Marshall, saw the removal of the Indians as a means to his own political ends.

Not only were the tribes removed at gunpoint from their ancestral homelands, guaranteed to them by treaties, but there were other elements that foreshadowed Bell's "Chronicles." The Cherokees had sought to integrate themselves into their conquerors' social and legal systems, engaged as sovereigns to negotiate formally and lawfully their place in the U.S. polity, and litigated their grievances in federal courts to no avail. Like the blacks in the fictional "Chronicles," they too appealed to the kindness of strangers. One authoritative account of this shameful occasion noted:

> [M]any Cherokees continued to hold to their hope even while soldiers drove them from their homes into the stockades and on to the Trail of Tears. Some

> refused to believe that the American people would allow this to happen. Until the very end, the Cherokees spoke out supporting their rights to resist removal and to continue to live in the ancestral homelands.[4]

To coexist with their conquerors, the Cherokees had adopted Anglo ways, developing their own alphabet, bilingual (English-Cherokee) newspapers, a court system, and a written constitution.[5] They entered into a series of treaties that ceded dominion to the United States but that preserved a substantial measure of self-determination and autonomy.[6] Beginning in 1802 with the Georgia Compact, however, white landowners and officials variously entered into and repudiated treaties and other agreements with Indian tribes.[7] By 1830 the Indian Removal Act had been passed by Congress,[8] and the stage was set for *Cherokee Nation v. Georgia*[9] and *Worcester v. Georgia*.[10] In *Cherokee Nation*, Justice Marshall held that the Cherokee were a "domestic dependent nation" and thus the Supreme Court did not have original jurisdiction; he invited another "proper case with proper parties" to determine the "mere question of right."[11]

One of the "proper parties" presented itself the following year, in *Worcester v. Georgia*, and Chief Justice Marshall held for the Cherokees. Marshall found that each Indian tribe was

> a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of a state can have no force, and which the citizens of [a state] have no right to enter, but with the assent of the [Indians] themselves, or in conformity with treaties, and with the acts of Congress.[12]

Despite this first clarification of Indian sovereignty and the early example of preemption, the state of Georgia refused to obey the Court's order, and President Jackson refused to enforce the Cherokees' victory. Georgia, contemptuous of the Court's authority, in what it contended was its own affairs, did not even argue its side before the Court.

The Cherokees' victory was Pyrrhic, because even Cherokee supporters, such as Daniel Webster, turned their attention from enforcement of *Worcester* to the Nullification Crisis, which threatened the very existence of the Union.[13] The case of *Worcester* was resolved by a pardon, technically making moot the Cherokees' victory.[14] The greater good of the Union thus sacrificed Cherokee rights at the altar of political expediency, foreshadowing blacks' sacrifice during the Civil War, Japanese rights sacrificed during World War II, Mexicans' rights sacrificed during Operation Wetback, and black rights extinguished in 2000 for the Space Traders.

Chinese Exclusion

No racial group has been singled out for separate, racist treatment in U.S. immigration law more than have the Chinese. A full political analysis of immigration treaties, statutes, cases, and practices reveals an unapologetic, variegated racial character that today distinctly disadvantages Latin Americans. But peculiar racial antipathy has been specifically reserved for Asians, particularly the Chinese. While Chinese laborers were not enslaved in exactly the same fashion that blacks had been, they were imported under a

series of formal and informal labor-contracting devices. These were designed to provide cheap, exploitable raw labor for the U.S. railroad industry, a labor force that would have few legal or social rights. Immigration law developments in the 1800s, particularly the last third of the century, were dominated by racial devices employed to control the Chinese laborers and deny them formal rights. These formal legal devices included treaties, statutes, and cases.

Anti-Chinese animus was particularly virulent in California, where a series of substantive and petty nuisance state ordinances were aimed at the Chinese. These ordinances provided for arbitrary inspections of Chinese laundries,[15] special tax levies,[16] inspections and admission regulations for aliens entering California ports,[17] mandated grooming standards for prisoners that prohibited pigtails,[18] and a variety of other regulations designed to harass and discriminate against the laborers.[19] Many of these statutes were enacted in defiance of the preemptive role of the federal government in immigration policy making and would not have survived the U.S.–China Burlingame Treaty, adopted in 1868.

Although many of these statutes were struck down and Reconstruction legislation was worded to specify certain protections to immigrants, by 1880 the Burlingame Treaty had been amended to restrict the immigration of Chinese laborers.[20] Congress enacted the Chinese Exclusion Act in 1882[21] and even harsher legislation in 1884.[22] By 1888, Congress reached the point of no return. Another, harsher act was passed that virtually prohibited Chinese from entering or reentering the United States,[23] while the Burlingame Treaty was altered again, ratcheting down even further the mechanisms aimed at the Chinese.

In a series of important cases, the U.S. Supreme Court refused to strike down these federal laws and treaties, on political question grounds. In one of these cases, the Court stated:

> The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. . . . If there be any just ground of complaint on the part of China [or the Chinese immigrants], it must be made to the political department of our government, which is alone competent to act upon the subject.[24]

Although the aliens, like the Cherokees before them, prevailed in some of the most egregious instances, the racist tide had undeniably turned. In 1892, Congress extended the amended Burlingame Treaty for an additional ten years and added a provision for removing, through deportation, those Chinese who had managed to dodge the earlier bullets.[25] An extraordinary provision suspended deportation for those Chinese laborers who could qualify (through a special hardship exemption) and could furnish "one credible white witness" on their behalf.[26]

In 1893, this proviso was tested by the luckless Fong Yue Ting, who foolishly produced only another Chinese witness to stay his own deportation. The U.S. Supreme

Court upheld his expulsion, on political question grounds.[27] The majority opinion speculated that the Chinese would not be truthful, noting that Chinese testimony in similar situations "was attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witness of the obligations of an oath."[28] As my grandfather would have said, they obviously had no shame and were probably *sin verguenzas*.

Congress enacted additional extensions of the Chinese exclusion statutes and treaties until 1943. When the immigration laws began to become more codified, each iteration formally included specific reference to the dreaded and unpopular Chinese. Thus, the Immigration Acts of 1917, 1921, and 1924 all contain references that single out this group. If the Space Traders had landed in the late 1800s or early 1900s and demanded the Chinese in exchange for gold, antitoxins, and other considerations, there is little doubt but that the states, Congress, and the U.S. Supreme Court would have acquiesced.

Mexicans, the Bracero Program, and Operation Wetback

Nineteenth-century Chinese labor history in the United States is one of building railroads; that of Mexicans and Mexican Americans is agricultural labor, picking perishable crops. In the southwestern and western United States, Mexicans picked half the cotton and nearly 75 percent of the fruits and vegetables by the 1920s. By 1930, half the sugar beet workers were Mexican, and 80 percent of the farmhands in Southern California were Mexican. As fields became increasingly mechanized, it was Anglo workers who rode the machines, consigning Mexicans to stoop-labor and hand cultivation. One observer noted, "The consensus of opinion of ranchers large and small . . . is that only the small minority of Mexicans are fitted for these types of labor [i.e., mechanized agricultural jobs] at the present time."[29]

Most crucial to the agricultural growers was the need for a reserve labor pool of workers who could be imported for their work, displaced when not needed, and kept in subordinate status so they could not afford to organize collectively or protest their conditions. Mexicans filled this bill perfectly, especially in the early twentieth-century Southwest, where poverty and the Mexican Revolution forced rural Mexicans to come to the United States for work. This migration was facilitated by U.S. growers' agents, who recruited widely in Mexican villages; by the building of railroads (by Mexicans, not Chinese) from the interior of Mexico to El Paso; and by labor shortages in the United States during World War I.

Another means of controlling the spigot of Mexican farm workers was the use of immigration laws. Early labor restrictions through federal immigration law (and state law, as in California) had been aimed at Chinese workers, as outlined in the previous section. When agricultural interests pressured Congress to allow Mexican temporary workers during 1917–1921, the head tax (then set at eight dollars), literacy requirements, public charge provisions, and Alien Contract Labor Law provisions were waived. By 1929, with a surplus of native U.S. workers facing the Depression, the supply of Mexicans was turned off by reimposing the immigration requirements.

While U.S. nativists were pointing to the evils and inferiority of southern European immigrants, Mexicans were characterized as a docile, exploitable, deportable labor force. As one commentator noted:

> Mexican laborers, by accepting these undesirable tasks, enabled [Southwestern] agriculture and industry to flourish, thereby creating effective opportunities for [white] American workers in the higher job levels. . . . The representatives of [U.S.] economic interests showed the basic reason for their support of Mexican immigration[;] employers of the Southwest favored unlimited Mexican immigration because it provided them with a source of cheap labor which would be exploited to the fullest possible extent.[30]

To control the southern border, the Border Patrol was created in 1924, while the Department of Labor and the Immigration Bureau began a procedure in 1925 to regulate Mexican immigration by restricting the flow to workers already employed or promised positions.

During the Depression, two means were used to control Mexican workers: mass deportations and repatriations. Los Angeles was targeted for massive deportations of persons with Spanish-sounding names or Mexican features who could not produce formal papers, and over eighty thousand Mexicans were deported from 1929–1935.[31] Many of these persons had the legal right to be in the country or had been born citizens but simply could not prove their status; of course, many of these workers had been eagerly sought to harvest perishable crops. In addition, over half a million Mexicans were also "voluntarily" repatriated by choosing to go to Mexico rather than remain in the United States, possibly subject to formal deportation.

By 1940, the cycle had turned: labor shortages and World War II had created the need for more agricultural workers, and growers convinced the U.S. government to enter into a large-scale contract-labor scheme, the Bracero Program. Originally begun in 1942 under an executive order, the program brokered laborers under contracts between the United States and Mexico.[32] Between 1942 and 1951 over half a million braceros were hired under the program. Public funds were used to seek and register in Mexico workers who, after their labor had been performed, were returned to Mexico until the crops were ready to be picked again. This program was cynically employed to create a reserve pool of temporary laborers who had few rights and no vesting of equities.

By 1946, the circulation of bracero labor, both in its certification and its deportation mechanism, had become hopelessly confused. It became impossible to separate Mexican Americans from deportable Mexicans. Many United States citizens were mistakenly repatriated to Mexico, including men with Mexican features who had never been to Mexico.[33] Thus, a system of "drying out wetbacks" was instituted. This modest legalization process gave some Mexican braceros an opportunity to regularize their immigration status and remain in the United States while they worked as braceros.

In 1950, under these various mechanisms, 20,000 new braceros were certified, 97,000 agricultural workers were dehydrated, and 480,000 old braceros were deported back to Mexico. In 1954, over 1 million braceros were deported under the terms of Operation Wetback, a Special Mobile Force of the Border Patrol. The program included massive

roundups and deportations, factory and field raids, a relentless media campaign designed to characterize the mop-up operation as a national security necessity, and a tightening up of the border to deter undocumented immigration.

Conclusion and My Grandfather's Memories

In two of his books based on folktales from Tierra Amarilla, New Mexico, Sabine Ulibarri has re-created the Hispano-Indian world of rural, northern New Mexico. In *Cuentos de Tierra Amarilla* (Tales from Tierra Amarilla),[34] he collects a variety of wonderful tales, rooted in this isolated town that time has not changed, even today. My grandfather enjoyed this book, which I read to him in his final years, 1981 and 1982. But his favorite (and mine) was Ulibarri's masterwork, *Mi Abuela Fumaba Puros* (My Grandmother Smoked Cigars),[35] in which an old woman lights cigars in her house to remind her of her dead husband.

My grandfather loved this story, not only because it was by his more famous *tocayo* (namesake), but also because it was at once outlandish ("mujeres en Nuevo Mexico no fumaban puros"—that is, women in New Mexico did not smoke cigars) and yet very real. Smells were very real to him, evocative of earlier events and *cuentos*, the way that tea and madeleines unlocked Proust's prodigious memory.[36] *Biscochitos* (cookies) evoked holidays, and *empanadas* (pies) Christmas. Had he outlived my grandmother, he would have had mementos in the house, perhaps prune pies or apricot jam.

My grandfather's world, with the exception of his World War I sortie in Texas and abroad, was small but not narrow. He lived by a code of behavior, one he passed to his more fortunate children (only one of whom still lives in New Mexico—my father) and grandchildren (most of whom no longer live in New Mexico). But for me, no longer in New Mexico, reading Derrick Bell's "Chronicles" is like talking to my grandfather or reading Sabine Ulibarri: the stories are at once outlandish yet very real.

Folklore and *corridos* (ballads) have always held a powerful place in Mexican society. Fiction has always held a powerful place in the human experience, and the "Chronicles" will inform racial jurisprudence and civil rights scholarship in the United States in ways not yet evident. Critical minority renderings of U.S. racial history, immigration practices, and labor economy can have equally compelling results, however, recounting what actually happened in all the sordid details. If Derrick Bell's work forces us to engage these unsavory practices, he will have performed an even greater service than that already attributed to him in this forum and elsewhere. He will have caused us to examine our grandfathers' stories and lives.

It is 1990. As a deterrent to Central American refugees and as bait to attract their families already in the United States, the U.S. Immigration and Naturalization Service (INS, now known as Immigration and Customs Enforcement) began in the 1980s to incarcerate undocumented adults and unaccompanied minors in border camps.[37] One, near Brownsville, Texas, was once used as a U.S. Department of Agriculture pesticide storage facility.[38] The INS has defied court orders to improve conditions in the camps,[39] and by 1990 hundreds of alien children were being held without health, educational, or legal services.[40] Haitian boat people were being interdicted at sea, given "hearings" on the boats, and repatriated to Haiti; by 1990, only six of twenty thousand interdicted Haitians had been granted asylum.[41] The INS had begun a media campaign to justify its

extraordinary practices on land and on sea. The cycle of U.S. immigration history continued, and all was ready for the Space Traders.

NOTES

1. L. Graglia, Book Review, 5 Const. Comm. 436, 437 (1988) (reviewing D. Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (1987)).

2. See, e.g., Derrick Bell, *After We're Gone: Prudent Speculations on America in a Postracial Epoch*, Chapter 1, this volume ("Blacks and their white supporters challenged these procedures in the courts, but their suits were dismissed as 'political questions' that must be determined by coequal branches of government").

3. See Rennard I. Strickland & William M. Strickland, *The Court and the Trail of Tears*, Sup. Ct. Hist. Soc'y 1979 Y.B. 20 (1978).

My grandfather had many stories about Indians, mostly about how they had been bilked out of their land and tricked by Anglos. His familiarity with Native Americans was with the various Pueblo peoples, whose lands are predominantly in northern New Mexico, as well as Navajos and Apaches (Mescalero and Jicarilla). I clearly remember him taking me and my brothers to the Santa Fe Plaza (the "end of the Santa Fe trail") and showing us a plaque in the plaza commemorating the commercial triumphs over the "savage" Indians. Years later, someone scratched out the offensive adjective, and the state felt compelled to erect another, smaller sign next to the plaque, explaining that the choice of words was a sign of earlier, less sophisticated times and that no insult was really intended.

My grandfather, for one, never intended insult and would have approved of the scratching. He taught us that Indians were good people, excellent artists (he would point to the Indian women selling their jewelry on the sidewalks in front of the Palace of the Governors), and generally preyed on by the world at large. Interestingly, he held a very strong devotion both to Mary, La Senora de Guadalupe, the Mexican-Indian veneration, and to Mary, La Conquistadora, the New Mexican–Spanish veneration representing the conquest over the Indians. My grandparents' house had vigil lights, pictures, and figurines in both Hispanic traditions, and the incongruity never occurred to me then. In addition to the Plaza walks, he would take us as he tended the gravesite of his daughter who had died as a baby. The cemetery plot was a couple of hundred yards from an Indian school and church (St. Catherine's), where he would often choose to pray for his daughter. In any event, my grandfather was, for his day, generous toward and supportive of Indians.

4. William F. Swindler, *Politics as Law: The Cherokee Cases*, 3 Am. Indian L. Rev. 7 (1975); see also Strickland & Strickland, *supra* note 3, at 22 (recounting history of bitter disagreements over role of Supreme Court).

5. See Strickland & Strickland, *supra* note 3, at 22; see also M. Wardell, A Political History of the Cherokee Nation (University of Oklahoma Press 1977) (1938).

6. See, e.g., Strickland & Strickland, *supra* note 3, at 21; R. Strickland, *From Clan to Court: Development of Cherokee Law*, 31 Tenn. Hist. Q. 316 (1972).

7. See generally Wardell, *supra* note 5; Strickland & Strickland, *supra* note 3, at 20–22.

8. Indian Removal Act, 4 Stat. 411 (1830).

9. 30 U.S. (5 Pet.) 178 (1831). Richard Peters, the official Supreme Court reporter at that time, gathered all the arguments, briefs, and opinions into a single volume, The Case of the Cherokee Nation Against the State of Georgia (1831) (cited in Strickland & Strickland, *supra* note 3, at n.19).

10. 31 U.S. (6 Pet.) 515 (1832).

11. 30 U.S. (5 Pet.) 181 (1831).

12. 31 U.S. (6 Pet.) 515, 560 (1832).

13. In November 1832, South Carolina attempted to secede and nullify its membership in the Union. President Jackson issued his Nullification Proclamation, insisting that states could not secede. Faced with this crisis, even staunch Indian supporters rushed to Jackson's side in favor of the Union. See, e.g., Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 Stan. L. Rev. 500 (1969); Strickland & Strickland, *supra* note 3, at 28–29.

14. See G. Jahoda, The Trail of Tears, 1813–1855 (1975) (Georgia officials anticipated Jackson's nonenforcement); see also Strickland, *supra* note 6, at 326.

15. See Yick Wo v. Hopkins, 118 U.S. 356 (1886) (invalidating city health ordinance applied only to Chinese).

16. See Ling Sing v. Washburn, 20 Cal. 534 (1862) (striking down "capitation" tax on Chinese). See generally Ronald Takaki, Strangers from a Different Shore (1988) (discussing immigration and labor history of Asians).

17. See Chy Lung v. Freeman, 92 U.S. 175 (1875) (striking down California Commissioner of Immigration's authority to admit aliens); People v. Downer, 7 Cal. 170 (1857) (striking down state tax on Chinese arrivals).

18. See Ho Ah Kow v. Nunan, 5 Sawyer 552 (C.D. Cal. 1879).

19. Charles L. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth-Century America: The First Phase, 1850–1870*, 72 Calif. L. Rev. 529 (1984). For a review of evidence that Asians remain discriminated against, despite high statistical achievement, see *Asian and Pacific Americans: Behind the Myths*, Change, Nov.–Dec. 1989 (Special Issue).

20. See 22 Stat. 826 (1880) (revising 1868 treaty to suspend Chinese immigration).

21. 22 Stat. 58 (1882) (suspending Chinese immigration for ten years and establishing Chinese certificate requirement).

22. See 23 Stat. 115 (1884) (making certificate mandatory for Chinese entry into the United States).

23. See 25 Stat. 476 (1884) (rescinding right of Chinese to reenter the United States, even if they had entry certificates; stipulating "punishment to master of vessel unlawfully bringing Chinamen").

24. Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (the Chinese exclusion case).

25. See 27 Stat. 25 (1892).

26. See Fong Yue Ting v. United States, 149 U.S. 698 (1893).

27. See *id*. at 731.

28. *Id*. at 730 (citing Chae Chan Ping v. United States, 130 U.S. 581, 598 (1889)).

29. P. Taylor, Mexican Labor in the United States Imperial Valley 42 (1928).

30. R. Divine, American Immigration Policy, 1924–1952, at 58, 59 (1957).

31. See A. Hoffman, Unwanted Mexican Americans in the Great Depression: Repatriation Pressures, 1929–1939, at 126 (1974); A. Hoffman, *Mexican Repatriation Statistics: Some Suggested Alternatives to Carey McWilliams*, 1972 W. Hist. Q. 391.

32. See, e.g., J. R. Garcia, Operation Wetback: The Mass Deportation of Mexican Undocumented Workers in 1954, at 18–69 (1980).

33. See Mario Barrera, Race and Class in the Southwest: A Theory of Racial Inequality 104–07 (1979).

34. S. Ulibarri, Cuentos de Tierra Amarilla (1971). Sabine Ulibarri, also a native of Tierra Amarilla, told me he had known of my grandfather because the town was small and because their names were so similar. My grandfather, who never met Ulibarri (who was twenty years younger), called him his *tocayo* (namesake).

35. S. Ulibarri, Mi Abuela Fumaba Puros (1977).

36. See M. Proust, Remembrance of Things Past (rev. ed. 1981).

37. See, e.g., U.S. Committee for Refugees, Refugees at Our Borders: The U.S. Response to Asylum Seekers (1989) (critical report on detention policies in South Texas); ABA Coordinating Committee on Immigration Law, Lives on the Line: Seeking Asylum in South Texas (1989) (critical report on legal services available to detainees in South Texas).

38. Author's observation during a visit to South Texas in the summer of 1989; also based on discussions with El Proyecto Libertad attorney (private immigration legal assistance program), Madison, Wisconsin, October 1989.

39. See Orantes-Hernandez v. Meese, 685 F. Supp. 1488 (D. Cal. 1988) (INS officials not only must refrain from placing obstacles in way of communication between detainees and their attorneys but are obligated to affirmatively provide detainees with legal assistance); Orantes-Hernandez v. Thornburgh, No. 82-1107 (D. Cal. 1989) (INS not in compliance with earlier court order). See also Ramos v. Thornburgh, No. TY89-42-CA (E.D. Tex. 1989) (requiring INS to treat Salvadoran asylum claims as "having established a substantial likelihood of success on the merits," when INS had characterized claims as "frivolous").

40. See, e.g., U.S. Committee for Refugees, *supra* note 37; ABA Coordinating Committee, *supra* note 37.

41. See U.S. Committee for Refugees, *supra* note 37, at 12–13.

3. The New Racial Preferences

DEVON W. CARBADO AND CHERYL I. HARRIS

Michigan's Proposal 2 and California's Proposition 209 both prohibit their state governments from discriminating or granting "preferential treatment . . . on the basis of race."[1] Both initiatives aimed at eliminating state promulgated race-based affirmative action programs. For advocates of Proposal 2 and Proposition 209, affirmative action is the quintessential example of a preference on the basis of race; the policy benefits blacks and Latinos and burdens whites and, in some formulations, Asian Americans.

Supporters of both measures insisted that the state should not be in the business of allocating benefits and burdens along racial lines, particularly when doing so undermines another core American value: meritocracy. More generally, they argued that state policy should not be based on race at all but rather should embody the principles of color blindness and race neutrality, concepts they deployed interchangeably to mean the nonutilization of race. Under this argument, Proposition 209 and Proposal 2 became necessary means to a realizable and desirable color-blind end—the elimination of racial preferences. This racial logic made both ballot initiatives the heirs of *Brown v. Board of Education* and affirmative action policies the heirs of *Plessy v. Ferguson*.

Our project is to take Proposition 209 and Proposal 2 seriously by engaging in a thought experiment: What concretely does it mean to make institutional processes color blind or race neutral? We believe it enlightening to explore this question in the arena of school admissions policies, focusing on the personal statement, which plays a particularly important role in an applicant's file but is rarely discussed in debates about race and admissions. Admissions officers read these statements to ascertain whether applicants can distinguish themselves and demonstrate that their potential contributions to the school extend beyond the applicants' numbers. Applicants, for their part, employ the personal statement as a way to quite literally inscribe themselves into and personalize the application. Given the significance of the personal statement, this chapter asks: What do antipreference mandates require with respect to personal statements?

A version of this chapter previously appeared as Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 Cal. L. Rev. 1139 (2008). Originally published in the *California Law Review*.

Focusing on the personal statement shows that excising race from admissions is far from simple. Indeed, so long as the personal statement is part of the admissions process, implementing the color-blind imperative of Proposition 209 and Proposal 2 might not even be possible. First, an applicant's file can contain not only direct or explicit racial signifiers (e.g., "As a young Latina . . .") but also indirect or implicit racial signifiers (e.g., "My name is Maria Hernandez, and I have lived all my life in East Los Angeles"). Because race can come embedded in an applicant's name, geographic connections, and other non-race-specific references, eliminating explicit and direct references to racial categories or racial group membership is not the same thing as eliminating race altogether.

Second, an admissions officer's recognition that she is not supposed to take race into account does not mean that she is in a cognitive position to comply with that command. Evidence suggests that, notwithstanding best efforts on her part to ignore race—indeed, in part precisely because of those efforts—race will remain an elephant in her mind. How this will shape her reading of any given file is hard to know. Preventing the explicit consideration of race is not the same thing as preventing any consideration of it.

A final reason to doubt whether race can be completely removed from the admissions process also draws on recent understandings of the psychology of white normativity. Assuming that an admissions file contains no racial markers whatsoever, one line of research suggests that an admissions officer's default presumption will be that the applicant is white. To the extent that this is the case, race remains a part of the admissions process.

But the difficulty of excising race from the admissions process is only half the story. Prohibiting explicit references to race in the context of admissions does not make admissions processes race neutral. On the contrary, it installs what we call a new racial preference.

To see how this happens, consider first the applicant's side.

Color-blind admissions regimes that require applicants to exclude references to race in order to preclude institutions from considering them on the basis of race create an incentive for applicants to suppress their racial identity and to adopt the position that race does not matter in their lives. This effort is likely to be particularly costly to applicants for whom race is, in fact, a central part of their social experience and sense of identity. The life story of many people—particularly with regard to describing disadvantage—simply does not make sense without reference to race. Consequently, should these applicants attempt to transcribe their experiences in race-neutral terms, they risk being disadvantaged because their lives will be unintelligible to admissions officials and unrecognizable to themselves.

Of course, the question of how one presents oneself in any admissions process is ultimately a question of choice. In this respect, applicants can ultimately choose whether to make their racial identity essential or inessential, salient or insignificant. Our point is simply that a formally color-blind admissions process exerts significant pressures and incentives that constrain that choice and inhibit the very self-expression that the personal statement is intended to encourage. This is at least one sense in which, in a color-blind admission process, applicants are neither similarly situated nor competing on a level field. The dissimilarity among applicants and the unevenness of the field are functions of the racial preference that color-blind admissions regimes produce. This racial

preference benefits applicants who view their racial identity as irrelevant or inessential and who make no express mention of it in the application process. These applicants are advantaged vis-à-vis applicants for whom race is a fundamental part of their sense of self.

The racial preference of color-blind admission regimes is also discernible from the institutional side of the application process. First, readers of admissions files who encounter a personal statement from an applicant who asserts her racial identity confront the dilemma of whether they can legitimately consider the statement as it stands, whether doing so would constitute "cheating" or whether the statement can or should be racially cleansed. Whichever option is pursued, the reader must wrestle with whether and how this racial information can be processed. Because of uncertainty about the way racially marked information should be managed, the file risks being classified as problematic; files without explicit racial references do not pose such difficulties.

Second, to read the file in a color-blind way, the admissions officer would likely have to ignore highly relevant information, without which the applicant's personal statement might literally not make sense. Candidates whose personal statements avoid references to race do not face these same risks. This is another sense in which color-blind admissions processes are tilted to prefer applicants who subordinate or suppress their race.

As should already be apparent, the new racial preference that formally race-free admissions processes create is not a preference for a racial category per se. Nor is this preference "on the basis of skin color," which is how opponents of affirmative action characterize the policy. The new racial preference rewards a particular way of relating to and expressing one's racial identity. More specifically, the preference gives a priority or advantage to applicants who choose (or are perceived) to suppress their racial identity over those who do not.

One might think of this preference as a kind of racial viewpoint discrimination—analogous to the viewpoint distinction or preference that the First Amendment prohibits. Race is the "content" and color blindness and racial consciousness are competing "viewpoints." Just as the government's regulation of speech must be content neutral and cannot be based on the viewpoint expressed, a university's regulation of admissions should be content neutral and should not burden or prefer applicants based on the racial viewpoint their personal statements express.

In short, Proposition 209 and Proposal 2 neither eliminate race from admissions nor make admissions processes racially neutral. Both initiatives produce a new racial preference that has gone largely unnoticed.

If we are right that antipreference admissions processes that profess to be color blind and race neutral in fact produce racial preferences, why do they continue to have traction as color-blind and race-neutral procedures? Put another way, why are the racial preferences that result from admissions policies that formally erase race largely uncontested? In part the answer resides in a three-pronged ideological structure that undergirds color blindness and race neutrality and mediates the relationship between them. The first prong rests on the assumption that color blindness and race neutrality are normatively desirable and practically realizable. Indeed, this presumption lies at the foundation of initiatives like Proposition 209 and Proposal 2; if one can demonstrate that either color blindness or race neutrality is unattainable or unstable—which is precisely what we endeavor to do here—so too are the policies that pretend to effectuate them.

The second part of the ideological structure conflates color blindness with race neutrality and race consciousness with racial preference. The prevailing understanding of race in America is that these associations are both fixed and inexorable. Far from being necessary and inevitable, the association between color blindness and race neutrality, on the one hand, and race consciousness and racial preference, on the other, is contingent and mired in a set of contestable assumptions.

The third part of the structure is constituted by empirical claims about race (for example, that our society is color blind) masquerading for normative claims (for example, that our society *should* be color blind). Similarly, in this part of the ideological structure, the empirical assertion that race *does not* matter often stands in for the normative assertion that race *should not* matter. This simple transmutation of an aspirational statement to an empirical assertion helps make color blindness an existential "what is"—the default racial description of American society. This default simultaneously obscures the pervasiveness of racial consciousness and makes it difficult to have a public debate about the efficacy and desirability of color blindness. Each part helps explain our collective and national racial blind spot to the advantages and disadvantages antipreference initiatives like Proposition 209 and Proposal 2 can be interpreted to confer.

Even those who do not believe that we already live in a color-blind or race-neutral world argue that this world is one to which we should aspire. Indeed, for people in this group, the assertion that race should not matter is a means to get us to that end. Inasmuch as Proposition 209 and Proposal 2 trade on the claims that (1) race does not matter and (2) race should not matter (collectively, "the color-blind claims"), both initiatives are also necessarily trading on color blindness and race neutrality.

But what if the color-blind claims neither produce nor reflect color blindness or race neutrality? We argue that the color-blind claims do not, in fact, necessarily produce either of those things. We develop this argument with reference to Supreme Court Justice Clarence Thomas, an important advocate for the principles of color blindness and race neutrality.

Our starting point is to think about how Justice Thomas's colleagues perceive him, a basic question of racial categorization. When Thomas enters the chambers of the Supreme Court every day, his colleagues are very much aware of his race. If they were asked to racially categorize Thomas, presumably they would say that he is black. Let's call the moment in which Justice Thomas is categorized in this way the moment of racial recognition.

Stipulate now that upon noticing or becoming aware of Thomas's race, his colleagues, particularly Justices Scalia, Alito, and Roberts, determine either that, as a descriptive matter, Thomas's race does not matter or, as a normative matter, Thomas's race should not matter. Let's call both of these positions racial nonconsideration. As we explain below, neither form of racial nonconsideration is necessarily color blind or race neutral.

First, one could point to the empirical evidence across disciplines demonstrating that being black in America matters. At the very least, this is indirect evidence that Justice Thomas's race matters. Second, Justice Thomas's race might matter to him in the sense that his history as a person who experienced racial segregation makes him deeply opposed to any state policy based on race. Indeed, Thomas's own self-story suggests that this is his stance.

Third, others with whom Thomas interacts may share Thomas's view that because of his racial history, it is important to take his views about race seriously. In other words, they may believe that it's one thing for Justice Scalia, a white man who did not experience the burdens of Jim Crow, to say that race does not matter and quite another thing for Justice Thomas, a black man who grew up attending segregated schools, to stake out that very position. In this way, Thomas's race can matter in terms of conferring racial authority or legitimizing his racial viewpoint.

Fourth, Thomas's race matters in a more fundamental way. His phenotype is processed through a particular matrix of social meanings, historically inscribed and maintained through contemporary social relations that code him as outside the racial category "white" or "Caucasian." Because of these social meanings that link phenotype to racial categories, at least in the United States, he cannot claim to be white. That such an assertion is easily falsifiable demonstrates that his race, and race more generally, matters.

Fifth, that Thomas's colleagues recognize him as black suggests that, in some instances, they rely on, take note of, and differentially respond to people based on racial categorization. (Again, they wouldn't refer to Thomas as white or any of their other colleagues as black.) That in other instances, such as in the context of admissions, they seek to ignore race is neither color blind nor race neutral. It reflects a set of preferences about when to see and when not to see—when to ignore and not to ignore—race.

Neil Gotanda's seminal work on color blindness makes a similar point about a decision maker's claim that she ignored race and was effectively color blind. According to Gotanda, "[B]efore a private person or a government agent can decide 'not to consider race,' he must first recognize it. In other words, we could say that one 'noticed race but did not consider it.'"[2] However, the claim of nonconsideration rests on the dubious assertion that it is possible to be color blind by first recognizing race and then suppressing the prior racial recognition on the basis of a legal mandate to do so. As Linda Krieger notes, drawing on studies in social psychology, "A legal duty which admonishes people simply not to consider race, national origin or gender harkens to Dostoevsky's problem of the polar bear: 'Try . . . not to think of a polar bear, and you will see that the cursed thing will come to mind every minute.'"[3] Krieger's point, with which we agree, is that efforts to suppress a thought produce the paradoxical effect that one repeatedly thinks about and is preoccupied with the prohibited thought. This is especially so with respect to race, a salient and prominent social category. The ambient nature of race in our society makes it enormously difficult, if not impossible, as a matter of cognition, for us to ignore racial markers that we have already noticed. Dostoevsky's problem of the polar bear is our problem of race.

The suppression of racial recognition is not racially neutral. Upon noticing race, the decision to suppress it turns on a normative judgment that it ought not to be part of some deliberative process. But inasmuch as race has already been recognized, that commitment comes too late. In this regard, the choice is not between a process that does not include race and one that does. Instead, the choice is either about the "quantitative measure of the weight accorded race in the decision"[4] or about how qualitatively to treat race in the decision. The exercise of either of those choices is neither color blind nor race neutral.

Nor is the conceptualization of race as "just" skin-color neutral. People often base their commitment to color blindness on the view that race is mere skin color. If race is

nothing but skin color, they argue, it is an aspect of identity that we should ignore. Note, however, that this ostensibly race-neutral position is based on a racial understanding of identity: race as skin color. Further, it is based on a racial understanding of awareness and epistemology: that it is possible to eradicate our awareness of skin color and therefore our knowledge of race altogether.

The conception of race as skin color (and the notion that race can be eliminated by that formulation) is neither race neutral nor color blind. It is one way to understand race and, as such, is in competition with other understandings, including but not limited to the notion that race is a structural and ideological force that employs social categories to allocate benefits and burdens. Viewing race as skin color might be blinding oneself to this structural conception of race, but it is not blinding oneself to race per se. Viewing race as skin color is seeing race in a particular way that is contestable and normatively contingent.

Color-blind claims are in effect rhetorical placeholders for color blindness and race neutrality, not factual or empirical conditions that necessarily produce or reflect race neutrality and color blindness. This might suggest that we jettison color blindness and race neutrality from our racial vocabulary and at a minimum reevaluate, if not abandon, the assertions that race does or should not matter. For now, it is enough to understand that the perceived neutrality and color blindness of Proposition 209 and Proposal 2 are based in part on the perception that color blindness and race neutrality are realizable or have been realized. More specifically, fueling both measures are the claims that (1) we do not take race into account (and therefore are already color blind and race neutral) and that (2) we should not take race into account (to become color blind and race neutral). The circulation of these ideas obfuscates the racial consciousness of Proposition 209 and Proposal 2 and leads us to think that both mandates are necessary either to keep us color blind and race neutral or as a means to get us to those realizable ends.

At the same time, the color-blind claims also affect how we view affirmative action. The claims render affirmative action a racial preference that either departs from the status quo of color blindness and race neutrality or prevents us from getting to those desirable and attainable ends.

NOTES

1. The core provisions of Proposal 2 and Proposition 209, as incorporated into their respective states' constitutions, are identical: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting." Mich. Const. art. I, §26(2); Cal. Const. art. I, §31(a). California's Proposition 209 passed in November 1996 and took effect in August 1997 following the resolution of litigation challenging its constitutionality. See Coal. for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997) (litigation challenging Proposition 209 as unconstitutional under the Equal Protection Clause).

2. As Gotanda argues, "Nonrecognition differs from nonperception. Compare color-blind nonrecognition with medical color-blindness. A medically color-blind person is someone who cannot see what others can. . . . To be racially color-blind, on the other hand, is to ignore what one has already noticed." Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 Stan. L. Rev. 1, 18 (1991).

3. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1240 (1995).

4. Gotanda, *supra* note 2, at 18.

4. When the First Quail Calls

Multiple Consciousness as Jurisprudential Method

MARI J. MATSUDA

In 1868 two white women, Angelina and Sarah Grimke, acknowledged publicly that a black man, the son of their slave-owning brother, was their nephew. They commenced to bestow on that nephew the love and familiarity due a relative. In publicly embracing their blood tie to a black man, these women were doing something unthinkable, inconceivable—something outside the consciousness of their time. What was it that projected the thinking of these two women ahead of the thinking of their peers? It was their consciousness of oppression, developed during their feminist and abolitionist struggles.

The confluence of the feminist and abolitionist causes marks one of the most progressive moments in American history. In their honor, let us consider women of color as a paradigm group for the deployment of multiple consciousness as jurisprudential method. Let us imagine a student with woman-of-color consciousness sitting in class in the first year of law school. The dialogue in class aims to force students to pare away the extraneous, to adopt the lawyer's skill of narrowing issues and delineating the scope of relevant evidence. The professor sees his job as training the students out of the muddle-headed world where everything is relevant and into the lawyer's world where a few critical facts prevail.

The discussion in class today is of a Miranda-type case. Our student wonders whether the defendant was a person of color and whether the police officer was white. Knowing the city in which the case arose, the student also knows that the level of police violence is so high there that church groups hold candlelight vigils outside the main police station every Sunday. The crime charged is rape. The student wonders about the race of the victim and whether the zealous questioning by the police was tied to the victim's race. The student thinks about rape—the rape of her roommate last year and her own fears. She knows, given the prevalence of violence against women, that some of her classmates in this class of one hundred students have been raped. She wonders how they are reacting to the case, what pain it resurrects for them.

A version of this chapter previously appeared as Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 Women's Rts. L. Rep. 7 (1989). Originally published in the *Women's Rights Law Reporter*.

In the consciousness of this student, many facts and emotions are relevant to the case that are extraneous to standard legal discourse. The student has decided to adopt standard legal discourse for the classroom and to keep her woman-of-color consciousness for herself and for her support group. This bifurcated thinking is not unusual for her. She's been doing it throughout her schooling—shifting back and forth between her consciousness as a Third World person and the white consciousness required for survival in elite educational institutions.

This student, as she has become older, has learned to peel away layers of consciousness like layers of an onion. In the one class where she has a woman professor—a white woman—she feels free to raise issues of violence against women, but she decides to keep to herself another level of consciousness: her nationalist anger at white privilege and her perception that the dominant white conception of violence excludes the daily violence of ghetto poverty.

This constant shifting of consciousness produces sometimes madness, sometimes genius, sometimes both. You can hear it in the music of Billie Holiday. You can read it in the writing of Professor Pat Williams—that shifting in and out, that tapping of a consciousness from beyond and bringing it back to the place where most people stand.

Let's give an ending to the student I described: she goes on to excel in law school, she becomes an international human rights activist, and she writes poems in her kitchen in her spare time while she waits for the pies to cool. She doesn't go mad, because she continues to meet with her support group and they continue to tell her, "No, you are not crazy; the world looks that way to us, too."

What does a consciousness of the experience of life under patriarchy and racial hierarchy bring to jurisprudence? The ideas emanating from feminist legal theorists and legal scholars of color intersect in ways that shed light on fundamental inquiries of jurisprudence: What is justice, and what does law have to do with it?

Outsider scholars have recognized that their specific experiences and histories are relevant to jurisprudential inquiry. They reject narrow evidentiary concepts of relevance and credibility. They reject artificial bifurcation of thought and feeling. Their anger, their pain, their daily lives, and the histories of their people are relevant to the definition of justice. "The personal is the political," we hear from feminists, and "Everything is political," we hear from communities of color. Those communities waste little time arguing over definitions of justice. Justice means children with full bellies sleeping in warm beds under clean sheets. Justice means no lynchings, no rapes. Justice means access to a livelihood. It means control over one's own body. These kinds of concrete and substantive visions of justice flow naturally from the experience of oppression.

And what of procedure, of law? Here outsiders respond with characteristic duality. On the one hand, they respond as legal realists, aware of the historical abuse of law to sustain existing conditions of domination. Unlike the postmodern critics of the left, however, outsiders, including feminists and people of color, have embraced legalism as a tool of necessity, making legal consciousness a tool to attack injustice. Thus, to the feminist lawyer faced with pregnant teenagers seeking abortions, it would be absurd to reject the use of an elitist legal system or the use of the concept of rights when this use is necessary to meet the immediate needs of her client. There are times to stand outside the courtroom door and say, "This procedure is a farce, the legal system is corrupt, and justice will never prevail in this land as long as privilege rules in the courtroom." There

are times to stand inside the courtroom and say, "This is a nation of laws—laws recognizing fundamental values of rights, equality, and personhood." Sometimes, as Angela Davis did, one needs to make both speeches in one day. Is that crazy? Inconsistent? Not to a black woman on trial for her life in racist America. It made perfect sense to Davis and to the twelve jurors who heard her when she said, "[Y]our government lies, but your law is above such lies."

Her decision to use a dualist approach to a repressive legal system may very well have saved her life. Not only did she tap her history and consciousness as a black, a woman, and a communist; she did so with intent and awareness. Her multiple consciousness was not a mystery to her but a well-defined and acknowledged tool of analysis, one that she was able to share with the jury.

A professor once remarked that the mediocre law students are the ones who are still trying to make it all make sense—that is, the students who are trying to understand law as necessary, logical, and coextensive with reality. The students who excel in law schools—and the best lawyers—are the ones who are able to detach law and to see it as a system that makes sense only from a particular viewpoint. Those lawyers can operate within that view and then shift out of it for purposes of critique, analysis, and strategy. The shifting of consciousness I have thus far ascribed to women of color is a tool used—in a more limited way—by skilled lawyers of many ideological bents. A good corporate lawyer can argue within the language and policy of antitrust law, modify that argument to suit a Republican judge, and then advise a client that the outcome may well turn on some event in Geneva wholly irrelevant to the legal doctrine. Multiple consciousness as jurisprudential method, however, encompasses more than consciousness shifting as skilled advocacy. The method encompasses as well the search for the pathway to a just world.

The multiple consciousness I urge is not a random ability to see all points of view but a deliberate choice to see the world from the standpoint of the oppressed. That world is accessible to all of us. We should know it in its concrete particulars. We should know of our sister carrying buckets of water up five flights of stairs in a welfare hotel, another trembling at 3:00 A.M. in a shelter for battered women, and still others holding bloodied children in their arms in Cape Town, on the West Bank, and in Nicaragua. The jurisprudence of outsiders teaches that these details and the emotions they evoke are relevant and important on the road to justice. These details are accessible to all of us, of all genders and colors. We can choose to know the lives of others by reading, studying, listening, and venturing into different places. For lawyers, our pro bono work may be the most effective means of acquiring a broader consciousness of oppression.

Abstraction and detachment are ways out of the discomfort of direct confrontation with the ugliness of oppression. Criticized by both feminists and scholars of color, abstraction allows theorists to discuss liberty, property, and rights in the aspirational mode of liberalism with little connection to what they mean in real people's lives. Much in our mainstream intellectual training values abstraction and denigrates nitty-gritty detail. Holding on to multiple consciousness will allow us to operate within both the abstractions of standard jurisprudential discourse and the details of our own special knowledge.

Whisperings at Yale and elsewhere about how deconstructionist heroes were closet fascists remind me of how important it is to stay close to oppressed communities. High talk about language, meaning, sign, process, and law can mask racist and sexist ugliness

if we never stop to ask, "Exactly what are you talking about and what is the implication of what you are saying for someone carrying buckets of water up five flights of stairs in a welfare hotel? What do you propose to do for her today, not in some abstract future you are creating in your mind?" If you have been made to feel, as I have, that such inquiry is theoretically unsophisticated and quaintly naive, resist! Read what feminists and people of color are writing. The reality and detail of oppression are a starting point for those entering into mainstream debates about law and theory.

From communities of outsiders struggling with immediate needs—for jobs, for education, for personal safety—we see new legal concepts emerging to challenge the citadel of neutrality. Proposals for non-neutral laws that will promote the human spirit include affirmative action, proposals for desegregation, proposals for curtailment of hate groups and elimination of propaganda advocating violence against women, and proposals for reparations to Native Americans for loss of their lands. Controversial proposals, they will continue to spark debates about their worth, in part because they add up to a new jurisprudence founded not on an ideal of neutrality but on the reality of oppression. These proposals recognize that this has always been a nation of dominant and dominated and that changing that pattern will require affirmative, non-neutral measures designed to make the least the most and to bring peace, at last, to this land.

In arguing for multiple consciousness as jurisprudential method, I don't mean to swoop up and thereby diminish the power of many different outsider traditions. I cannot pretend that I, as a Japanese American, truly know the pain of, say, my Native American sister. But I can pledge to educate myself so that I do not receive her pain in ignorance. And I can say as an American that I am choosing as my heritage the two hundred years of struggle by poor and working people, by Native Americans, by women, and by people of color for dignified lives in this nation. I can claim as my own the Constitution my father fought for at Anzio, the Constitution that I swore to uphold and defend when I was admitted to the bar. It was not written for me, but I can make it my own, using my chosen consciousness as a woman and person of color to give substance to those tantalizing words "equality" and "liberty."

I titled this chapter "When the First Quail Calls" in reference to a signal used on the underground railroad to mark the time of departure to freedom. I imagine the fear and the courage of slaves who dared to leave the South and the fear of free blacks and whites who chose to help them. They were all ahead of their time in thinking they could run a freedom train in the darkest hour of slavery.

Timing is an element of jurisprudential inquiry—how much can we hope to attain at this moment. When is it time to assert a new principle of law? When is it time to openly defy law? When is it time to wait? Again we can look to the histories of oppressed groups to inform this inquiry. We can know that often it is time to set out on the freedom trail when the darkness is still upon us. You who are in law school now are stereotyped as the children of a conservative, even postracial era, concerned with economic success and unengaged in political struggle. It is not the time, the commentators decree, for activism. And yet you set your own time. Students across the country are organizing conferences, battling for affirmative action and divestment, confronting racism and patriarchy, listening in the night for the quail's call. We know it is time, our time, and we will make it so.

5. A Critique of "Our Constitution Is Color-Blind"

NEIL GOTANDA

We accept as unremarkable an employer who asserts, "Yes, I noticed that she was black, but I did not consider her race in making my hiring or promotion decision." This technique of "noticing but not considering race" implicitly involves recognition of the employee's racial category and a transformation or sublimation of that recognition so that the racial label is not considered in the employer's decision-making process. Advocates of the color-blind model argue that nonrecognition by government is clearly superior to any race-conscious process. Indeed, nonrecognition advocates apparently find the political and moral superiority of this technique so self-evident that they think little or no justification is necessary.

But just how adequate is color-blind constitutionalism as a technique for combating racial subordination? I argue that nonrecognition is self-contradictory. Not only that; nonrecognition fosters the systematic denial of racial subordination and the psychological repression of an individual's recognition of that subordination, thereby allowing it to continue.

Nonrecognition has three elements. First, there must be something that is cognizable as a racial characteristic or classification. Second, the characteristic must be recognized. Third, the characteristic must not be considered in a decision. For nonrecognition to make sense, it must be possible to recognize something while not including it in making a decision.

Nonrecognition is a technique, not a principle of traditional substantive common law or constitutional interpretation. It addresses the question of race, not by examining the social realities or legal categories of race but by setting forth an analytical methodology. This technical approach permits a court to describe, accommodate, and then ignore issues of subordination. This deflection from the substantive to the methodological is significant. Because the technique appears purely procedural, its normative, substantive impact is hidden. Color-blind application of the technique is important because it suggests a seemingly neutral and objective method of decision making that avoids any consideration of race.

A version of this chapter previously appeared as Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 Stan. L. Rev. 1 (1991). Originally published in the *Stanford Law Review*.

Decisions that use color-blind nonrecognition are often regarded as superior to race-conscious ones. Proponents of nonrecognition argue that it facilitates meritocratic decision making by preventing the corrupting consideration of race. They regard race as a political or special interest consideration, detrimental to fair decision making.

To use color-blind nonrecognition effectively in the private sphere, we would have to fail to recognize race in our everyday lives. This is impossible. One cannot literally follow a color-blind standard of conduct in ordinary social life. Moreover, the technique of nonrecognition ultimately supports the supremacy of white interests.

In everyday American life, nonrecognition is self-contradictory because it is impossible not to think about a subject without having first thought about it at least a little. Nonrecognition differs from nonperception. Compare color-blind nonrecognition with medical color blindness. A medically color-blind person is someone who cannot see what others can. It is a partial nonperception of what is really there. To be racially color blind, on the other hand, is to ignore what one has already noticed. The medically color-blind individual never perceives color in the first place; the racially color-blind individual perceives race and then ignores it. This is not just a semantic distinction. The characteristics of race that are noticed (before being ignored) are situated within an already existing understanding of race. That is, race carries with it a complex social meaning. This preexisting race consciousness makes it impossible for an individual to be truly nonconscious of race. To argue that one did not really consider the race of an African American is to concede that there was an identification of blackness. Suppressing the recognition of a racial classification to act as if a person were not of some cognizable racial class is inherently racially premised.

Professor Patricia Williams offers a bizarre example of this enforced nonrecognition when she recounts her struggle with the editors of the *University of Miami Law Review*. In an article published with them, Williams describes her exclusion from a New York store as follows:

> Two Saturdays before Christmas, I saw a sweater that I wanted to purchase for my mother. I pressed my brown face to the store window and my finger to the buzzer, seeking admittance. A narrow-eyed white youth who looked barely seventeen, wearing tennis sneakers and feasting on bubble gum, glared at me, evaluating me for signs that would pit me against the limits of his social understanding. After about five seconds, he mouthed, "We're closed," and blew pink rubber at me. It was one o'clock in the afternoon. There were several white people in the store who appeared to be shopping for things for their mothers.
>
> I was enraged. At that moment I literally wanted to break all of the windows in the store and take lots of sweaters for my mother.[1]

When editing her account, "the editors initially deleted all references to [Williams's] racial identity informing her that references to physiogomy [*sic*] were irrelevant. . . . [But] if the racial identity of the speaker is not included, the point of the story is unintelligible."[2] Had the editors prevailed, Williams would have appeared irrational for being so angry at a store clerk over a minor incident. The editors sought to suppress the existence of race from a narrative in which race was the center of the incident. Their attempted use of nonrecognition would have produced a misleading "nonracial" narrative.

While the actions of the *University of Miami Law Review* editors appear nonsensical, similar efforts in most other contexts would be regarded as perfectly legitimate. For example, in a recent empirical study, Professor Ian Ayres examined whether race and gender substantively affected automobile showroom sales transactions.[3] Ayres found that white men purchasing automobiles in the Chicago area were offered substantially lower prices than were women or blacks and concluded that car salespersons were unwilling to negotiate better prices with black and female buyers. If a salesman were to say that he "did not consider race" in his sales transactions, it would not be regarded as a complex assertion. Yet Professor Ayres's study reveals a wide range of socioeconomic considerations involved in such a seemingly simple statement.

From a psychological or psychoanalytic perspective, nonrecognition may be considered a mode of repression. The claim that race is not recognized is an attempt to deny the reality of internally recognized social conflicts of race. This internal psychological conflict between recognition and repression of racial identity is reflected in legal discourse. More concretely, an individual's assertion that he "saw but did not consider race" can be interpreted as a recognition of race and its attendant social implications followed by suppression of that recognition. The legal mode of racial nonrecognition is, then, the external extension of this psychological mode of denial of race. As explained by Charles Lawrence, "When an individual experiences conflict between racist ideas and the societal ethic that condemns those ideas, the mind excludes his racism from consciousness."[4] The impetus for that conflict may be moral, legal, or both. But the suppression does take place, and the external world accommodates it by accepting and institutionalizing the repression rather than attempting to expose and alter the conditions of racial exploitation.

The inherent self-contradictions of nonrecognition can be summarized in terms of dialectical logic: A subject is defined by its negation, hence, an assertion of nonconsideration necessarily implies consideration. The stronger and more defined the character of racial recognition, the clearer and more sharply drawn its dialectical opposite, racial nonrecognition. The assertion "I noticed but did not consider race" divides the dialectic into its two components, consideration and nonconsideration. It then focuses exclusively on the nonconsideration by denying the existence of the consideration component. While this is a complex maneuver surrounded by assertions of moral superiority, the attempt to deny racial consideration is, at its root, an attempt to hide the underlying racial oppression, a reality no amount of hand waving and obfuscation can eliminate.

NOTES

1. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. Miami L. Rev. 127, 128 (1987).

2. Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 Nat'l Black L.J. 1, 5, n.8 (1989).

3. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 Harv. L. Rev. 817 (1991).

4. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 323 (1987).

6. Liberal McCarthyism and the Origins of Critical Race Theory

RICHARD DELGADO

Stories of origin are essential components of almost every group's self-understanding. Native American cosmology, for example, offers an account of how the earth and its creatures came into being. For Latinos, the mythical land of Aztlán serves a similar constitutive function. And of course, Americans of every description learn the story of their country's revolutionary origins, including their colonial forebears' righteous grievances against the Crown and their subsequent westward march in pursuit of Manifest Destiny—a story that, naturally, differs dramatically from that of the Native Americans.

Like the abovementioned stories, critical race theory's accounts of its own beginnings are multiple and contested but perform many of the same functions—designating an official ideology, selecting a set of heroes, and avoiding the appearance of contingency and luck in explaining how the group came into existence.

One suspicion that emerges when one encounters competing stories of origin is the possibility that an unarticulated, broader version might better explain events than any of the others alone. Moreover, it may turn out that no one account holds an exclusive claim to the truth but that a hitherto unidentified material force may be at work as well.

In 1980 Derrick Bell startled the legal world when he posited in an article, "Brown v. Board of Education and the Interest Convergence Dilemma," that this groundbreaking decision arrived when it did, not because of a belated spasm of conscience on the part of the Supreme Court but because of a fortuitous combination of material and sociopolitical circumstances. The NAACP Legal Defense and Education Fund, Bell pointed out, had been litigating school desegregation cases throughout the South for decades and achieving, at most, narrow victories. Yet the skies opened in 1954 when the Supreme Court, in a unanimous decision, appeared to grant the organization everything it wanted.

Why just then? Based on fragmentary evidence coupled with some highly astute intuition, Bell posited that America's need to burnish its image in the eyes of the international community set the stage for the breakthrough decision. At the time, the United

A version of this chapter previously appeared as Richard Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 Iowa L. Rev. 1505 (2009). Originally published in the *Iowa Law Review*.

States was competing with its Soviet adversaries for the loyalties of the uncommitted Third World, much of which was black, brown, or Asian. Every time the world press featured front-page stories and photographs of lynchings and Jim Crow treatment in the South, our Cold War rivals made capital at our expense.

Thus, it behooved America's establishment to arrange a spectacular victory for African Americans as a way to improve our competitive position vis-à-vis the Soviet bloc. In addition, the country was then absorbing back into its civilian population tens of thousands of black men and women who had served in World War II and Korea. Having for the first time experienced an environment where a person of color might advance more readily than in civilian life and having risked their lives in the defense of democracy, these men and women were unlikely to return meekly to lives of menial labor and deference to whites. For the first time in years, domestic unrest loomed. A breakthrough demonstrating that America had blacks' best interests at heart would go far to quell any incipient uprising.

When newly discovered evidence from governmental files confirmed Bell's hypothesis, "interest convergence" took its place as a powerful tool of critical analysis. Bell later expanded his material-determinist approach to the full sweep of American history in his monumental casebook *Race, Racism, and American Law*, while other scholars employed the tool to understand such areas as labor history and Latino legal fortunes.

What might interest convergence tell us about the origins of critical race theory? Can a concept that has helped historians understand the twists and turns of black fortunes help explain how critical race theory itself arose and then saw its fortunes wax and wane? My thesis is that it can and does. I posit that America's guardians foresaw the arrival of growing numbers of black and Latino applicants knocking at the doors of America's leading colleges and universities. This early generation of undergraduates of color, who would have entered the nation's newly desegregated grade schools beginning in the middle and late 1950s, in the wake of *Brown*, their ranks now swollen by affirmative action, seemed poised to become the nation's first generation with many black and brown schoolteachers, social workers, mayors, college professors, lawyers, executives, and doctors.

Establishment figures were not at all eager for these future leaders to learn social analysis from far-left professors of law, history, criminology, and political science. Having just lived through the turbulent 1960s, these visionary figures preferred the new cohort of minorities to be moderate, responsible, and above all, not angry. Accordingly, the establishment removed the white radical professors in a series of tenure denials that spread across the country during this period. Culling from newspaper reports, personal interviews, and archival material, I show how two prominent law professors, a professor of history and one of criminology, were forced out of their jobs at elite universities.

I then connect four of the most prominent removals with the rise of critical legal studies and critical race theory. Specifically, I show how these leftists used their periods of unemployment (in one case) or underemployment (in three others) to nurture radicalism in the hinterlands in ways that contributed to the rise of these two schools of radical thought.

One hopeful message from the foregoing is, simply, that it is hard to kill an idea. A related insight holds that, as much as the establishment might wish to confine education to what it finds useful, it cannot in the end do so. A theory of surplus education—a correlate of Marx's famous proposition—holds that a worker taught enough mathematics

to use a machine or operate a cash register will use that knowledge to figure out that the owner is raking off a great deal of profit and ask for a raise. If you teach Chicano children to read well enough that they can follow the directions on a bag of fertilizer or pesticide, they may also read the rest of the label, including the health warnings, and may one day get a lawyer and file a class action against you for personal injury. If you teach grade-school students the revolutionary ideals that led to the Boston Tea Party, you may find them using that same rhetoric against you if you have been tyrannizing them in the classroom. Like capitalism, education inevitably generates its own contradictions and pressures for reform.

I hasten to add that nothing should diminish the brilliance or courage of the founding figures of the critical race theory movement. Rather, I seek to explain why we were successful when we were, who among our intellectual predecessors paid a price for our rise, how political power and the educational establishment work to both promote and inhibit change, and the likely fate of groups like ours in the years ahead.

One lesson that emerges is that placing excessive reliance on the liberal establishment can sometimes be a serious error. That establishment primarily looks after its own interests; indeed, mainstream liberals may be nearly as great a threat to progressive movements and intellectual freedom as were the cigar-chomping conservatives who drove Hollywood screenwriters, State Department career officers, and academic leftists out of town in the 1940s and 1950s merely because, as idealistic youths, those screenwriters, officers, and academics had attended a socialist or communist meeting or two.

Insurgent scholars may easily be the next victims of the homeostatic instincts of today's liberals; indeed, the careers of some might have suffered at their hands, whether they know it or not. If I am right, the cycle will probably repeat itself, with a new generation of students building on current work and achieving new degrees of freedom, sometimes without realizing the price their predecessors paid for the liberty they now enjoy.

Critical Race Theory: Three Stories of Origin

Critical race theory developed as an academic field in the middle and late 1970s when a host of lawyers and legal scholars across the country realized that the impressive gains of the 1960s civil rights era had halted and were, in many cases, being rolled back. New, more nuanced approaches were required to combat the types of subtle, unconscious, or institutional racism that were developing and that were more deeply entrenched and difficult to combat than the former overt variety.

Beginning with the early work of Derrick Bell and Alan Freeman, scholars put forward the idea that racism is normal, not aberrant, in American society and over time becomes natural to those living in it. As a result, formal equality and legal rules requiring equal treatment of blacks and whites are capable of redressing only the most dramatic forms of injustice, not the more routine forms that target persons of color daily. Early writing experimented with new modes of scholarship, including legal storytelling. Building on the American civil rights tradition, including the work of such figures as Martin Luther King, Jr., W.E.B. Du Bois, and César Chávez, as well as Continental and postcolonial writers, the new movement slowly but surely altered our understanding of race and civil rights.

Organizationally, the movement gained impetus when, in 1989, a workshop outside Madison, Wisconsin, gave it a name and a formal structure. Convened by former University of Wisconsin Hastie Fellow Kimberlé Crenshaw, who had become a law professor at the University of California, Los Angeles, the conference was the first of several annual workshops that explored intersectionality, the black-white binary of race, essentialism, and other critical themes.

What enabled critical race theory to progress from a small, nameless collection of scholars to a legal movement with conferences, anthologies, and law review articles in the space of a few short years? Three stories of origin overlap, each emphasizing the role of a different small group.

The Harvard Story

One story centers on the role of a noncredit, student-initiated class at Harvard Law School. This story goes roughly as follows. When Derrick Bell resigned to become the dean at University of Oregon Law School in 1981, Harvard appointed a prominent white civil rights scholar, Jack Greenberg, to coteach his class on race law the following year. Black students questioned his selection, pointing out that Harvard surely could have found a black professor somewhere in the United States capable of teaching Bell's course. When Harvard stood its ground, the black students boycotted the course, which turned out to have a virtually all-white enrollment.

The students then secured permission to create an alternative course that met on Saturdays under the sponsorship of Harvard law professor Charles Ogletree. Featuring a series of professors of color who flew in to give single talks, the course satisfied student demands for an academic experience that offered a sustained, critical examination of race. Many of the professors who addressed the group, as well as some of the student organizers, went on to become key figures in the critical race theory movement, and many of their talks turned into articles that became movement classics.

According to the Harvard story, the weekend series marked the beginning of the critical race theory movement. Other stories, however, emphasize a slightly different set of actors and events.

The Berkeley Story

A short time after the aforementioned events unfolded on the East Coast, a group of law students at the University of California at Berkeley formed the Boalt Hall Coalition for a Diverse Faculty. Disappointed with the law school's slow pace in hiring faculty of color, gays, and women, the students rallied, spoke out, and invited professors of color—including some of the very same ones who spoke at Harvard—to give talks about the need for diversity and to deliver papers that they hoped would persuade the school's professors to hire more minorities. When the Berkeley faculty was slow in responding to their requests, the students led a national strike for diversity that spread to a number of schools. Andrea Guerrero, one of the organizers of the coalition, subsequently wrote a book about the upsurge in student activism at her school, which lasted for years and continues, albeit in changed form, today.

The Los Angeles Story

While the two student movements were winding down, the Conference of Critical Legal Studies (CLS), an organization of left-leaning law professors at elite schools was preparing to hold a national conference at an old hotel in downtown Los Angeles. On learning that the event's theme would be race, a small group of law professors of color requested an opportunity to address the gathering. The organization readily agreed, and the resulting panel included a number of young scholars who would go on to play important roles in the critical race theory movement.

The presentation gained additional significance when the panelists reached an agreement with the editors of the *Harvard Civil Rights–Civil Liberties Law Review* to publish some of their papers. The subsequent articles became key documents in the critical race theory corpus, laying the foundation for the initial conference in Madison, Wisconsin, a few years later.

Who Founded Critical Race Theory?

Which story, the Harvard story, the Berkeley story, or the Los Angeles story, best explains how critical race theory began? The Harvard alternative course possesses a certain dramatic appeal, with its collection of plucky students rescuing radical thought from an unresponsive administration. Moreover, it occurred earliest in time. But the group left little in the way of a legacy. The course apparently did not continue in future years, nor did it yield written scholarship other than what the guest speakers succeeded in publishing on their own.

As mentioned, the Berkeley students did inspire similar efforts across the nation, generating consequences extending beyond their immediate sphere of action. Still, few of the law schools targeted by the strike hired diverse faculty in the years immediately following. The coalition's efforts did, however, produce one book and a number of law review articles, and several of its members went on to become law professors and critical race theorists in their own right.

The Los Angeles group left a tangible legacy in the form of a collection of foundational articles in a top law review. In addition, at least one of the professors of color published his paper in an outside journal. Though the CLS steering committee responded tolerantly and affirmatively to the minorities' request to address the group and the audience listened respectfully to their criticisms of its account of race, CLS made few, if any, organizational changes as a result. Indeed, it ceased operating in a formal sense soon afterward and survives mainly through occasional law review articles by its founding members, often of a retrospective or ruminative nature.

None of these efforts proceeded in coordination with the others, although each might have responded to common needs and forces. Each contributed different things—one, scholarship; another, cachet; yet another, new blood in the form of large numbers of students across the country who would provide the audience, readership, law review editors, and future scholars necessary to sustain a movement.

Moreover, no one story seems to explain fully why critical race theory arose just then or assumed the particular form that it did. A thorough explanation requires a closer look at currents roiling American society during the 1970s and 1980s and, in particular, the

influence of a generation of post-*Brown* youth of color on the thought of elite educators. It also entails an examination of a series of career-altering academic personnel decisions that took place around this time that I term "liberal McCarthyism."

Liberal McCarthyism and the Fates of Four Professors

To understand how events set the stage for the rise of critical race theory, we will need to consider the role of two groups—prominent educational leaders such as Kingman Brewster, James Conant, Clark Kerr, and Albert Bowker and insurgent scholars such as David Trubek, Staughton Lynd, Richard Abel, and Anthony Platt. We will also need to take note of the role of a post-*Brown* generation of color, several hundred thousand strong, who marched up the K–12 ladder and, by the period in question (the late 1960s and early 1970s), was beginning to knock on the doors of America's colleges and universities.

A Fellowship of Visionaries: Kingman Brewster, James Conant, Clark Kerr, and Albert Bowker

A key qualification of an elite university president is the ability to spot a trend—to grasp large social currents, appreciate their relevance for the university's mission, and act accordingly.[1] By the early and mid-1960s, leading educational writers could foresee the arrival of substantial numbers of post-*Brown* students of color who began to flood the nation's campuses about a dozen years after that famous decision. Of course, the nation already had its share of talented black and brown youth, but many of them attended historically black colleges like Morehouse or Howard; the few who attended predominantly white colleges and universities did so in such small numbers that their impact was relatively slight.

By the period in question, however, those numbers were rising and showed every sign of continuing to do so. Beginning in the late 1960s, predominantly white schools accelerated this trend by adopting affirmative action policies that gave promising youths of color increased opportunities to gain admission and, once admitted, to succeed in their studies.

What would the new cohort of black and brown students be like? Would they be as clamorous as the largely white student protesters who had roiled Berkeley, Michigan, and Yale just a few years earlier? Would they endorse violence and spout Mao, Marx, and Guevara, as the Black Panthers and Brown Berets had done during the turbulent 1960s? Or would they be studious, latter-day versions of Booker T. Washington, leading their communities responsibly and peacefully into an era of harmony with whites?

The speeches, personal writings, oral interviews, and memoirs of four prominent university officials show that these questions were very much on their minds during this period. These officials spoke about the shape and orientation of the new wave of minority students and hoped that they would integrate peacefully into the campus scene, devote themselves to their studies, mix with white students, and move easily into leadership positions while serving as role models for the next generation of black and brown youth. And they were especially wary of the role that young, white, radical professors might play in socializing them.

A few provisos are in order. I do not maintain that each of these towering figures consciously and openly aimed to rid their campuses of leftist professors to avoid corrupting

minority youth, much less that they conspired with each other in a smoke-filled room. Much of their participation was indirect. But these leading figures set an example and tone and communicated, directly or indirectly, to their underlings the kind of campus they wanted, leaving it to the department heads, deans, and chancellors who ran the campus on a day-to-day basis and supervised personnel decisions emanating from below to act accordingly.

And the kind of campus those top leaders wanted was peaceful, with students of all types working together to create the kind of society that high-level technocrats love—everything operating smoothly like a well-oiled machine. This meant that these figures, praised for their educational vision, readily sacrificed actual intellectual diversity for the outward appearance of it, in the form of students of color. Hardcore Marxists have long written that race divides the working class. Whether that is true or not, a generation of promising left-wing professors lost their jobs, their security, and their opportunity to participate in elite academic marketplaces so that America's decision makers might buy a short-lived racial peace.

Even if America's educational elite welcomed the labor and talents of the thousands of black, Latino, Asian, and female students who were beginning to arrive at their campuses, it did not relish the thought of their exposure to radical social ideas. It needed them to remain loyal to mainstream American values, including those of liberal capitalism. And it took measures to ensure this end.

Kingman Brewster, President of Yale University

Born to a prominent New England family, Kingman Brewster served as president of Yale University from 1963 to 1977. Before that, he taught at Harvard Law School and served as provost at Yale. The possessor of an Ivy League education, he is the subject of at least two books discussing his years in the Yale hot seat and is thought to be the inspiration of a character ("King") in the popular cartoon series *Doonesbury*. A well-connected member of the Eastern establishment, after leaving Yale, Brewster served as U.S. ambassador to the United Kingdom and, later, as master of University College, Oxford.

As the president of Yale, Brewster was by all accounts a skilled negotiator who succeeded in keeping the lid on during tempestuous times, primarily by co-opting dissent and enlisting his adversaries to a version of his position. During his tenure, Yale saw a series of increasingly sharp student protests on behalf of minority admissions and against the Vietnam War. Students also demanded a role in university governance and shaping such policies as grades. When the university was slow in responding, they would often up the ante with sit-ins, teach-ins, disruption of alumni weekends, and even threats to shut down the university. The protests reached their height in 1967–1968, some of them centering in the law school. Under Dean Louis Pollak, the school was a bastion of New Deal liberalism and the cradle of the legal-realist school of scholarship, which rejected formalism in favor of policy analysis and an open-ended, pragmatic role for judges.

Many of the Yale faculty members were liberal, especially at the law school, where a large portion of the senior and mid-level faculty had been active supporters of the civil rights movement and high-level public servants during Democratic administrations. They thought of their role as training future leaders and were surprised when some of their students, from families much like their own, rejected their values and called them apologists

for a failed social order. When a small group of young faculty sided with the students, their senior colleagues were taken aback, considering them traitors to their class.

The Yale faculty drew a distinction between black protesters, such as the Black Panthers who threatened to burn down the university if the town of New Haven convicted a few of their members for an earlier incident, and the white students who demanded change. The black students' demands struck them as both more legitimate and more frightening than those of the discontented white students from wealthy families.

During this period, Brewster was walking a tightrope. He saw reform as essential to avoid revolution, yet he believed strongly in Yale's traditional mission of educating students for leadership roles in a liberal society. When some of the young faculty, including three professors discussed in Chapter 16, sided with the students, the "psychodrama," as one writer put it, in which they had participated, "may have played a role" in the turnover that followed. The same writer noted that he knew of no other sequence of such concerted firings.

What were Brewster's thoughts about radicalism and its influence on the new generation of black and brown students? In a speech at Yale University, he identified disruptive protests and "false idolization of student popularity" as serious threats to the values of the university. Sounding an ominous note, he warned that the threat might "require reappraisal of the scope and limits . . . of faculty action."

In a second speech—this one at the annual convention of the American Association for the Advancement of Science—Brewster noted that the largest threat to the university comes "not from the silent majority without, but from the raucous minority within the house of intellect." A university cannot be a completely egalitarian community, he added, for "a community of shamans and gurus would not be a university." Both speeches show that Brewster drew a sharp distinction between the responsible centrists and liberals on his faculty and the far left.

With black protesters, Brewster's signature tactic, of which he was proud, was co-optation, offering them a piece of the action. If the blacks toned down their militancy and agreed to make only reasonable demands, he would grant them concessions and guarantee them a place at the table. This tactic was very much in accord with his general approach to minority issues. According to the authors of a book about the New Haven Black Panther murder trial, Brewster had a "vision of a vanguard of [black] leaders who would diversify America's ruling class"—meaning that they would assimilate and fit in.[2] A second biographer notes Brewster's use of co-optation and describes black undergraduates as grudgingly admiring him for his ability to negotiate flexibly and offer concessions that slowly and almost insensibly drew them to his side. The author also notes that Brewster had long been concerned with the role blacks would play in the post-*Brown* order. When, at the height of student protests, moderate black student leaders like Henry Louis Gates, William Farley, and Kurt Schmoke sided with Yale against the Black Panthers and pressed other blacks to endorse nonviolence and peaceful change, Brewster's policy received vindication. In turn, the establishment rewarded these better-behaved blacks, whose behavior Brewster had singled out and reinforced, with Rhodes Scholarships and other honors.

Brewster's treatment of African Americans was friendly but instrumental. For example, he readily agreed to approve an Afro-American studies major at Yale, believing it could quell racial tensions between blacks and whites and offer an opportunity for black

students to immerse themselves in the systematic study of a body of literature and history, thus providing an outlet for energy that might otherwise go toward disruption. When he supported coeducation at Yale a short time later, his decision also was more a product of strategic calculation than a sincere change in perception about female equality.

Brewster was so pleased at the success of his program of rewarding black moderation that he subsequently wrote a letter to McGeorge Bundy, his former Yale lieutenant and colleague who was then directing the Ford Foundation. In it, he asked Bundy to provide financial support for black students at top universities and reiterated his belief in a "tradition of moderate, independent public service." "Negroes," he wrote, had "reached the moat and were pushing on" toward full admission. His "moderate, incremental approach" could enable this to happen without too much disruption to America and its class system. Bundy's Ford Foundation subsequently adopted an express policy of offering minority leaders in a dozen cities, even former Panthers and Brown Berets, federal Office of Equal Opportunity (OEO) grants that would shift them from street militancy to a policy of urban development (i.e., capitalism). (For a review of the actions of three other university presidents during this period and a discussion of their role in firing four radical professors, see Chapter 16.)

NOTES

1. For example, will long-term enrollments increase or decrease? Will the legislature favor or disfavor public spending or seek a balanced budget? Will chemistry, physics, or engineering be the key to important scientific breakthroughs? Will students prefer to live on campus or off? Will wealthy alums donate generously or keep their checkbooks hidden? Will federal money favor crime control? Aerospace? Multicultural education? Will the adjunct faculty unionize? The custodians? The clerical staff?

2. Paul Bass & Douglas W. Rae, Murder in the Model City 128 (2006); see also Geoffrey Kabaservice, The Guardians: Kingman Brewster, His Circle, and the Rise of the Liberal Establishment 234–35, 260, 264–65, 286–88 (2004); Laura Kalman, Yale Law School in the Sixties: Revolt and Reverberations 117 (2005); Jerome Karabel, The Chosen 383 (2005).

7. Forbidden Conversations on Race, Privacy, and Community

CHARLES R. LAWRENCE III

"Hey, Chuck! You're on the school board. I need to ask you about which schools are the good ones here in D.C. We're in the market for a house. Can you recommend a good public school?" The question comes from a young colleague, a liberal Democrat who supports integration and affirmative action. His child is still less than a year old, and it strikes me as a little early to be worrying about elementary schools, but I'm not surprised. Today young urban professionals start worrying about where they will send their children to school well before their first child is conceived. Perhaps parents have always been concerned about their children's education, but my colleague knows the stakes are different now. He has read about the growing industry of consultants with names like Ivy Wise Kids who will coach parents on how to prepare four- and five-year-olds for preschool tests and interviews. He is positioning his child in a competitive market, and his choices will determine that child's future (or at least his chances to get into Harvard or Yale). What parent wouldn't use every asset at his disposal to maximize his children's options?

I answer with a list of four or five elementary schools that I assure him are as good as any private one in the city. All of them are located in white neighborhoods of Washington, D.C., west of Rock Creek Park. I do not mention the school that my children attend. I know that theirs is not the school he envisions when he asks me about "good schools." For one thing, it's too black, but it's more complicated than that, with silences and things left unsaid. I am thinking about what the good schools look like, about what the children at those schools look like and who their parents are. I'm thinking about the many not-so-good schools in the city and the children in those schools and their parents. I'm thinking about what caused these conditions. Part of me is resenting my colleague's question and judging his reason for asking, but I am a parent and I understand a parent's honorable motive. I do not speak of these things, because we have an unspoken agreement that we will not speak of racism and its consequences when our friends, neighbors, or colleagues must make choices about the lives of their children. If I speak

A version of this chapter previously appeared as Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy),* 114 Yale L.J. 1353 (2005). Originally published in the *Yale Law Journal*.

of the racism that has created these conditions, I will likely be heard to call my colleague racist. I would be misunderstood, and I do not want to offend. I tell myself that I just do not have the time or energy for this complicated conversation, but I feel guilt for my silence. I am participating in the taboo against some necessary conversations.

This chapter considers my silence and the relationship between the constitutional injury of racial segregation and the privatization of education. When I speak of privatization here I do not mean only the flight to private schools or the corporatization of school systems or the politics of school vouchers, although these are all symptoms of a larger problem I explore. The larger problem is something I call the privatization of care and concern. Public policy makers and individual parents increasingly think and speak about children's right to equal educational opportunity as if that project were primarily about giving parents the "liberty" to be consumers in the education market on behalf of their own children. The decisions about how to educate our children (meaning the children in our nuclear family)—where we will school them, who their classmates will be, what curriculum they will learn—are thought of as private and part of our constitutionally protected liberty to raise our children as we see fit. When my colleague asks about a good school for his son, he is not enquiring about what school is best for his children and mine, much less for the poor black children who live in our city. When parents search for a good school for their children, they do not see the project as collective, as about how to determine what is best for all our children and see to it that they get it.

How is this privatized view of education related to the segregation of urban schools? Private schools have long offered a haven for whites resisting school desegregation. Recall how Prince Edward County, Virginia, closed all of its public schools from 1959 to 1964 and provided tuition grants to private white academies. But what I want to explore is a more complex mechanism whose impact on poor black children is not entirely different. In the nation's capital, only 4.6 percent of the children attending public schools are white. By the time they reach their senior year in high school, less than 1 percent of the graduating class is white. More than 60 percent of D.C.'s public school students are eligible for free or reduced-price lunch. The race and class segregation within the District is even more extreme. The schools east of the Anacostia River in Wards Seven and Eight are more than 99 percent black. More than 90 percent of the school district's white elementary students go to a few schools in the white neighborhoods west of Rock Creek Park and on Capitol Hill.

Just over fifty years ago Washington, D.C., schools were segregated by law. In 1967 a federal court found that while the District had desegregated its schools, it had maintained segregated classrooms within its schools through a system of tracking students that perpetuated the inequalities of the old de jure system. But today's segregation is not the product of intentional government action. Rather, it is what the courts have called de facto segregation. The product of private acts of individuals who "choose" to live in a segregated neighborhood or to send their children to a segregated school, de facto segregation does not constitute a cognizable constitutional injury because it is caused not by actions traceable to the state. In the years immediately following *Brown v. Board of Education*, we spoke of de facto segregation with the understanding that despite the absence of legal injury there was still an injury in fact, an injury we could see and measure, one caused by our private acts, a moral injury for which we were personally and collectively responsible.

However, this understanding of de facto segregation has changed in recent years. We have come to think of de facto segregation not simply as the absence of judicially cognizable constitutional injury but as the absence of any injury at all. If poor black children in Washington, D.C., are injured, it is not by their racial and economic isolation but by dysfunctional public schools. Nearly sixty years after *Brown* and *Bolling v. Sharpe*, the word "segregation" rarely appears in public policy discussions or private conversations. Almost no one talks about racism, stigma, or white flight or about what whites are running from and what they are taking with them. One hears much talk about the disastrous state of our public schools—in think tanks, on editorial pages, and at dinner parties where the invited guests all send their children to private schools. The *Washington Post* sees a bloated bureaucracy, a corrupt teachers' union, incompetent school administrators, and ineffective school board members. The No Child Left Behind Act requires "standards" and "assessment" to be sure "low-performing" schools are held "accountable." But no one talks about who has left whom behind. No one measures the enormous divestment in social and political capital that accompanies white flight. No one holds accountable the parents who have fled to the manicured lawns of private schools.

The story of this silence on race and segregation and their relationship to the increasingly privatized view of education is the more complicated one that requires telling. It is a story of people of good will who are nonetheless responsible for the segregation of the public schools—white parents, with black friends, colleagues, and neighbors, who are afraid to send their children to public schools where most of the children are black, and middle-class black parents who are also afraid. These fears are related to race and racism, and they divert us from thinking about injury to the moral obligation of inclusion in community, the obligation that is the subject of *Brown* and the foundation of our democracy.

This chapter asks how constitutional theory should account for the impact of racial prejudice on American democracy. In particular, how does racism affect the way we create community and make decisions about who we are and about the laws that govern our behavior? How should what we understand about our society's racism shape the meaning we give and the role we assign to the Equal Protection Clause of the Fourteenth Amendment?

For many liberal scholars, participation in the process of representative democracy is the touchstone of constitutional theory. For John Hart Ely, for example, the duty of democracy's decision makers to take into account the interests of all of those whom their decisions affect stands at the center of his theory of representation reinforcement.[1] As we shall see, that duty is dishonored when racism—and a failure to talk honestly about race—excludes poor black and brown children from the circle of care that defines the scope of that duty.

A Story About Trying to Talk to Neighbors About School Integration

An Integrated Neighborhood, a Segregated School

It is the summer of 1992. Mari Matsuda and I have come to Washington, D.C., to teach at Georgetown. We move into a lovely 1920s brick colonial house in a neighborhood called Shepherd Park. We love the quiet, tree-lined streets, the old houses and big yards. But what really sold us was that this is perhaps the only truly integrated neighborhood

in the city. Almost evenly divided between black and white families who live side by side throughout the neighborhood, Shepherd Park in recent years has seen a sprinkling of Latino and Asian families come to the neighborhood, as have a few openly gay couples. Of course, this has not always been so.

In 1920, when developers divided Boss Shepherd's huge country estate into lots, the deeds contained restrictive covenants forbidding sale to blacks or Jews. In the 1940s, when those covenants became judicially unenforceable,[2] many Jewish families moved to the neighborhood, as evidenced by the three large synagogues within walking distance of our house. In the late 1950s and early 1960s, blacks started moving to the neighborhood. Realtors sought to exploit whites' racial fear and turn a quick profit by blockbusting—getting whites to sell cheap by scaring them with tales of declining property values that would come with black neighbors and then selling dear to middle-class blacks eager to own these fine houses where they could not live before. Happily, the blockbusters failed. Black and white lawyers, doctors, teachers, and businessmen organized and educated their neighbors to resist the blockbusters. They held potlucks, dances, and mass meetings. Their organization, Neighbors, Inc., still continues today.

Our story, however, does not end happily ever after. We discover that the neighborhood public school, an easy walk from home for our children, does not reflect the neighborhood's demographics. In the 1970s, Shepherd Elementary was as fully integrated as the residential area surrounding it and one of the best elementary schools in the city. By 1992, when we arrived, it was essentially an all-black school. The white families in our neighborhood sent their children to private schools or used the school district's out-of-boundary process to enroll their children in elementary schools located in white neighborhoods on the other side of Rock Creek Park. Many of our black neighbors followed suit.

The seats vacated by our fleeing neighbors were filled quickly with children from families who lived outside Shepherd's geographic district. Ambitious black parents from middle-class, working-class, and poor neighborhoods used the out-of-boundary process to escape their own local public schools and give their children a better chance at a school with a reputation for good teachers and vigilant parents. Now almost 80 percent of the children in our neighborhood school live outside the neighborhood. Shepherd was at once the victim and beneficiary of a competitive system where parents felt they must use whatever economic and social capital they could muster to maximize the educational opportunities of their own children. While the doctors, lawyers, and professors in our neighborhood scrambled to find places at schools in wealthy white neighborhoods across the park, black teachers, bookkeepers, firefighters, and computer technicians dressed in their Sunday best for admissions interviews with the principal at Shepherd Elementary.

A Dream and a Plan

The year is 1992. Our first child will not be born for another year and a half, but Mari and I know we want to send her to Shepherd Elementary. We chose this neighborhood because it was integrated. We want to raise our children in a community where they will learn the lessons our parents taught us—to value difference, to know firsthand the gifts that all people bring to the human enterprise, to understand the wrongs of racism and

discrimination against the poor, and to experience the reward of working with others to set things right. Our neighbors have joined to oppose the racist fearmongering of blockbusting and resist residential white flight. This seems a good place to start the work of reintegrating our neighborhood public school.

During the next three years two babies arrive at our house. They grow more quickly than seems possible, and too soon they are in preschool, real people with their own personalities, gifts, and vulnerabilities. We are working parents, and, in the small spaces our busy lives allow, our conversation invariably turns to our children's future and to their future school. Somehow in the course of these cramped and often interrupted conversations we hatch a plan of sorts. We will find out everything we can about the school. We will meet and talk to our neighbors, especially those with small children. We will share our ideas, ideals, and information. We will find allies who share our belief in the importance of public schools and integration. If we can persuade enough families in this relatively privileged community to send their children to Shepherd, we can create a model school where black and white children and middle-class, working-class, and poor children will learn with and from one another as will their families.

Challenges become apparent early on. On our own block are three families with children of school age. None is enrolled in a public school. We learn that Shepherd has a popular prekindergarten program and some very good teachers in the early primary grades but that many parents move their children to other schools when they reach the third or fourth grade. One neighbor tells us that her son and daughter had attended Shepherd until one of the son's teachers suggested she move them to another school because they were bright, high-achieving children.

As we talk to colleagues and friends it becomes apparent that middle-class parents in every section of the city have given up on the public schools. The causes leading to the deterioration of the city's public schools are complex, but the school district's reputation as a failing system is well earned. Each day we open our *Washington Post* to find reports of mismanagement, fire code violations, shootings, uncertified teachers, and shockingly low test scores. Congress has created a control board to replace the elected school board, and three different school superintendents have held office during the three years we have lived in D.C. Many parents do not distinguish between the conditions in their local school and those in the District as a whole. Others worry that even if they can find a good elementary school, they will not be able to find a satisfactory middle or high school. In an increasingly tight market for seats in the best private schools, it makes sense to secure one of those seats now rather than take one's chances later.

Mari and I are firm in our decision to send our children to the local public school but far from certain about that decision's wisdom. Like all parents, our dreams for our children are without limit. Liberal parents often say, "We just want our children to have options." Of course, this really means they want them to have a choice between Harvard, Yale, Swarthmore, and Juilliard. We are not immune from this parental disease. We understand the strength of a parent's bond with his or her child. What parents want most in a school is a place where their child is safe and treasured, where her talents are recognized and nourished, and where she loves to go to school and learns to think of herself as competent in that universe. They want a school where the teachers and staff listen to their concerns and take them seriously.

"Nobody's Business but My Own": Talking with Friends and Neighbors and the Unspoken Subtext of Race

Our eldest child is four. It is the spring before she will enter the prekindergarten class at Shepherd Elementary, and our neighborhood is ablaze with magnolia, dogwood, cherry, and azalea blossoms. We walk the neighborhood with flyers announcing a meeting of Shepherd Park Parents with Young Children (SPPYC) to be held at our home. The flyer invites neighbors for coffee, bagels, and a chance to meet and talk with other neighbors with young children. This is the organization's third such event. About two dozen families attended each. The only stated agenda was to provide neighbors with young children a chance to meet and talk about common concerns. We plan to introduce the subject of our local public school and use this as an opportunity to recruit people to the cause.

It feels good to be out in the neighborhood knocking on doors. Invariably people are friendly and open. But even at this early stage in our efforts I experience ambivalence as I approach my neighbors. I am certain of our purpose, and it is easy enough to express my own enthusiasm about the idea of neighbors coming together to make a common commitment to the school. Nevertheless, I find it more difficult to press other parents about their plans for their own children, particularly if they say that they have already decided not to send their child to Shepherd. One parent plans to sell his house and move to Maryland before his son reaches school age, and I hesitate to push further on the subject or even ask why. Something tells me that another parent's decision about where to send his children to school is his own business. Yet how will parents and neighbors discover common values and identify collective responsibilities if conversation about how we raise our children is taboo?

So we press the conversation with our neighbors as much as our discomfort will allow. And in our morning of leafleting we find several families who are still weighing their options, anxious for more information and a chance to talk with others. We also discover several families with children already attending Shepherd. We like them immediately. They are upbeat, smart people with progressive politics and a sense of humor.

When it comes time for the meeting, we are pleased at the turnout. About forty adults and their children fill our first floor. As parents introduce themselves and say why they have come, they speak candidly of their concerns about teacher quality, class size, curriculum, the condition of the building, test scores, and what they've heard about how much better the schools are across the park. No one mentions race. No one asks, "Will my child be the only white kid in the class?" But a tall, attractive, dark-haired white woman with a New York accent raises her hand to say she wants to respond to questions about the school's test scores and lack of academic competitiveness. She says that her children attend Shepherd. She tells us of a sister in New York City who is sending her daughter to one of the city's elite private schools, and of her own daughter at Shepherd who is outperforming her New York cousin on every test. She never mentions race, but she is living evidence that white children and their parents can thrive in this nearly all-black school.

SPPYC meets once or twice more. We support a drive to keep the local library open and talk about a proposed pocket park and the need for a stop sign on Fourteenth Street, but we do not meet again as a group to discuss the school. That same spring, good friends who live close by tell us that in September they will send their son to a popular

progressive private school that has recently relocated to a new campus in our neighborhood. Their son shared a play group with our daughter before either of them could walk. His mom grew up in the neighborhood and attended Shepherd when she was a child. Over dinner we often talked of racism, peace, and the trials and joys of raising our children. They say they have decided that the progressive philosophy and teaching style of the private school are a better fit for their son, a free-spirited, nonconforming child. But we are disappointed, nonetheless, I think as much in ourselves as in them. We never speak directly to these good white people about their choice, how much race has affected their decision, or whether we might have done something together with other friends and neighbors that would have allowed them to make a different choice. This is about their child. It is a private space.

Who Said It Would Be Easy?

September comes. We are sitting in the Shepherd auditorium. The room is packed. We watch as the principal calls each class to the front to meet their teacher. Gorgeous children, every shade of brown, scrubbed and oiled and coifed and wearing their back-to-school finest, hug and kiss last good-byes to parents, grandparents, and toddler siblings. Eight or ten pink faces, looking very much at home amid this sea of brown, greet old friends with the idiom and inflection of their black classmates. The five or six white parents in the crowded room appear almost as much at ease as their offspring, chatting and laughing with other adults and hugging their children's classmates. They are integration's veterans, white people inoculated against fear of blackness by crossing racial boundaries and making friends.

Our daughter's prekindergarten class contains not one white child. Given our initial dreams we might well have been disappointed and discouraged. But we discover that Shepherd is a lovely school, despite white flight, broken toilets, a leaky roof, and a crowded, noisy cafeteria. Beyond the problems we have found wonderful, caring, creative, and sometimes brilliant teachers for our children, and the vibrant and diverse families at Shepherd have become our friends.

What Are We Afraid Of? The Unspoken Text

A green and gold sign in front of the school reads, "Shepherd Elementary, A Jewel of a School." The glass-enclosed bulletin board below announces, "Open House, March 10, Welcome Parents." Twice a year the school invites parents to visit classrooms while school is in session to give prospective parents a chance to see the school. Neighborhood parents come to the school for one last look before they make the ultimate decision about whether to send their children to private school or apply for an out-of-boundary exception. Many black families from beyond Shepherd's geographic boundaries visit with hopes that they will win a place here for their child in the out-of-boundary process.

Parents with children already attending Shepherd use the opportunity to check out their children's teachers for the coming year. But most of us know the teachers well. The school is small—two classes at each grade level from prekindergarten to sixth grade. The parent grapevine quickly spreads the word about which teachers are good and which are mean-spirited, burned out, or not very bright. We've seen which teachers give each girl

and boy a good-bye hug at 3:15, which will stop and stoop down to console the crying first-grade child or gently and firmly remind the sixth-grade boy to remove his hat. We know which teachers fill their classrooms with books, science projects, and art materials that the school district does not provide. We do not need to see the standardized test results to know which teacher expects every child to read.

A gaggle of sixth graders greets me at the front door, four girls and three boys dressed in white blouses and shirts and dark skirts and slacks. "Hi, Dr. Lawrence," says a smiling girl, pushed toward me by her fellow greeters. She hands me a green flyer with a map of the school and the names of the teachers identified by grade and room number. "May I help you find your way to a classroom?" she asks, following the scripted greeting and smiling to show that she knows I know my way around. I am proud of these well-groomed, well-coached, giggling greeters. Their warmth and enthusiasm shine right through their manners, and I feel certain that they will make a good impression. If I were a new parent, I'd be thinking, "I want my child to go to school with kids like this."

But as I turn the corner at the end of the hall, I realize that today I am looking at the school through a new parent's eyes. I am more worried than I want to admit about the school's appearance, the slight smell of disinfectant in the hall, the broken panes of glass replaced by yellowing plastic, and the worn stairways. I am thinking about the white parent who may look at the courteous sixth graders at the door and see only their blackness, that not one of them is white. I worry that even a black parent, a doctor or a law professor like me, will look at Shepherd and be fearful of sending his child here. I am on the lookout for these parents who look into classrooms with apprehensive eyes and wonder if their son or daughter would be safe and cared for in this place. I want to meet them, to introduce myself, and reassure them that there is nothing here to be afraid of. Like those children at the front door, my dress, manners, and speech must counter the multitude of scary images of blackness that populate America's history and culture. I worry that I may not be up to the task. For I too know these fears.

The Fear of Blackness

What are we afraid of? I begin with the fear that is hardest to face. It is difficult to speak about this fear because it requires us to think about racism in its crudest, most elemental form. If we fear for our child because most of the other children in her school are black, it is likely that this fear is caused, at least in part, by a fear of blackness. We have internalized a set of beliefs about African Americans that has its origins in racist ideology—that black people are lazy, dirty, savage, impulsive, oversexed, or any number of other scary things. We are all frightened to some degree of things and people we do not know, but racism includes a particularly invidious form of that fear. None of us wants to think of him- or herself as capable of this kind of thinking. So we deny these beliefs and thus the fear of blackness.

Our neighborhood meetings were always well integrated, with at least as many white parents as black and some interracial couples. White families easily introduced themselves and engaged in animated conversations with their newfound neighbors, black and white. At the school's open house white faces are far fewer. I see only five as I visit classrooms, two of them with black spouses. I imagine these white parents thinking,

"If I send my child here, he may well be the only white child in his class." Often when I speak with white parents about sending their child to an urban public school they mention their concern for the child's safety or wonder whether she would prosper where no other child looks like her. I wonder if they realize that for much of my childhood I was the only black child in my class. I am certain that my parents were also worried about my racial isolation, but when white parents express these concerns I sense that they are afraid, afraid not just for their child's academic opportunities, but of the black children who would be his classmates and of those children's black parents.

Here I should reiterate a point that I have made elsewhere—that we are all racists, that we share a common history and culture where racism has played and still plays a central role. As our culture has rejected racism as immoral and unproductive, hidden or unconscious prejudice has become the more prevalent form of it. I have argued elsewhere that we should think about racism as a disease rather than as a crime (see Chapter 31). Our conversations about why some of us feel we cannot send our children to black schools might be easier if we could admit these fears to ourselves and others without fear of judgment and condemnation. If we could talk about our fears of blackness we might find ways to confront and alleviate them. But these remain forbidden conversations. We cannot speak with friends and neighbors of their fear of blackness because we do not want to call them racists.

The Fear of Having One's Children Treated like Black Children

"I visited the school and looked in the girls' bathroom. The toilet seat was missing." One of our neighbors is explaining why she will not send her daughter to Shepherd and has instead entered the out-of-boundary lottery in hopes of placing her in a school in a white neighborhood. A black professional and community activist, she is a leader in the fight to close down an open-air drug market down the street from her home. Her fear is not so much one of black children as of having her children mistreated because of their proximity to other black children who are being mistreated. She knows that because the children who attend the school are mostly black, it is not likely that a handyman will replace the toilet seat. There will probably be fewer experienced and qualified teachers, fewer books, fewer computers, and fewer science and math labs than elsewhere. Chances are there will be no kiln to fire a child's clay pot, no violins and cellos to outfit an orchestra. But more than these material inequalities, she fears that adults will expect less of the children in this school than of those in the white neighborhood. She worries the school will look for hyperactive boys and brace for sullen, sassy girls. At the open house the principal stressed "classroom management" and said nothing about creative teaching methods or programs for gifted children. She is afraid that on the first day of school, when her child's kindergarten teacher looks around the circle of bright, scrubbed faces, she will expect that most of the class will not go to college, rather than imagine that she is teaching a roomful of future doctors, lawyers, and CEOs.

One of the products of racism and segregation is that poor black children receive very different treatment from that of the children of highly educated white parents. Studies show how teachers' attitudes toward poor, minority children reproduce the race and class stratification in American society and how educators make assumptions about

the capabilities of their students based on race and class that shape interactions and expectations.

So my neighbor's fears are well founded if they reflect her knowledge of what most often happens in schools with a significant number of poor and working-class black children. But the conversation I want to have with her would not end here. I want to talk with her about Shepherd Elementary and the complex ways that her fears might be, at the same time, warranted and unwarranted. I want to tell her about the several skilled, inspired, creative, caring teachers who have taught our children here and who say that they have recognized and nurtured each of my children's unique genius. I want to speak candidly about the handful of teachers I would like to be rid of and admit that Mari and I have used our privilege to keep our children out of their classes. I want to tell her that when enough parents like her enroll their children, the toilet seats, broken windows, and leaking roof will be fixed more quickly. We privileged parents with significant social capital need not comprise a majority to change the culture. Working-class and poor parents at Shepherd have shown that they too are ready to make demands. I want to be truthful about what worries me most—that many of us have been beaten down by the constant and unremitting message from the larger culture that says we should expect little from black children and their teachers and parents. I worry that over time we will begin to internalize the message and give up fighting against it. With each passing month and year we lose a little of our outrage at the unfixed toilet and the teacher who cannot make her subjects and verbs agree. We are fearful that we cannot win this battle for all children, and so we retreat in an effort to save our own.

The Fear That One's Child Will Not Fully Develop Her Gifts or Will Lose the Race for Privilege

I began by describing an exchange with a colleague, a new parent who worried about where his child would go to college. It is hard to imagine a parent who does not look at his child and imagine who he or she will be ten and twenty years from now. We watch their budding gifts: the way she draws a picture or solves a puzzle, his perfect pitch and poetry, her passion for musical theater and his for bridges, the way he makes the throw from third, her crossover dribble. We watch how quickly and joyfully they learn when they are toddlers on the playground, and we wonder if they will know teachers who will show them how to love Matisse, Romare Bearden, Puccini, Ellington, Whitman, Adrienne Rich, microbiology, and quantum physics. Our greatest fear is that no teacher will see the budding scientist, dancer, or CEO or have the skill to nurture these gifts. In a world where knowledge, teaching, and learning are increasingly commodified and stratified, where only those children whose parents can pay will touch a cello, read James Joyce, or see a cell divide beneath a microscope, we realize that we are in a cutthroat competition with other parents to secure a place in a preschool with an inside track to the Ivy League. We hear a colleague quietly boasting of a daughter admitted to Yale or Amherst, and we fear our child will be left out, that the promise of her gifts will go unrealized and that it will be our fault. We may disagree in principle with an education system that preserves class hierarchy, but if it's the only game in town and our children are at stake, it's just too scary to opt out.

The Fear of Solitary Decision Making

They say it takes a village, but parents know that raising children in today's world is solitary work. Our own parents and siblings are as likely to live on the opposite side of the continent from us as they are to live across the street. Working parents hire nannies or leave their children with babysitters and child care centers. Our homes and apartments turn inward toward backyards and family rooms equipped with high-tech multimedia centers. We might remember playing on neighborhood streets and sidewalks with childhood friends or riding a bike to the local playground, but those streets no longer feel safe for our own children.

When I speak of the loneliness of parenting I do not mean only that we are too often driving alone as we chauffeur children to soccer games and piano lessons. I am most concerned with the solitariness of our decision making about how we raise our children. When we choose a babysitter, a piano teacher, or a soccer league; when we decide whether our children will play with toy guns or how much TV they will watch; when we talk to them about drugs, war, racism, and sexuality; when we decide where they will go to school, we are too often alone. We may consult a friend or colleague, the Internet, or one of those firms that for a fee will tell us the school where our child will fit best. But these are consultations in which we ask for information to place on our private list of pros and cons. We rarely speak to other parents about what we want for our children and what they need, about our values and how we can best convey them to our children. We rarely ask for or receive help in this solitary task because an unwritten sign says "private."

This loneliness deepens when parents confront the fears that prompt white and middle-class-black flight from urban schools. As each white or middle-class black family decides on its own to leave Shepherd Elementary, those of us who remain grow more fearful of being left alone. The fear increases because of the uncertainty about who will leave next and how rapid the exodus will be. The forbidden conversation isolates us from one another and makes the hard work of parenting more solitary still.

Understanding and Misunderstanding *Brown*: On Community and Privacy

In our efforts to create an integrated school at Shepherd Elementary we encountered a dual challenge: to overcome the fear of blackness engendered by America's racism and to understand and empathize with the depth of intimacy between parents and their children.

Brown v. Board of Education is a case about citizenship, community, and the special role that public education plays in defining and creating community. The Court begins by telling us that the plaintiffs, Negro children, "seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis."[3] The Court's juxtaposition of "public schools" and "community" is not coincidental. Of course the plaintiffs' claim in *Brown* was about more than exclusion from schools. It was a claim for belonging, for full membership in a community. But the plaintiffs chose public education as the beachhead for their attack. They understood, as ultimately did the Court, the peculiar relationship between the institutions a community creates to educate its children and the creation of community itself.

A community creates common schools in recognition of the need to convey knowledge, culture, and skills to its children as well as to transmit values and create relationships. Schools create community because they take the private act of parental care and entrust it to the collective. As Chief Justice Earl Warren put it:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.[4]

Brown makes sense only in the context of this finding of a widespread commitment to public education. If the vast majority of white citizens—the people who mattered and were listened to in the community—did not support and rely on public schools to educate their own children, those schools would not have played this central role as a marker of community membership or citizenship. Today when large numbers of privileged parents withdraw from urban public schools, they change or move this marker of community membership, and black children are once again excluded.

The moral mandate of *Brown* is that all children in this country have a right to full membership in the community and to the resources that membership brings. This is so even if the walls that deny them access are built between poor black children in urban public schools and privileged white children in private schools and exclusive suburbs.

Today we often think of *Brown* as about improving test scores for poor children rather than about integration. Vouchers, charter schools, Edison Schools, and the No Child Left Behind Act all offer educational reform for poor minority children with no direct attention to race or class integration. But segregated schools cannot deliver equality of education. This is not because black children must sit next to white children to learn. Schools must be integrated because segregated schools build a wall between poor black and brown children and those of us with privilege, influence, and power that denies them the social, political, and economic resources we command. Although the wall is not a physical structure, it nonetheless enables us to hoard our wealth on one side while children on the other side are left with little. The genius of segregation as a tool of oppression lies in the signal it sends to the oppressors—that their monopoly on resources is legitimate, that there is no need for sharing, no moral requirement of empathy and care. The children on the other side of the wall are not our own, not our kin. They do not belong to our community. This is the meaning of *Brown*'s observation that segregation is inherently unequal.

NOTES

1. John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 181 (1980).
2. Hurd v. Hodge, 334 U.S. 24 (1948); Shelley v. Kraemer, 334 U.S. 1 (1948).
3. Brown v. Bd. of Educ., 347 U.S. 483, 487 (1954).
4. *Id.* at 493.

From the Editors

Issues and Comments

Would the United States accept the Space Trader's horrid offer? And if all blacks were to go off to the unknown (but surely dire) fate Derrick Bell posits, who would be next—and what would be the consequences for the rivalry between classes vying to avoid selection? Is Michael Olivas right in stating that the United States has regularly and with few qualms traded groups of color for material gain of elite groups?

If, as many of the authors in this book suggest, the legal system is no longer a sensible place to take complaints of racial injustice, what, then, is the solution for a black, Native American, Latino, or Asian American aggrieved by racism? If judges will not listen (is it true that they rarely will?), who will? Is color blindness always a negative self-deception, as Neil Gotanda argues? A cop-out, as Charles Lawrence and other authors suggest? Is cultivating multiple consciousness, as Mari Matsuda suggests, at least a partial solution?

You may wish to reconsider your answers after examining Parts III (on revisionist history of civil rights progress), XI (on cultural nationalism), and XV (on criticism of critical race theory and self-analysis). Many of the Suggested Readings, immediately following, address these questions.

SUGGESTED READINGS

Banks, R. Richard, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 Yale L.J. 875 (1998).

Bell, Derrick A., Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518 (1980).

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Bell, Derrick A., Jr., *Racial Realism*, 24 Conn. L. Rev. 363 (1992).

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PART II

STORYTELLING, COUNTER-STORYTELLING, AND NAMING ONE'S OWN REALITY

AMONG THE most characteristic approaches in the critical race theory genre are storytelling, counterstorytelling, and analysis of narrative. An opening essay by Derrick Bell uses a fictional story to illustrate how the framers of the U.S. Constitution cared more about protecting property than they did about the humanity of black people. Richard Delgado shows how any event can be retold differently and that oppositional storytelling can alter how we construct legal reality.

Thomas Ross exposes the varying narratives of race and racism that interweave in the Supreme Court opinions in an important affirmative action decision, *Richmond v. J. A. Croson Co*. Gerald Torres and Kathryn Milun show, through analysis of an Indian law case, how the law can prevent a people from expressing their own voice and worldview by imposing rigid categories and ways of speaking.

Consummate storyteller Patricia Williams weaves several stories—about finding an apartment, about learning of her own slave origins, and about attending law school at Harvard—to demonstrate the need to retain rights-based theory to advance minority causes, a methodology that the critical legal studies left was quick to discard.

Finally, andré cummings shows how critical race theory's writers and storytellers and today's musical rap stars are in many ways opposite sides of the same coin.

8. Property Rights in Whiteness

Their Legal Legacy, Their Economic Costs

DERRICK A. BELL, JR.

A few years ago, I was presenting a lecture in which I enumerated the myriad ways black people have been used to enrich this society and made to serve as its proverbial scapegoat. I was particularly bitter about the country's practice of accepting black contributions and ignoring the contributors. Indeed, I suggested, had black people not existed, America would have invented them.

From the audience, a listener reflecting more insight on my subject than I had shown shouted out, "Hell, man, they did invent us!" The audience immediately understood and responded to the comment with a round of applause in which I joined. Whether we are called "colored," "Negroes," "Afro-Americans," or "blacks," we are marked with the caste of color in a society still determinedly white. As a consequence, we are shaped, molded, changed from what we might have been into what we are. Much of what we are—considering the motivations for our "invention"—is miraculous. And much of that invention—as you might expect—is far from praiseworthy, scarred as it is by all the marks of oppression.

Not the least of my listener's accomplishments was the seeming answer to the question that is implicit in the title of this chapter. And indeed, racial discrimination has wrought and continues to place a heavy burden on all black people in this country. A major function of racial discrimination is to facilitate the exploitation of black labor, deny us access to benefits and opportunities that would otherwise be available, and blame all the manifestations of exclusion-bred despair on the asserted inferiority of the victims.

But the costs and benefits of racial discrimination are not so neatly summarized. There are two other interconnected political phenomena that emanate from the widely shared belief that whites are superior to blacks and that have served critically important stabilizing functions in the society. First, whites of widely varying socioeconomic status employ white supremacy as a catalyst to negotiate policy differences, often through compromises that sacrifice the rights of blacks.

A version of this chapter previously appeared as Derrick A. Bell, Jr., *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 Vill. L. Rev. 767 (1988). Originally published in the *Villanova Law Review*.

Second, even those whites who lack wealth and power are sustained in their sense of racial superiority, and thus rendered more willing to accept their lesser share, by an unspoken but no less certain property right in their whiteness. This right is recognized and upheld by courts and the society like all property rights under a government created and sustained primarily for that purpose.

Let us look first at the compromise-catalyst role of racism in American policy making. When the Constitution's framers gathered in Philadelphia, it is clear that their compromises on slavery were the key that enabled Southerners and Northerners to work out their economic and political differences.

The slavery compromises set a precedent under which black rights have been sacrificed throughout the nation's history to further white interests. Those compromises are far more than an embarrassing blot on our national history. Rather, they are the original and still definitive examples of the ongoing struggle between individual rights reform and the maintenance of the socioeconomic status quo.

Why did the framers do it? Surely, there is little substance in the traditional rationalizations that the slavery provisions in the Constitution were merely unfortunate concessions pressured by the crisis of events and influenced by then prevailing beliefs that (1) slavery was on the decline and would soon die of its own weight or that (2) Africans were thought a different and inferior breed of beings and their enslavement carried no moral onus.

The insistence of Southern delegates on protection of their slave property was far too vigorous to suggest that the institution would soon be abandoned.[1] And the antislavery statements by slaves and white abolitionists alike were too forceful to suggest that the slavery compromises were the product of men who did not know the moral ramifications of what they did.[2]

The question of what motivated the framers remains. My book *And We Are Not Saved*[3] contains several allegorical stories intended to explore various aspects of American racism using the tools of fiction. In one, Geneva Crenshaw, a black civil rights lawyer gifted with extraordinary powers, is transported back to the Constitutional Convention of 1787.

There is, I know, no mention of this visit in Max Farrand's records of the convention proceedings. James Madison's compulsive notes are silent on the event. But the omission of the debate that follows her sudden appearance in the locked meeting room, and the protection she is provided when the delegates try to eject her, is easier to explain than the still embarrassing fact that these men—some of the outstanding figures of their time—could incorporate slavery into a document committed to life, liberty, and the pursuit of happiness for all.

Would they have acted differently had they known the great grief their compromises on slavery would cause? Geneva's mission is to use her knowledge of the next two centuries to convince the framers that they should not incorporate recognition and protection of slavery in the document they are writing. To put it mildly, her sudden arrival at the podium is sufficiently startling to intimidate even these men. But outrage quickly overcomes their shock. Ignoring Geneva's warm greeting and her announcement that she has come from two hundred years in the future, some of the more vigorous delegates, outraged at the sudden appearance in their midst of a woman, and a black woman at that, charge toward her. As Geneva describes the scene:

> Suddenly, the hall was filled with the sound of martial music, blasting trumpets, and a deafening roll of snare drums. At the same time—and as the delegates were almost upon me—a cylinder composed of thin vertical bars of red, white, and blue light descended swiftly and silently from the high ceiling, nicely encapsulating the podium and me.
>
> To their credit, the self-appointed eviction party neither slowed nor swerved. As each man reached and tried to pass through the transparent light shield, there was a loud hiss, quite like the sound electrified bug zappers make on a warm, summer evening. While not lethal, the shock the shield dealt each attacker was sufficiently strong to literally knock him to the floor, stunned and shaking.

This phenomenon evokes chaos rather than attention in the room, but finally, during a lull in the bedlam, Geneva tries for a third time to be heard. "Gentlemen," she begins again. "Delegates," she says, pausing, and, with a slight smile, adds, "Fellow citizens. I have come to urge that, in your great work here, you not restrict to white men of property the sweep of Thomas Jefferson's self-evident truths. For all men—and women too—are equal and endowed by the Creator with inalienable rights, including 'Life, Liberty and the pursuit of Happiness.'"

The debate that ensues between Geneva and the framers is vigorous, but despite the extraordinary powers at her disposal, Geneva is unable to alter the already reached compromises on slavery. She tries to embarrass the framers by pointing out the contradiction in their commitment to freedom and liberty and their embrace of slavery. They will not buy it:

> "There is no contradiction," replied a delegate. "Gouverneur Morris . . . has admitted that 'Life and liberty were generally said to be of more value, than property. . . [but] an accurate view of the matter would nevertheless prove that property is the main object of Society.'"[4]
>
> "A contradiction," another added, "would occur were we to follow the course you urge. We are not unaware of the moral issues raised by slavery, but we have no response to the [Southern delegate] who has admonished us that 'property in slaves should not be exposed to danger under a Government instituted for the protection of property.'"[5]
>
> "Government was instituted principally for the protection of property and was itself . . . supported by property. Property is the great object of government; the great cause of war; the great means of carrying it on."[6] The security the Southerners seek is that their Negroes may not be taken from them. After all, Negroes are their wealth, their only resource.

Where, Geneva wonders, were those delegates from Northern states, many of whom abhorred slavery and had already spoken out against it in the convention? She finds her answer in the castigation she receives from one of the framers, who tells her:

> Woman, we would have you gone from this place. But if a record be made, that record should show that the economic benefits of slavery do not accrue only to the South. Plantation states provide a market for Northern factories, and the

> New England shipping industry and merchants participate in the slave trade. Northern states, moreover, utilize slaves in the fields, as domestics, and even as soldiers to defend against Indian raids.
>
> Slavery . . . provided the wealth that made independence possible, another delegate told her. The profits from slavery funded the Revolution. It cannot be denied. At the time of the Revolution, the goods for which the United States demanded freedom were produced in very large measure by slave labor. Desperately needing assistance from other countries, we purchased this aid from France with tobacco produced mainly by slave labor. The nation's economic well-being depended on the institution, and its preservation is essential if the Constitution we are drafting is to be more than a useless document. At least, that is how we view the crisis we face.

At the most dramatic moment of the debate, a somber delegate gets to his feet and walks fearlessly right up to the shimmering light shield. Then he speaks seriously and with obvious anxiety:

> This contradiction is not lost on us. Surely we know, even though we are at pains not to mention it, that we have sacrificed the freedom of your people in the belief that this involuntary forfeiture is necessary to secure the property interests of whites in a society espousing, as its basic principle, the liberty of all. Perhaps we, with the responsibility of forming a radically new government in perilous times, see more clearly than is possible for you in hindsight that the unavoidable cost of our labors will be the need to accept and live with what you call a contradiction.

Realizing that she is losing the debate, Geneva intensifies her efforts. But the imprisoned delegates' signals for help have been seen and the local militia summoned. Hearing some commotion beyond the window, she turns to see a small cannon being rolled up and aimed at her. Then, in quick succession, a militiaman lights the fuse, the delegates dive under their desks, the cannon fires, and with an ear-splitting roar, the cannonball breaks against the light shield and splinters, leaving the shield intact but terminating both the visit and all memory of it.

The framers felt—and likely they were right—that a government committed to the protection of property could not have come into being without the race-based, slavery compromises placed in the Constitution. That the economic benefits of slavery and the political compromises of black rights played a very major role in the nation's growth and development is surely so. In short, without slavery, there would be no Constitution to celebrate. This is true not only because slavery provided the wealth that made independence possible but also because it afforded an ideological basis to resolve conflict between propertied and unpropertied whites.

According to historians, including Edmund Morgan[7] and David Brion Davis,[8] working-class whites did not oppose slavery when it took root in the mid-1660s. They identified on the basis of race with wealthy planters even though they were and would remain economically subordinate to those able to afford slaves. But the creation of a black subclass enabled poor whites to identify with and support the policies of the upper class. And large landowners, with the safe economic advantage provided by their slaves,

were willing to grant poor whites a larger role in the political process.[9] Thus, paradoxically, slavery 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.

My point is that the slavery compromises continued, rather than set, a precedent under which black rights have been sacrificed throughout the nation's history to further white interests. Consider only a few examples:

> The long fight for universal male suffrage was successful in several states when opponents and advocates reached compromises based on their generally held view that blacks should not vote. Historian Leon Litwack reports that, "utilizing various political, social, economic, and pseudo-anthropological arguments, white suffragists moved to deny the vote to the Negro. From the admission of Maine in 1819 until the end of the Civil War, every new state restricted the suffrage to whites in its constitution."[10]
>
> By 1857, the nation's economic development had stretched the initial slavery compromises to the breaking point. The differences between planters and business interests that had been papered over seventy years earlier by greater mutual dangers could not be settled by a further sacrifice of black rights in the *Dred Scott* case.[11]

Chief Justice Roger Taney's conclusion in *Dred Scott* that blacks had no rights whites were bound to respect represented a renewed effort to compromise political differences between whites by sacrificing the rights of blacks. The effort failed, less because Taney was willing to place all blacks—free as well as slave—outside the ambit of constitutional protection than because he rashly committed the Supreme Court to one side of the fiercely contested issues of economic and political power that were propelling the nation toward the Civil War.

When the Civil War ended, the North pushed through constitutional amendments, nominally to grant citizenship rights to former slaves but actually to protect its victory. But within a decade, when another political crisis threatened a new civil war, black rights were again sacrificed in the Hayes-Tilden Compromise of 1877. Constitutional jurisprudence fell in line with Taney's conclusion regarding the rights of blacks vis-à-vis whites even as his opinion was condemned. The country moved ahead, but blacks were cast into a status that looked positive only when compared with slavery itself.

The reader, I am sure, could add several more examples, but I hope these suffice to illustrate the degree to which whites have used white supremacy to bridge broad gaps in wealth and status to negotiate policy compromises that sacrifice blacks and the rights of blacks.

In the post-Reconstruction era, the constitutional amendments initially promoted to provide rights for the newly emancipated blacks were transformed into the major legal bulwarks for corporate growth. The legal philosophy of that era espoused liberty of action untrammeled by state authority, but the only logic of the ideology—and its goal—was the exploitation of the working class, whites as well as blacks.

As to whites, consider *Lochner v. New York*,[12] in which the Court refused to find that the state's police powers extended to protecting bakery employees against employers

who required them to work in physically unhealthy conditions for more than ten hours per day and sixty hours per week. Such maximum-hours legislation, the Court held, would interfere with the bakers' inherent freedom to make their own contracts with the employers on the best terms they could negotiate. In effect, the Court assumed in that preunion era that employees and employers bargained from positions of equal strength. Liberty of that sort legitimated the sweat shops in which men, women, and children were quite literally worked to death.

For blacks, of course, we can compare *Lochner* with the decision in *Plessy v. Ferguson*,[13] decided only eight years earlier. In *Plessy*, the Court upheld the state's police power to segregate blacks in public facilities even though such segregation must, of necessity, interfere with the liberties of facility owners to use their property as they saw fit.

Both opinions are quite similar in the Court's use of Fourteenth Amendment fictions: the assumed economic liberty of bakers in *Lochner* and the assumed political equality of blacks in *Plessy*. Those assumptions, of course, required the most blatant form of hypocrisy. Both decisions protected existing property and political arrangements, while ignoring the disadvantages to the powerless caught in those relationships: the exploited whites (in *Lochner*) and the segregated blacks (in *Plessy*).

The effort to form workers' unions to combat the ever-more-powerful corporate structure was undermined because of the active antipathy against blacks practiced by all but a few unions. Excluded from jobs and the unions because of their color, blacks were hired as scab labor during strikes, increasing the hostility of white workers that should have been directed toward their corporate oppressors.

The Populist Movement in the latter part of the nineteenth century attempted to build a working-class party in the South strong enough to overcome the economic exploitation by the ruling classes. But when neither Populists nor the conservative Democrats were able to control the black vote, they agreed to exclude blacks entirely through state constitutional amendments, thereby leaving whites to fight out elections themselves. With blacks no longer a force at the ballot box, conservatives dropped even the semblance of opposition to Jim Crow provisions pushed by lower-class whites as their guarantee that the nation recognized their priority citizenship claim, based on their whiteness.

Southern whites rebelled against the Supreme Court's 1954 decision declaring school segregation unconstitutional precisely because they felt the long-standing priority of their superior status to blacks had been unjustly repealed. Though today we celebrate the Court's rejection of the "separate but equal" doctrine of *Plessy v. Ferguson*,[14] the passwords for gaining judicial recognition of the viable property right in being white still include "higher entrance scores," "seniority," and "neighborhood schools." There is as well the use of impossible-to-hurdle intent barriers to deny blacks remedies for racial injustices, in which the relief sought would either undermine white expectations and advantages gained during years of overt discrimination or such relief would expose the deeply imbedded racism in a major institution, such as the criminal justice system.[15]

The continuing resistance to affirmative action plans, set-asides, and other meaningful relief for discrimination-caused harm is based in substantial part on the perception that black gains threaten the main component of status for many whites: the sense that, as whites, they are entitled to priority and preference over blacks. The law has mostly encouraged and upheld what Mr. Plessy argued in *Plessy v. Ferguson* was a property right in whiteness, and those at the top of the society have benefited because the masses

of whites are too occupied in keeping blacks down to note the large gap between their shaky status and that of whites on top.

Blacks continue to serve the role of buffers between those most advantaged in the society and those whites seemingly content to live the lives of the rich and famous through the pages of the tabloids and television dramas like *Dallas*, *Falcon Crest*, and *Dynasty*. Caught in the vortex of this national conspiracy that is perhaps more effective because it apparently functions without master plans or even conscious thought, many blacks understandably manifest self-destructive or nonfunctional behavior patterns. Indeed, the wonder is that so many continue to strive and sometimes succeed.

The cost to black people of racial discrimination is high, but beyond the bitterness that blacks understandably feel is the reality that most whites, too, are, as Jesse Jackson puts it, victims of economic injustice. Indeed, allocating the costs is not a worthwhile use of energy when finding a cure is so clearly the need now.

There are today—even in the midst of outbreaks of antiblack hostility on our campuses and elsewhere—some indications that an increasing number of working-class whites are learning what blacks have long known: that the rhetoric of freedom so freely voiced in this country is no substitute for the economic justice that has been so long denied.

True, it may be that the structure of capitalism, supported as was the framers' intention by the Constitution, will never give sufficiently to provide real economic justice for all. But in the beginning, that Constitution deemed those who were black as the fit subject of property. The miracle of that document—too little noted during its bicentennial—is that those same blacks and their allies have in their quest for racial justice brought to the Constitution much of its current protection of individual rights.

The challenge is to move the document's protection into the sacrosanct area of economic rights this time to ensure that opportunity in this sphere is available to all. Progress in this critical area will require continued civil rights efforts but may depend to a large extent on whites coming to recognize that their property right in being white has been purchased for too much and has netted them only the opportunity, as one noted historian put it, to harbor sufficient racism to feel superior to blacks while nevertheless working at a black's wages.[16]

The cost of racial discrimination is levied against us all. Blacks feel the burden and strive to remove it. Too many whites have felt that it was in their interest to resist those freedom efforts. But the efforts to achieve racial justice have already performed a miracle of transforming the Constitution—a document primarily intended to protect property rights—into a vehicle that provides a measure of protection for those whose rights are not bolstered by wealth, power, and property.

NOTES

1. Even on the unpopular subject of importing slaves, Southern delegates were adamant. John Rutledge from South Carolina warned, "If the Convention thinks that N.C.; S.C. & Georgia will ever agree to the plan, unless their right to import slaves be untouched, the expectation is vain. The people of those States will never be such fools as to give up so important an interest." 2 The Records of the Federal Convention of 1787, at 373 (M. Farrand ed., 1911).

2. The debate over the morality of slavery had raged for years, with influential Americans denouncing slavery as a corrupt and morally unjustifiable practice. See, e.g., W. Wiecek, The Sources

of Antislavery Constitutionalism in America: 1760–1848, at 42–43 (1977). And slaves themselves petitioned governmental officials and legislatures to abolish slavery. See 1 A Documentary History of the Negro People in the United States 5–12 (H. Aptheker ed., 1968).

3. D. Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (1987).

4. See generally 1 The Records of the Federal Convention of 1787, at 533 (M. Farrand ed., 1911).

5. *Id.* at 593–94.

6. *Id.* at 542.

7. E. Morgan, American Slavery, American Freedom: The Ordeal of Colonial Virginia (1975).

8. D. Davis, The Problem of Slavery in the Age of Revolution: 1770–1820 (1975).

9. Morgan, *supra* note 7, at 380–81.

10. L. Litwack, North of Slavery: The Negro in the Free States, 1790–1860, at 79 (1967).

11. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

12. 198 U.S. 45 (1905) (overruled by Ferguson v. Skrupa, 372 U.S. 726, 730 (1963)) ("[D]octrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely [is] . . . discarded").

13. 163 U.S. 537 (1896).

14. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

15. McCleskey v. Kemp, 107 S. Ct. 1756 (1987).

16. C. Vann Woodward, The Strange Career of Jim Crow (3d ed. 1974) (on the function of racism in society).

9. Storytelling for Oppositionists and Others

A Plea for Narrative

RICHARD DELGADO

Storytelling

Everyone has been writing stories these days. And I don't just mean writing *about* stories or narrative theory, important as those are. I mean actual stories, as in once-upon-a-time-type stories. Many, but by no means all, who have been telling legal stories are members of what could be loosely described as out-groups, groups whose marginality defines the boundaries of the mainstream, whose voice and perspective—whose consciousness—has been suppressed, devalued, and abnormalized. The attraction of stories for these groups should come as no surprise. For stories create their own bonds and represent cohesion, shared understandings, and meanings. The cohesiveness that stories bring is part of the strength of the out-group. An out-group creates its own stories, which circulate within the group as a kind of counterreality.

The dominant group creates its own stories, as well. The stories or narratives told by the in-group remind it of its identity in relation to out-groups and provide it with a form of shared reality in which its own superior position is seen as natural.

The stories of out-groups aim to subvert that reality. In civil rights, for example, many in the majority hold that any inequality between blacks and whites is because of either cultural lag or inadequate enforcement of currently existing beneficial laws—both of which are easily correctable. For many minority persons, the principal instrument of their subordination is neither of these. Rather, it is the prevailing *mind-set* by means of which members of the dominant group justify the world as it is—that is, with whites on top and browns and blacks at the bottom.

Stories, parables, chronicles, and narratives are powerful means for destroying mind-set—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place. These matters are rarely focused on. They are like eyeglasses we have worn a long time. They are nearly invisible; we use them to scan and interpret the world and only rarely examine them for themselves. Ideology—the received wisdom—makes current social arrangements seem

A version of this chapter previously appeared as Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411 (1989). Originally published in the *Michigan Law Review*.

fair and natural. Those in power sleep well at night; their conduct does not seem to them like oppression.

The cure is storytelling (or as I sometimes call it, counterstorytelling). As Derrick Bell, Bruno Bettelheim, and others show, stories can shatter complacency and challenge the status quo. Stories told by underdogs are frequently ironic or satiric; a root word for "humor" is *humus*, or *bringing low*, *down to earth*.[1] Along with the tradition of storytelling in black culture[2] there exists the Spanish tradition of the picaresque novel or story, which tells of humble folk piquing the pompous or powerful and bringing them down to more human levels.[3]

Most who write about storytelling focus on its community-building functions: Stories build consensus, a common culture of shared understandings, and a deeper, more vital ethics. But stories and counterstories can serve an equally important destructive function. They can show that what we believe is ridiculous, self-serving, or cruel. They can show us the way out of the trap of unjustified exclusion. They can help us understand when it is time to reallocate power. They are the other half—the destructive half—of the creative dialectic.

Storytelling and Counterstorytelling

The same object, as everyone knows, can be described in many ways. A rectangular red object on my living room floor may be a nuisance if I stub my toe on it in the dark, a doorstop if I use it for that purpose, further evidence of my lackadaisical housekeeping to my visiting mother, a toy to my young daughter, or simply a brick left over from my patio restoration project. There is no single true, or all-encompassing, description. The same holds true of events. Watching an individual perform strenuous repetitive movements, we might say that he or she is exercising, discharging nervous energy, following doctor's orders with respect to health, or suffering a seizure or convulsion. Often, we will not be able to ascertain the single best description or interpretation of what we have seen. We participate in creating what we see in the very act of describing it.[4]

Social and moral realities, the subject of this chapter, are just as indeterminate and subject to interpretation as single objects or events, if not more so. For example, what is the "correct" answer to the following question: The American Indians are (A) a colonized people; (B) tragic victims of technological progress; (C) subjects of a suffocating, misdirected federal beneficence; (D) a minority stubbornly resistant to assimilation; or (E) ———; or (F) ———?

My premise is that much of social reality is constructed. We decide what is and, almost simultaneously, what ought to be. Narrative habits, patterns of seeing, shape what we see and aspire to.[5] These patterns of perception become habitual, tempting us to believe that the way things are is inevitable or the best that can be in an imperfect world. Alternative visions of reality are not explored or, if they are, rejected as extreme or implausible.

How can there be such divergent stories? Why do they not combine? Is it simply that members of the dominant group see the glass as half full and blacks the same glass as half empty? I believe there is more than this at work; there is a war between stories. They contend for, tug at, our minds. To see how the dialectic of competition and rejection works—to see the reality-creating potential of stories and the normative implications of

adopting one story rather than another—consider the following series of accounts, each describing the same event.

A Standard Event and a Stock Story That Explains It

The following series of stories revolves around the same event: A black lawyer interviews for a teaching position at a major law school (school X) and is rejected. Any other race-tinged event could have served equally well for purposes of illustration. This particular event was chosen because it occurs on familiar ground—many readers of this book are past or present members of a university community who have heard about or participated in events like the one described.

Setting. A professor and student are talking in the professor's office. Both are white. The professor, Blas Vernier, is tenured, in mid-career, and well regarded by his colleagues and students. The student, Judith Rogers, is a member of the student advisory appointments committee.

ROGERS: Professor Vernier, what happened with the black candidate, John Henry? I heard he was voted down at the faculty meeting yesterday. The students on my committee liked him a lot.

VERNIER: It was a difficult decision, Judith. We discussed him for over two hours. I can't tell you the final vote, of course, but it wasn't particularly close. Even some of my colleagues who were initially for his appointment voted against him when the full record came out.

ROGERS: But we have no minority professors at all, except for Professor Chen, who is untenured, and Professor Tompkins, who teaches trial practice, on loan from the district attorney's office once a year.

VERNIER: Don't forget Mary Foster, the assistant dean.

ROGERS: But she doesn't teach, she just handles admissions and the placement office.

VERNIER: And does those things very well. But back to John Henry. I understand your disappointment. Henry was a strong candidate, one of the stronger blacks we've interviewed recently. But ultimately he didn't measure up. We didn't think he wanted to teach for the right reasons. He was vague and diffuse about his research interests. All he could say was that he wanted to write about equality and civil rights, but so far as we could tell he had nothing new to say about those areas. What's more, we had some problems with his teaching interests. He wanted to teach peripheral courses, in areas where we already have enough people. And we had the sense that he wouldn't be really rigorous in those areas, either.

ROGERS: But we need courses in employment discrimination and civil rights. And he's had a long career with the NAACP Legal Defense Fund and really seemed to know his stuff.

VERNIER: It's true we could stand to add a course or two of that nature, although as you know our main needs are in commercial law and corporations, and Henry doesn't teach either. But I think our need is not as acute as you say. Many of the topics you're interested in are covered in the second half of the

constitutional law course taught by Professor White, who has a national reputation for his work in civil liberties and freedom of speech.

ROGERS: But Henry could have taught those topics from a black perspective. And he would have been a wonderful role model for our minority students.

VERNIER: Those things are true, and we gave them considerable weight. But when it came right down to it, we felt we couldn't take that great a risk. Henry wasn't on the law review at school, as you are, Judith, and has never written a line in a legal journal. Some of us doubted he ever would. And then, what would happen five years from now when he came up for tenure? It wouldn't be fair to place him in an environment like this. He'd just have to pick up his career and start over if he didn't produce.

ROGERS: With all due respect, Professor, that's paternalistic. I think Henry should have been given the chance. He might have surprised us.

VERNIER: So I thought, too, until I heard my colleagues' discussion, which, I'm afraid, given the demands of confidentiality, I can't share with you. Just let me say that we examined his case long and hard and, I am convinced, fairly. The decision, while painful, was correct.

ROGERS: So another year is going to go by without a minority candidate or professor?

VERNIER: These things take time. I was on the appointments committee last year, chaired it in fact. And I can tell you we would love nothing better than to find a qualified black. Every year, we call the Supreme Court to check on current clerks, telephone our colleagues at other leading law schools, and place ads in black newspapers and journals. But the pool is so small. And the few good ones have many opportunities. We can't pay nearly as much as private practice, you know.

[Rogers, who would like to be a legal services attorney but is attracted to the higher salaries of corporate practice, nods glumly.]

VERNIER: It may be that we'll have to wait another few years, until the current crop of black and minority law students graduates and gets some experience. We have some excellent prospects, including some members of your very class.

ROGERS: *[Thinks: I've heard that one before.]* Well, thanks, Professor. I know the students will be disappointed. But maybe when the committee considers visiting professors later in the season it will be able to find a professor of color who meets its standards and fits our needs.

VERNIER: We'll try our best. Although you should know that some of us believe that merely shuffling the few minorities in teaching from one school to another does nothing to expand the pool. And once they get here, it's hard to say no if they express a desire to stay on.

ROGERS: *[Thinks: That's a lot like tenure. How ironic; certain of your colleagues we would love to get rid of, too.]* Well, thanks, Professor. I've got to get to class. I still wish the vote had come out otherwise. Our student committee is preparing a list of minority candidates whom we would like to see considered. Maybe you'll find one or more of them worthy of teaching here.

VERNIER: Judith, believe me, there is nothing that would please me more.

In the above dialogue, Professor Vernier's account represents the stock story—the one the institution collectively forms and tells about itself. This story picks and chooses from among the available facts to present a picture of what happened: an account that justifies the world as it is. It emphasizes the school's benevolent motivation ("look how hard we're trying") and good faith. It stresses stability and the avoidance of risks. It measures the black candidate through the prism of preexisting, agreed-on criteria of conventional scholarship and teaching. Given those standards, it purports to be scrupulously meritocratic and fair; Henry would have been hired had he measured up. No one raises the possibility that the merit criteria employed in judging Henry are themselves debatable—*chosen*, *not* inevitable. No one, least of all Vernier, calls attention to the way merit conceals the contingent connection between institutional power and the things rated.

There is also little consideration of the possibility that Henry's presence on the faculty might have altered the institution's character, helped introduce a different prism and different criteria for selecting future candidates. The account is highly procedural—it emphasizes that Henry got a full, careful hearing—rather than substantive: a black was rejected. It emphasizes certain "facts" without examining their truth—namely, that the pool is very small, that good minority candidates have many choices, and that the appropriate view is the long view; haste makes waste.

The dominant fact about this first story, however, is its seeming neutrality. It scrupulously avoids issues of blame or responsibility. Race played no part in the candidate's rejection; indeed, the school leaned over backward to accommodate him. A white candidate with similar credentials would not have made it as far as Henry did. The story comforts and soothes. And Vernier's sincerity makes him an effective apologist for his system.

Vernier's story is also deeply coercive, although the coercion is disguised. Judith was aware of it but chose not to confront it directly; Vernier holds all the cards. He pressures her to go along with the institution's story by threatening her prospects at the same time that he flatters her achievements. A victim herself, she is invited to take on and share the consciousness of her oppressor. She does not accept Vernier's story, but he does slip a few doubts through cracks in her armor. The professor's story shows how forceful and repeated storytelling can perpetuate a particular view of reality. Naturally, the stock story is not the only one that can be told. By emphasizing other events and giving them slightly different interpretations, a quite different picture can be made to emerge.

Al-Hammar X's Counterstory

A few days after word of Henry's rejection reached the student body, Noel Al-Hammar X, leader of the radical Third World Coalition, delivered a speech at noon on the steps of the law school patio. The audience consisted of most of the black and brown students at the law school, several dozen white students, and a few faculty members. Chen was absent, having a class to prepare for. The assistant dean was present, uneasily taking mental notes in case the dean asked her later what she heard.

Al-Hammar's speech was scathing, denunciatory, and at times downright rude. He spoke several words that the campus newspaper reporter wondered if his paper would print. He impugned the good faith of the faculty, accused them of institutional if not garden-variety racism, and pointed out in great detail the long history of the faculty as

an all-white club. He said that the law school was bent on hiring only white males and only "ladies" who were well-behaved clones of white males. It would never hire a black unless forced to do so by student pressure or the courts. He exhorted his fellow students not to rest until the law faculty took steps to address its own ethnocentricity and racism. He urged boycotting or disrupting classes, writing letters to the state legislature, withholding alumni contributions, setting up a shadow appointments committee, and several other measures that made the assistant dean wince.

Al-Hammar's talk received a great deal of attention, particularly from the faculty who were not there to hear it. Several versions of his story circulated among the faculty offices and corridors ("Did you hear what he said?"). Many of the stories about the story were wildly exaggerated. Nevertheless, Al-Hammar's story is an authentic counterstory. It directly challenges—both in its words and tone—the corporate story the law school carefully worked out to explain Henry's nonappointment. It rejects many of the institution's premises, including "we try so hard" and "the pool is so small," and even mocks the school's meritocratic self-concept. "They say Henry is mediocre, has a pedestrian mind. Well, they ain't sat in none of my classes and listened to themselves. Mediocrity they got. They're experts on mediocrity." Al-Hammar denounced the faculty's excuse making, saying there were dozens of qualified black candidates, if not hundreds. "There isn't that big a pool of chancellors or quarterbacks," he said. "But when they need one, they find one, don't they?"

Al-Hammar also deviates stylistically, as a storyteller, from John Henry. He rebels against the reasonable discourse of law. He is angry, and anger is out of bounds in legal discourse, even as a response to discrimination. John Henry was unsuccessful in getting others to listen. So was Al-Hammar but for a different reason. His counterstory overwhelmed the audience. More than just a narrative, it was a call to action, a call to join him in destroying the current story. But his audience was not ready to act. Too many of his listeners felt challenged or coerced; their defenses went up. The campus newspaper the next day published a garbled version, saying that he had urged the law faculty to relax its standards to provide minority students with role models. This prompted three letters to the editor asking how an unqualified black professor could be a good role model for anyone, black or white.

Moreover, the audience Al-Hammar intended to affect—namely, the faculty—was even more unmoved by his counterstory. It attacked them too frontally. They were quick to dismiss him as an extremist, a demagogue, a hothead—someone to be taken seriously only for the damage he might do should he attract a body of followers. Consequently, for the next week the faculty spent much time in one-on-one conversations with "responsible" student leaders, including Judith Rogers.

By the end of the week, a consensus story had formed about Al-Hammar's story. That story about a story held that Al-Hammar had gone too far, that there was more to the situation than Al-Hammar knew or was prepared to admit. Moreover, Al-Hammar was portrayed *not* as someone who had reached out, in pain, for sympathy and friendship. Rather, he was depicted as a bad actor, someone with a chip on his shoulder, someone no responsible member of the law school community should trade stories with. Nonetheless, a few progressive students and faculty members believed Al-Hammar had done the institution a favor by raising the issues and demanding that they be addressed. They were a distinct minority.

The Anonymous Leaflet Counterstory

About a month after Al-Hammar spoke, the law faculty formed a special committee for minority hiring. The committee contained practically every young liberal on the faculty, two of its three female professors, and the assistant dean. The dean announced the committee's formation in a memorandum sent to the law school's ethnic student associations, the student government, and the alumni newsletter, which gave it front-page coverage. It was also posted on bulletin boards around the law school.

The memo spoke about the committee and its mission in serious, measured phrases—"social need," "national search," "renewed effort," "balancing the various considerations," "identifying members of a future pool from which we might draw." Shortly after the memo was distributed, an anonymous four-page leaflet appeared in the student lounge, on the same bulletin boards on which the dean's memo had been posted, and in various mailboxes of faculty members and law school organizations. Its author, whether student or faculty member, was never identified.[6]

The leaflet was titled "Another Committee, Aren't We Wonderful?" It began with a caricature of the dean's memo, mocking its measured language and high-flown tone. Then, beginning in the middle of the first page, the memo told in conversational terms the following story:

> And so, friends and neighbors, how is it that the good law schools go about looking for new faculty members? Here is how it works. The appointments committee starts out the year with a model new faculty member in mind. This mythic creature went to a leading law school, graduated first or second in his or her class, clerked for the Supreme Court, and wrote the leading note in a law review on some topic dealing with the federal courts. This individual is brilliant, personable, and humane and has just the right amount of practice experience with the right firm.
>
> Schools begin with this paragon in mind and energetically beat the bushes, beginning in September, in search of him or her. At this stage, they believe themselves genuinely and sincerely color blind. If they find such a mythic figure who is black or Hispanic or gay or lesbian, they will hire this person in a flash. They will of course do the same if the person is white.
>
> By February, however, the school has not hired many mythic figures. Some that they interviewed turned them down. Now, it's late in the year and they have to get someone to teach trusts and estates. Although there are none left on their list who are Supreme Court clerks, etc., they can easily find several who are a notch or two below that—who went to good schools but not Harvard or who went to Harvard yet were not first or second in their classes. Still, they know, to a degree verging on certainty, that this person is smart and can do the job. They know this from personal acquaintance with this individual, or they hear it from someone they know and trust. Joe says Bill is really smart, a good lawyer, and will be terrific in the classroom.
>
> So they hire this person because, although he or she is not a mythic figure, functionally equivalent guarantees—namely, first- or second-hand experience—assure them that this person will be a good teacher and scholar. And so it generally turns out—the new professor does just fine.

> Persons hired in this fashion are almost always white, male, and straight. The reason: We rarely know blacks, Hispanics, women, and gays. Moreover, when we hire the white male, the known but less-than-mythic quantity, late in February, *it does not seem to us that we are making an exception.* Yet we are. We are employing a form of affirmative action—bending the stated rules so as to hire the person we want.
>
> The upshot is that whites have two chances of being hired—by meeting the formal criteria we start out with in September (that is, by being mythic figures) and also by meeting the second, informal, modified criteria we apply later to friends and acquaintances when we are in a pinch. Minorities have just one chance of being hired—the first.
>
> To be sure, once every decade or so a law school, imbued with crusading zeal, will bend the rules and hire a minority with credentials just short of Superman or Superwoman. And when it does so, *it will feel like an exception.* The school will congratulate itself—it has lifted up one of the downtrodden. And it will repeatedly remind the new professor how lucky he or she is to be here in this wonderful place. It will also make sure, through subtle or not-so-subtle means, that the students know it, too.

But, the leaflet continued, there is a coda:

> If, later, the minority professor hired this way unexpectedly succeeds, this will produce consternation among his or her colleagues. For things were not intended to go that way. When he or she came aboard, the minority professor lacked those standard indicia of merit—Supreme Court clerkship, high LSAT score, prep school background—that the majority-race professors had and believe essential to scholarly success.
>
> Yet the minority professor is succeeding all the same—publishing in good law reviews, receiving invitations to serve on important commissions, winning popularity with students. This is infuriating. Many majority-race professors are persons of relatively slender achievements—you can look up their publishing record any time you have five minutes. Their principal achievements lie in the distant past, when, aided by their parents' upper-class background, they did well in high school and college and got the requisite test scores on standardized tests, which test exactly the accumulated cultural capital they acquired so easily and naturally at home. Shortly after that, their careers started to stagnate. They publish an article every five years or so, often in a minor law review, after gallingly having it turned down by the very review they served on as editor twenty years ago.
>
> So their claim to fame lies in their early exploits, the badges they acquired up to about the age of twenty-five, at which point the edge they acquired from Mummy and Daddy began to lose effect. Now along comes the hungry minority professor, imbued with a fierce desire to get ahead, a good intellect, and a willingness to work seventy hours a week if necessary to make up for lost time. The minority person lacks the merit badges awarded early in life, the white professor's main source of security. So the minority's colleagues don't like it and use

perfectly predictable ways to transfer the costs of their discomfort to the misbehaving minority.

So that, my friends, is why minority professors

(i) have a hard time getting hired and
(ii) have a hard time if they are hired.

When you and I are running the world, we won't replicate this unfair system, will we? Of course not—unless, of course, it changes us in the process.

This second counterstory attacks the faculty less frontally in some respects—for example it does not focus on the fate of any particular black candidate, such as Henry, but attacks a general mind-set. It employs several devices, including narrative and careful observation—the latter to build credibility (the reader says, "That's right"), the former to beguile the reader and get him or her to suspend judgment (everyone loves a story). The last part of the story is painful; it strikes close to home. Yet the way for its acceptance has been paved by the earlier parts, which paint a plausible picture of events, so that the final part demands consideration. It generalizes and exaggerates—many majority-race professors are *not* persons of slender achievement. But such broad strokes are part of the narrator's art. The realistically drawn first part of the story, despite shading off into caricature at the end, forces readers to focus on the flaws in the good face the dean attempted to put on events. And despite its somewhat accusatory thrust, the story, as was mentioned, debunks only a mind-set, not a person. Unlike Al-Hammar X's story, it does not call the chair of the appointments committee, a much-loved senior professor, a racist. (But did Al-Hammar's story, confrontational as it was, pave the way for the generally positive reception accorded the anonymous account?)

The story invites the reader to alienate herself or himself from the events described, to enter into the mental set of the teller, whose view is different from the reader's own. The oppositional nature of the story, how it challenges and rebuffs the stock story, thus causes her or him to oscillate between poles. It is insinuative: At times, the reader is seduced by the story and its logical coherence—it is a plausible counterview of what happened; it has a degree of explanatory power.

Yet the story places the majority-race reader on the defensive. He or she alternately leaves the storyteller's perspective to return to his or her own, saying, "That's outrageous; I'm being accused of . . ." The reader thus moves back and forth between two worlds, the storyteller's, which the reader occupies vicariously to the extent the story is well told and rings true, and the reader's own, returning to and reevaluating it in light of the story's message. Can my world still stand? What parts of it remain valid? What parts of the story seem true? How can I reconcile the two worlds, and will the resulting world be a better one than the one with which I began?

NOTES

1. J. Shipley, The Origins of English Words 441 (1984) (*humor* derives from *ugu*, a word for wetness, and is related to *humus*—earth or earthly sources of wetness); see also The Oxford Dictionary of English Etymology 452 (C. Onions ed., 1966).

2. See The Book of Negro Folklore (L. Hughes & A. Bontemps eds., 1958); The Negro and His Folklore in Nineteenth-Century Periodicals (B. Jackson ed., 1967); Linda Greene, *A Short Commentary on the Chronicles*, 3 Harv. Blackletter J. 60, 62 (1986); see also L. Parrish, Slave Songs of the Georgia Sea Islands (1942).

3. See, e.g., M. Cervantes, Don Quixote of La Mancha (W. Starkie ed. & trans., 1954) (1605). For ironic perspectives on modern Chicano culture, see R. Rodriguez, Hunger of Memory (1980); Gerald Lopez, *The Idea of a Constitution in the Chicano Tradition*, 37 J. Legal Educ. 162 (1987); Richard Rodriguez, *The Fear of Losing a Culture*, Time, July 11, 1988, at 84. Cf. Richard Delgado, *The Imperial Scholar*, 132 U. Pa. L. Rev. 561 (1984) (ironic examination of the dearth of minority scholarship in the civil rights field).

4. See, e.g., R. Akutagawa, *In a Grove*, in Rashomon and Other Stories 19 (T. Kojima trans., 1970); R. Leoncavallo, I Pagliacci (1892) (in the prologue, hunchbacked clown Tonio explains that stories are real, perhaps the most real thing of all, turning commedia dell'arte—"it's only a play, we're just acting"—on its head).

5. See J. B. White, Heracles' Bow 175 (1985); John Cole, *Thoughts from the Land of And*, 39 Mercer L. Rev. 907, 921–25 (1988) (discussing theories that language determines the physical world, rather than the opposite); J. White, *Thinking About Our Language*, 96 Yale L.J. 1960, 1971 (1987) (describing the dangers of reification). See generally N. Goodman, Ways of Worldmaking (1978); E. Cassirer, Language and Myth (1946).

I say "shape," not "create" or "determine," because I believe there is a degree of intersubjectivity in the stories we tell. See *infra*, recounting an event in the form of different stories. Every well-told story is virtually an archetype—it rings true in light of the hearer's stock of preexisting stories. But stories may expand that empathic range if artfully crafted and told; that is their main virtue.

6. Like all the stories, the leaflet is purely fictional; perhaps it was born as an "internal memo," stimulated by Al-Hammar's speech, in the minds of many progressive listeners at the same time.

10. The Richmond Narratives

THOMAS ROSS

This is a story of the "Richmond narratives."

In *City of Richmond v. J. A. Croson Co.*,[1] a majority of the Supreme Court struck down a Richmond, Virginia, ordinance that set aside for minority firms 30 percent of the subcontracting work on city construction jobs. The majority concluded that the ordinance denied the white contractors equal protection of the laws. Justice Marshall, dissenting, characterized the *Richmond* decision as "a deliberate and giant step backward in [the] Court's affirmative action jurisprudence."[2]

The *Richmond* decision is not just another chapter in the Court's evolving affirmative action jurisprudence. The decision is a source of powerful, and potentially disturbing, insights. The *Richmond* opinions, the Richmond narratives, tell stories. These stories reveal much, and not just about the decision in *Richmond*. They reveal, with special clarity, the deeper nature of our struggle to move to a world where discrimination on the basis of race truly has no place, no purpose, no logic.

Judicial Opinions as Narrative

To think of and read judicial opinions as narratives is dangerous business. In doing so, one can miss or obscure the essential lesson taught by Robert Cover—the violence of the word.[3] Although other stories can be put to violent ends—such as the persistent myth of the Jewish conspiracy—judicial opinions embody violence in a special way. Opinions that tell a story of the choice to send a boy to execution, to take children away from their father and mother, and to obliterate living communities are vividly connected with violence. But the power of Cover's lesson was that he taught us to see the violence of law everywhere, even in apparently mundane judicial choices.[4] After all, what empowers a judge to command that one person shall pay damages to another person, what accounts for the surface formality and peace of the courtroom battlefield, and why do persons accept with apparent peace deeply felt injustice every day in every courtroom in this country? It is the violence of the word.

A version of this chapter previously appeared as Thomas Ross, *The Richmond Narratives*, 68 Tex. L. Rev. 381 (1989). Originally published in the *Texas Law Review*.

"Law talk," in its various forms, usually suppresses this connection with violence. Law talk is rational and calm, even dispassionate. Judicial opinions are generally well-controlled pieces of apparently rational discourse. Even in dissent, judges ultimately seem to take on the sense of detachment and cool rationality that is part of the ascribed cultural role of judges.

Reading opinions as narratives can become another way of suppressing the violence of these texts. If reading opinions as narratives obscures that point, it is a pernicious endeavor. I hope instead to read opinions as narratives as a way of illuminating the idea of law as composed essentially of choices made for and against people and imposed through violence.

The Richmond Narratives

The constitutionality of affirmative action has been perhaps the most divisive and difficult question of contemporary constitutional jurisprudence. Affirmative action demands the paradoxical solution of first taking account of race to get to a world where it is not taken into account. Legal scholars have recounted this struggle elsewhere. For our purposes it is sufficient to note that before *Richmond* the Court's affirmative action jurisprudence had been characterized by acrimonious talk and little clear consensus. In this regard, the Richmond narratives carried on their historical legacy.

In *Richmond*, the Court struck down the City of Richmond's Minority Business Utilization Plan.[5] The plan required prime contractors who were awarded city construction contracts to subcontract at least 30 percent of the dollar amount of each contract to "minority business enterprises." A "minority business enterprise" was defined as any business at least 51 percent owned or controlled by "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." A majority of the Court concluded that this particular affirmative action measure violated the Fourteenth Amendment's equal protection clause.

The *Richmond* case spawned six opinions—six potential narratives. Each narrative is rich. Yet the most powerful, complex, and important narratives are the concurring opinion by Justice Antonin Scalia[6] and the dissenting opinion by Justice Thurgood Marshall.[7] Scalia and Marshall occupied the Court's most extreme positions on the issue of affirmative action, Scalia opposing and Marshall supporting. Scalia and Marshall's disagreement by itself suggests that their opinions merit special scrutiny. Nonetheless, this analysis focuses on a different feature of Scalia's and Marshall's opinions.

Scalia's opinion as narrative is on the surface an impoverished and abstract story. The facts of the *Richmond* case are recounted in snippets. Moreover, Scalia never speaks concretely about any case or context. The opinion, in terms of what it says, is mostly abstract principles drawn from precedents that Scalia strung together with no recounting of the cases or principles drawn from an unexplored historical context. These abstract principles seem to drive Scalia to his choice.

Marshall's narrative is altogether different. Marshall tells not only the stories of the particular dispute but also the stories of the city of Richmond, as the capital of the Confederacy, the place of "apartheid," the city with a "disgraceful history." While Scalia sets forth some facts and Marshall asserts abstract principles, the overall textures of the two narratives are markedly distinct.

Scalia and Marshall are not simply engaged in a struggle for the future meaning of equal protection and the possibility of affirmative action programs. These two storytellers have chosen forms of narrative that reveal the essential form of their respective ideologies. They have thereby demonstrated a connection between narrative and ideology spilling beyond the particular questions of affirmative action. Scalia's and Marshall's opinions are, in that sense, two of our most important stories.

Narrative and Ideology

Seeing judicial opinions as narratives and then linking that conception to ideology is, in one sense, a simple matter. A judge chooses to tell the reader one thing and not another. For example, in *Richmond* Justice Marshall chooses to tell the reader the story of Richmond's resistance to school desegregation.[8] Justice Scalia chooses not to speak of Richmond's school desegregation at all.[9] Justice Sandra Day O'Connor mentions it only as an instance of Marshall's irrelevancies.[10] Each justice told a different version of that story or no version at all. Each choice connects, in at least a rhetorical way, with each justice's ideology of affirmative action. Telling, or not telling, the reader that this is a city with a "disgraceful history" of race relations is a rhetorical move connected to ideology. Other examples of this sort of connection between the particular form of judicial narrative crafted and the ideology of its crafter abound.

There is, however, a different and special sort of connection between narrative and ideology that one can discern in the Court's affirmative action opinions. One can distinguish the narrative form most commonly used by those Justices who seek to limit or stop affirmative action from the narrative form used by Justice Marshall—the most important voice on the Court for affirmative action. This distinction in narrative form reveals the ideology of the narrator and thus demonstrates the special connection between narrative and ideology.

The various opinions both for and against affirmative action have much in common. Yet discernible tendencies and emphases divide the opinions. The text of the opinions limiting affirmative action is mostly abstract. Except for the formal recitation of facts at the beginning of a majority or plurality opinion, the Justices reason mostly by reference to abstract principles. The Justices draw these principles from rhetorical journeys back to the period of the Reconstruction amendments or to precedents. These are "rhetorical journeys" in the sense that the opinions speak hardly at all of a precedent's facts or to its historical context. The point is to derive very quickly some abstract principle that then forms part of a syllogistic argument for the choice made.

One of the central abstract principles is symmetry. Equal protection, it is said, demands symmetry. A law drawn on racial lines favoring whites is the same as one drawn to favor blacks. Turnabout is not fair play. There is only one level of scrutiny—and on and on. The principle of symmetry tells us that once we know that a law is drawn on racial lines, we know what we must do. We walk up to the law with the same presumptions, suspicions, and level of scrutiny, regardless of the race advantaged and regardless of the concrete circumstances surrounding the law.[11]

Another important abstraction is that of innocence. Those who seek to limit or stop affirmative action say the white "victims" of affirmative action are "innocent."[12] The mere existence of an affirmative action program tells us that there are innocent white

victims. In this vocabulary, the white person is innocent as long as he has not committed an act of particular and proven racial discrimination in connection with the job or other interest at stake. This definition of innocence puts aside the more subtle questions that can be asked of the position of any white person in our culture, questions that turn on the obvious advantage that we and our predecessors have enjoyed by the oppression of others.

Everywhere in these sorts of opinions (narratives) are abstract principles and choices that are compelled by syllogisms composed of these abstract principles. Almost nowhere in these opinions do Justices tell the richer stories of the people and places of the case or the stories of the historical context. Justice Marshall's opinions are the exception. He tells the richer story, talking about places and people.[13] For Marshall, history is a source of stories, rather than simply abstract principles.[14] Innocence seems a more complex thing for him. His opinions, although built around legal structures, seek to move the reader as much through empathy as the cool compulsion of the syllogism.

To these observations one might say, "But of course." It is simply a matter of rhetorical strategy. Abstraction works rhetorically for Scalia. Narrative works better for Marshall. But why would that be so? And is it so? Certainly one could construct a rhetorically respectable opinion for affirmative action built mostly on abstractions, and one could build an opinion against affirmative action with richly told stories.

The opinions of Scalia and Marshall in *Richmond* exemplify the two forms of narrative that run through the contemporary Court's affirmative action cases. Working through these two opinions illuminates the connection between narrative and ideology—a connection that is not one of absolute necessity or one of mere rhetorical strategy.

Scalia and the White Imagination

Scalia's opinion is, in structure and purpose, straightforward. He has constructed a series of arguments, each related to his central thesis that affirmative action must be severely circumscribed. "In my view there is only one circumstance in which the states may act by race 'to undo the effects of past discrimination': where that is necessary to eliminate their own maintenance of a system of unlawful racial classification."[15]

In form and language the opinion seems ordinary. Virtually every paragraph is littered with cites to other cases. The rhetorical format is one of reliance on abstract principles, derived from precedents and the lessons of history. All in all, it is an opinion familiar in its structure and language.

Nonetheless, Scalia's opinion, however ordinary in form and apparently abstract, has a special vividness and concrete quality that emerges in the process of reading. In the first paragraph Scalia quotes Alexander Bickel: "[D]iscrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."[16] Scalia quickly follows with the language from Justice John Marshall Harlan's dissent in *Plessy v. Ferguson* stating that "our Constitution is color-blind." By linking the Bickel and Harlan quotes, Scalia begins the process of constructing the important argument of symmetry. But as the opinion continues, the Bickel quotation has another significance. It is the beginning of a continuing metaphor, the metaphor of the bad seed or, implicitly, the metaphor of affirmative action as a cancer. Several paragraphs later, Scalia

speaks of the special danger of "oppression" from political "factions" (blacks) in "small political units" (Richmond, Virginia).[17] Subsequently, Scalia speaks the words that offer the reader a powerful sense of vividness. "The prophesy [of oppression] . . . came to fruition in Richmond in the enactment of a set-aside clearly and directly beneficial to the dominant political group, which happens also to be the dominant racial group."[18]

To understand the vividness of Scalia's extended metaphor, one must recall Bickel's lesson and ask what it is that makes affirmative action "destructive" to society. To say that a particular kind of law will "destroy" us is an abstraction waiting to be made real and vivid in the reading. The abstraction can become vivid for the white reader by imagining the oppression that white people might suffer at the hands of black people. When and where blacks are the dominant racial group, they will oppress whites, unless whites act to stop them. Affirmative action is thus the seed that will destroy whites. It is the means by which whites might be oppressed in those places where whites are racially outnumbered. In the city of Richmond, the dangerous seed of affirmative action came to fruition.

Scalia draws out this metaphor by language that seems abstract, formal, and quite ordinary. The vividness is provided by the reader. This provided meaning is a product of both the reader's individual imagination and the cultural influences shared by a white audience. Individual imagination may lead the reader to imagined stories of personal disadvantage in the name of affirmative action ("I did not get the appointment because I am a white male") or perhaps a brute image of the white man's fear of the black man ("I left the building late last night, and a black man followed me, asking for money"). Individual imagination as part of the process of reading Scalia's opinion will take different readers to different imaginings. Any particular reader, white or black, may have imaginings different from mine.

Nonetheless, one can suppose that throughout the white audience there will be a large measure of consonance in the readings. In some way the white reader will experience associations: connecting ideas of "difference" and "dominance," "victims" and "revenge," or other nonpictorial imaginings that produce precisely the sense of unease and fear that make Scalia's metaphor vivid and powerful.

The metaphor of destruction takes an even more evocative turn when Scalia amplifies it by using the metaphor of fire.[19] "When we depart from [the principle that racial discrimination is destructive of our society] we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns."[20] The fear of black insurrection is part of the unbroken history of the white man's imagination. To live in a society with people whose great-grandparents we enslaved and who are themselves the subjects of continuing humiliation must give us our own versions of the white slave master's nightmares. When and where we have been dominant, we have abused our power. What could we imagine when Scalia tells us that the prophecy of oppression came to fruition in Richmond? When Scalia speaks of the black person "even[ing] the score,"[21] we can fill out the story for ourselves.

The last, single-sentence paragraph of Scalia's opinion is a perfect composite of the abstract and vivid: "Since I believe that the appellee here had a constitutional right to have its bid succeed or fail under a decisionmaking process uninfected with racial bias, I concur in the judgment of the Court."[22] This sentence is abstract in several senses. First, it speaks of no names or places. It is universal in its ostensible implications. Second,

the central and implicit assumption in this declaration is that once the bias of the ordinance is removed no other racial bias will exist. This assumption has compelling plausibility in an abstract conception of place and time. It becomes problematic in its real place and time. We would not realistically suppose that the public contracting process in Richmond, Virginia, or anywhere in America, would be wholly uninfected by racial bias once it is cleansed of the taint of affirmative action.

The last sentence's proclamation of the "infection" of racial bias connects the white reader to the metaphor of affirmative action as the seed of our destruction. That metaphor, in turn, can take us again to the imaginings of oppression and revenge at the hands of black citizens. Scalia demands of his readers that they become more than mere readers—he demands that they become storytellers as well, and we do.

Marshall and Stories of Racism

Marshall's dissenting opinion is in many respects quite ordinary. It is littered with string cites, and is, in part, built around an abstract decisional model. His model is two-pronged, requiring that the affirmative action ordinance pursue "important governmental objectives" and that the chosen means be "substantially related" to those objectives.[23] He appears to build the bulk of his text around these formal inquiries.

Nonetheless, on closer consideration, Marshall's opinion is much more than simply an argument built around a model. As Scalia's opinion, in its reading, is much more than a series of abstract principles constituting a syllogistic argument, Marshall's opinion gets thicker and more complex in its reading.

The central and powerful distinction between Marshall's and Scalia's narratives is the distinction between the narrative invited and the narrative given. Scalia's narrative in its abstractions and metaphors invites the reader to embellish with his narratives and imaginings, to make the abstract concrete, to provide meaning to the metaphors. Marshall's opinion, on the other hand, gives the reader narratives. It names and talks of persons and places. For Marshall, history is a source of other stories more than a repository of abstract principles. Marshall is a storyteller in a very different way.

Every storyteller knows that stories have beginnings and endings and that readers often pay special attention to those places in the narrative. A reader of the Richmond narratives encounters the ending of Scalia's story juxtaposed with the beginning of Marshall's story. As the echoes of Scalia's infection of affirmative action fades, Marshall begins thus, "It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst."[24] In that first sentence, Marshall introduces a story he will not merely invite but will also tell—the story of Richmond's "disgraceful history" of race relations.[25]

Marshall tells of the "Richmond experience," an experience of "the deliberate diminution of black residents' voting rights, resistance to school desegregation, and publicly sanctioned housing discrimination."[26] Marshall speaks of the attempt to annex white suburbs to avoid the specter of a black majority in the city[27] and uses the word "apartheid."[28]

O'Connor dismisses and Scalia speaks only implicitly to this story of Richmond's history. The Justices thus dispute whether the story of Richmond's history is legally relevant. For Marshall, however, as the spokesperson for affirmative action, it is a special

and powerful narrative. Here Marshall is talking to the same audience as Scalia—the white audience. Marshall tells the white audience a story that is likely to be neither part of their actual personal experience nor part of their culture's repertoire of stories. He asks the white reader to hear this story and to empathize. It is a struggle for the reader and one that may, for some, never succeed. Still, if Marshall fails to tell this story and other stories like it, the white reader is unlikely to tell this narrative on his own. Marshall cannot merely invite narratives from this audience. He must provide them. From these told narratives, and the imaginings and narratives of the reader, there is the hope of the essential empathy from which a person can act beyond self-interest.

Marshall rejects the argument for symmetry by defining the difference between "governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism" or, perhaps more evocatively, between "remedial classifications" and "the most brute and repugnant forms of state-sponsored racism."[29] Although this part of the opinion is closer to Scalia's narrative-invited style, the narratives that Marshall invites here are those more likely told by the white reader. For example, "state-sponsored racism" is a powerful set of words invoking imaginings in the reader, of whatever race, of the institutions of slavery and apartheid that scar our history.

Marshall tells another story of racism. He tells the story of the racism that may be discerned in O'Connor's opinion, among others. He focuses on O'Connor's references to the dominant racial group in Richmond and the specter of simple racial politics.[30] Marshall argues that cities under the leadership of members of a racial minority may often be cities with much to remedy. He reminds us that this is certainly true of Richmond. Thus, Marshall argues, one should assume that the political leaders of Richmond acted with sincere remedial goals in mind and not simple racial politics. This measured objection contrasts sharply with his final reaction to O'Connor's argument on simple racial politics:

> The majority's view that remedial measures undertaken by municipalities with black leadership must face a stiffer test of Equal Protection Clause scrutiny than remedial measures undertaken by municipalities with white leadership implies a lack of political maturity on the part of this Nation's elected minority officials that is totally unwarranted. Such insulting judgments have no place in constitutional jurisprudence.[31]

At this moment, Marshall invites the white reader to imagine the hurt and insult of racism.

Marshall's charge that O'Connor and others have expressed "insulting judgments" about black elected officials is a story of racism on the Court. Thus, it is a powerful move and an especially evocative moment for the reader. Marshall's charge is, in a sense, inviting a narrative about the Justices. As the white reader struggles to understand the deeper meaning of Marshall's charge, he or she experiences discomfort. Marshall reveals the unthinkable notion that the Justices themselves harbor racist assumptions and attitudes. Yet this almost unthinkable notion is surely true—just as I harbor such assumptions and attitudes. For some readers, this may be the most powerful story Marshall has told.

Thus Scalia and Marshall tell different narratives. Scalia invites the reader to make his abstractions and metaphors concrete and vivid. Marshall tells stories in explicit detail, stories with details not likely to be provided by his audience. Marshall's stories quite

obviously do not necessarily persuade the white reader. But his stories make possible the essential move for any white reader who might embrace affirmative action—the move to empathy. Only if we can join, in some imperfect way, in the feelings and circumstances of the beneficiaries of affirmative action can we accept the role of those disadvantaged by affirmative action. Although Marshall makes our acceptance *possible* through his stories, whether it happens depends on the narratives we tell ourselves.

NOTES

1. 109 S. Ct. 706 (1989).

2. *Id.* at 740 (Marshall, J., dissenting).

3. See Robert Cover, *Violence and the Word*, 95 Yale L.J. 1601, 1609 (1986) (discussing the violence inherent in judicial opinions and other legal interpretations).

4. "The judges deal pain and death. That is not all that they do. Perhaps that is not what they usually do. But they do deal death, and pain. . . . In this they are different from poets, from critics, from artists." *Id.* at 1609.

5. See City of Richmond v. J. A. Croson Co., 109 S. Ct. 706, 730 (1989) (plurality opinion).

6. See *id.* at 735–39 (Scalia, J., concurring).

7. See *id.* at 739–57 (Marshall, J., dissenting).

8. See *id.* at 748.

9. See *id.* at 735–39 (Scalia, J., concurring).

10. "The 'evidence' relied upon by the dissent, the history of school desegregation in Richmond and numerous congressional reports, does little to define the scope of any injury to minority contractors in Richmond or the necessary remedy." *Id.* at 727 (plurality opinion).

11. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination").

12. See, e.g., Justice Powell's reference to "legal remedies that work against innocent people" (Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986)); see also Thomas Ross, *Innocence and Affirmative Action*, 43 Vand. L. Rev. 297 (1990) (also Chapter 79, this volume) (discussing the power and danger of the "rhetoric of innocence" in affirmative action).

13. "The majority's perfunctory dismissal of the testimony of Richmond's appointed and elected leaders is also deeply disturbing. These officials—including councilmembers, a former mayor, and the present city manager—asserted that race discrimination in area contracting had been widespread, and that the set-aside ordinance was a sincere and necessary attempt to eradicate the effects of discrimination." City of Richmond v. J. A. Croson Co., 109 S. Ct. 706, 747 (1989) (Marshall, J., dissenting).

14. "Had the majority paused for a moment on the facts of the Richmond experience, it would have discovered that the city's leadership is deeply familiar with what racial discrimination is. The members of the Richmond City Council have spent long years witnessing multifarious acts of discrimination, including, but not limited to, the deliberate diminution of black residents' voting rights, resistance to school desegregation, and publicly sanctioned housing discrimination. Numerous decisions of federal courts chronicle this disgraceful recent history." *Id.* at 748 (citations omitted).

15. *Id.* at 737 (Scalia, J., concurring).

16. *Id.* at 735 (quoting Alexander Bickel, The Morality of Consent 133 (1975)).

17. *Richmond*, 109 S. Ct. at 737 (Scalia, J., concurring).

18. *Id.*

19. See *id.* at 736–39. Scalia has used the "bad seed" metaphor in his academic writing to describe affirmative action. See Antonin Scalia, *The Disease as Cure*, 1979 Wash. U. L.Q. 147, 157.

20. See *Richmond*, 109 S. Ct. at 739 (Scalia, J., concurring).

21. *Id.*

22. *Id.*

23. See *Richmond*, 109 S. Ct. at 739–57 (Marshall, J., dissenting).

24. *Id.*

25. *Id.* at 739–43.

26. *Id.* at 748.
27. See *id.* at 748.
28. *Id.*
29. *Id.* at 752.
30. See *id.* at 753.
31. *Id.* at 754–55.

11. Translating *Yonnondio* by Precedent and Evidence

The Mashpee Indian Case

GERALD TORRES AND KATHRYN MILUN

The telling of stories holds an important role in the work of courts. Within a society, there are specific places where most of the activities making up social life within that society simultaneously are represented, contested, and inverted. Courts are such places. Like mirrors, they reflect where we are, from a space where we are not. Law, the mechanism through which courts carry out this mirroring function, has a curious way of recording a culture's practices of telling and listening to its stories. Such stories enter legal discourse in an illustrative, even exemplary, fashion.

Yonnondio—the address, the salutation—became a medium through which contending Indian and European cultures interacted. The evolving meaning of this salutation reflected changing relations of power as the Indians' early contact with European explorers themselves evolved into contact with the states represented by those explorers. Likewise, the land claim suits filed by various tribes during the 1970s[1] served as a channel through which some Indians attempted to communicate with the state—this time, through the medium of courts. For the state to hear their claims, however, these Indians were forced to speak in a formalized idiom of the language of the state—the idiom of legal discourse. Consider one such land claim suit, *Mashpee Tribe v. Town of Mashpee*,[2] and the formalized address that it incorporated. What happens, we ask, when such claims receive a legal hearing? We suggest that first they must be translated by means of examples that law can follow (precedent) and examples that law can hear (evidence).

We should suspect that the legal coding through which such translation is conducted highlights a problem inherent in the postmodern condition—the confrontation between irreconcilable systems of meaning produced by two contending cultures. The postmodern condition is a crisis of faith in the grand stories that have justified our history and legitimized our knowledge.[3] The very idea of what we can know is unstable. The crisis in the law that emerged with the legal realists and the attempts to reconstitute formalism—as the basis for survival of the rule of law—also reflect our postmodern condition. In the case of the Mashpee, the systems of meaning are irreconcilable: The politics of historical domination reduced the Mashpee to having to petition their "guardian"

A version of this chapter previously appeared as Gerald Torres and Kathryn Milun, *Translating* Yonnondio *by Precedent and Evidence: The Mashpee Indian Case*, 1990 Duke L.J. 625. Originally published in the *Duke Law Journal*.

to allow them to exist, and the history of that domination has determined in large measure the ways the Mashpee must structure their petitions. The conflict between these systems of meaning—that of the Mashpee and that of the state—is really the question of how we can "know" which history is most "true."

Yet the difficulty facing the Mashpee in this case is not just that they cannot find the proper language with which to tell their story or capture the essence of the examples that would prove their claims. The problem with conflicting systems of meaning is that there is a history and social practice reflected and contained within the language chosen. To require a particular way of telling a story not only strips away nuances of meaning but also elevates a particular version of events to a noncontingent status. More than that, however, when particular versions of events are rendered unintelligible, the corresponding counterexamples that those versions represent lose their legitimacy. Those examples come unglued from both the cultural structure that grounds them and the legal structure that would validate them. The existence of untranslatable examples renders unreadable the entire code of which they are a part, while simultaneously legitimizing the resulting ignorance.

"Ignorant," of course, merely means uninformed. The central problem is whether the limitations of the legal idiom permit one party truly to inform the other, or conversely, whether the dimension of power hidden in the idiomatic structure of legal storytelling forecloses one version in favor of another.

> [W]hen you are powerless, you don't just speak differently. A lot, you don't speak. Your speech is not just differently articulated, it is silenced. Eliminated, gone. You aren't just deprived of a language with which to articulate your distinctiveness, although you are; you are deprived of a life out of which articulation might come.[4]

What constitutes proof and what constitutes authority; what are the pragmatics of "legal" storytelling? Pragmatics in this context might be analyzed best in terms of a game. Any game must have rules to determine what an acceptable move is, but the rules do not determine all available moves. Although the total content of acceptable moves is not predetermined, the universe of potentially permissible moves is limited necessarily by the structure of the game. All language, but especially technical language, is a kind of game. What are the rules that govern discourse in the legal idiom? What kind of knowledge is transmitted?

By highlighting the peculiar nature of legal discourse and comparing it to other ways of telling and reading the Mashpees' history, we can explore and make concrete the roles of power and politics in legal rationality. The *Mashpee* case is especially well suited to this investigation because it casts so starkly the problem of law as an artifact of culture and power.

Looking Back at Indians and Indians Looking Back: The Case

In 1976 in *Mashpee Tribe v. Town of Mashpee*, the Indian community at Mashpee on Cape Cod sued to recover tribal lands alienated from them over the last two centuries in violation of the Indian Non-Intercourse Act of 1790.[5] The Non-Intercourse Act prohibits

the transfer of Indian tribal land to non-Indians without approval of the federal government. The tribe claimed its land had been taken from it, between 1834 and 1870, without the required federal consent. According to the Mashpee, the Commonwealth of Massachusetts had permitted the land to be sold to non-Indians and had transferred common Indian lands to the Town of Mashpee. The defendant, Town of Mashpee, answered by denying that the plaintiffs, Mashpee, were a tribe. Therefore, they were outside the protection of the Non-Intercourse Act and were without standing to sue.

As a result, the Mashpee first had to prove that they were indeed a tribe. A forty-day trial then ensued on that threshold issue. The Mashpee were required to demonstrate their tribal existence in accordance with a definition adopted by the U.S. Supreme Court at the turn of the century in *Montoya v. United States*: "By a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."[6] This is a very narrow and particular definition. As Judge Walter Skinner, who presided over the trial of the Mashpee's claim, explained in his instructions to the jury, "Now, what is the level of the burden of proof? I've said these matters need not be determined in terms of cosmic proof. The plaintiff has the burden of proving . . . if the [Mashpee] were a tribe."[7]

Judge Skinner agreed to allow expert testimony from various social scientists regarding the definition of "Indian tribe." By the closing days of the trial, however, the judge had become frustrated with the lack of consensus as to a definition:

> I am seriously considering striking all of the definitions given by all of the experts of a Tribe and all of their opinions as to whether or not the inhabitants of Mashpee at any time could constitute a Tribe. I let it all in on the theory that there was a professionally accepted definition of Tribe within these various disciplines.
>
> It is becoming more and more apparent that each definition is highly subjective and idiosyncratic and generated for a particular purpose not necessarily having anything to do with the Non-Intercourse Act of 1790.[8]

In the end, Judge Skinner instructed the jury that the Mashpee had to meet the requirements of *Montoya*—rooted in notions of racial purity, authoritarian leadership, and consistent territorial occupancy—to establish their tribal identity, despite *Montoya* itself not addressing the Non-Intercourse Act.

The case providing the key definition, *Montoya*, involved a company whose livestock had been taken by a group of Indians. The company sued the United States and the tribe to which the group allegedly belonged under the Indian Depredation Act, which provided compensation to persons whose property was destroyed by Indians belonging to a tribe. The theory underlying tribal liability is that the tribe should be responsible for the actions of its members. The issue in *Montoya* was whether the wrongdoers were still part of the tribe. The court found they were not.

Beyond reflecting archaic notions of tribal existence in general, the *Montoya* requirements incorporated specific perceptions regarding race, leadership, community, and territory that were entirely alien to Mashpee culture. The testimony revealed the *Montoya* criteria as generalized ethnological categories that failed to capture the specifics of what it means to belong to the Mashpee people. Because of this disjunction between

the ethnolegal categories and the Mashpee's lived experience, the tribe's testimony and evidence never quite "signified" within the idiom established by the precedent. After forty days of testimony, the jury came up with the following irrational decision: The Mashpee were not a tribe in 1790, were a tribe in 1834 and 1842, but again were not a tribe in 1869 and 1870. On the basis of the jury's findings, the trial court dismissed the Mashpee's claim.

The Baked and the Half-Baked

Whether the Mashpee are legally a tribe is, of course, only half the question. That the Mashpee existed as a recognized people occupying a recognizable territory for well over three hundred years is a well-documented fact.[9] To ascertain the meaning of that existence, however, an observer must ask not only what categories are used to describe it but also whether the categories adopted by the observer carry the same meaning to the observed.

The earliest structure used for communal Mashpee functions—a colonial-style building that came to be known as the Old Meetinghouse—was built in 1684. The meetinghouse was built by a white man, Shearjashub Bourne, as a place where the Mashpee could conduct their Christian worship. Shearjashub's father, Richard Bourne, had preached to the Mashpee and oversaw their conversion to Christianity almost a generation earlier. The Bourne family's early interest in the Mashpee later proved propitious. The elder Bourne arranged for a deed to be issued to the Mashpee to protect their interest in the land they occupied. Confirmation of this deed by the General Court of Plymouth Colony in 1671 served as the foundation for including "Mashpee Plantation" within the protection of the Massachusetts Bay Colony. As part of the colony, the Mashpee were assured that their spiritual interests, as defined by their Christian overseers, and their temporal interests would receive official attention. However, the impact of introducing the symbology of property deeds into the Mashpee's cultural structure reverberates to this day. Whether the introduction of European notions of private ownership into Mashpee society can be separated from either the protection the colonial overseers claim actually was intended or the Mashpee's ultimate undoing is, of course, central to the meaning of "ownership."

Colonial oversight quickly became a burden. In 1760 the Mashpee appealed directly to King George III for relief from their British overlords. In 1763 their petition was granted. The Mashpee Plantation received a new legal designation, granting the "proprietors the right to elect their own overseers."[10] This change in the tribe's relationship with its newly arrived white neighbors did not last long, however. With the coming of the Colonies' war against England and the founding of the Commonwealth of Massachusetts, all previous protections of Mashpee land predicated on British rule quickly were repealed, and the tribe was subjected to a new set of overseers with even more onerous authority than its colonial lords had held. The new protectors were granted "oppressive powers over the inhabitants, including the right to lease their lands, to sell timber from their forests, and to hire out their children to labor."[11]

During this time the Mashpee were on their way toward becoming the melange of racial types that ultimately would bring about their legal demise two hundred years later. Colonists had taken Mashpee wives, many of whom were widows whose husbands had

died fighting the British. The Wampanoags, another southern Massachusetts tribe that suffered terrible defeat in wars with the European colonists, had retreated and had been taken in by the Mashpee. Hessian soldiers had intermarried with the Mashpee. Runaway slaves took refuge with and married Mashpee Indians. The Mashpee became members of a mixed race, and the names some of the Mashpee carried reflected this mixture. What was clear to the Mashpee, if not to outside observers, was that this mixing did not dilute their tribal status because they did not define themselves according to racial type but rather by membership in their community. In an essay on the Mashpee in *The Predicament of Culture*,[12] one authority explained that despite the racial mixing that had historically occurred in the Mashpee community, since the Mashpee did not measure tribal membership according to "blood," Indian identity remained paramount. In fact, the openness to outsiders who wished to become part of the tribal community was part of the community values that contributed to tribal identity. The Mashpee were being penalized for maintaining their aboriginal traditions because they did not conform to the prevailing racial definition of community and society.

In 1833, a series of events began that culminated in the partial restoration of traditional Mashpee rights. William Apes, an Indian preacher who claimed to be descended from King Philip, a Wampanoag chief, stirred the Mashpee to petition their overseers and the governor of Massachusetts for relief from the depredation visited on them. What offended Apes was the appropriation of the Mashpee's worshipping ground by white Christians. In response to the imposition of a white Christian minister on their congregation, they had abandoned the meetinghouse in favor of an outdoor service conducted by a fellow Indian. The petition Apes helped draft began, "[W]e, as a Tribe, will rule ourselves, and have the right to do so, for all men are born free and equal, says the Constitution of the country."[13] What is particularly important about this challenge is that it asserted independence within the context of the laws of the Commonwealth of Massachusetts. The Massachusetts governor rejected this appeal, and the Mashpee's attempt at unilateral enforcement of their claims resulted in the arrest and conviction of Apes.

The appeal of Apes's conviction, however, produced a partial restoration of the tribe's right of self-governance and full restoration of its right to religious self-determination, because the tribe was returned to its meetinghouse. When the white former minister tried to intervene, he was removed forcibly and a new lock was installed on the meetinghouse doors. By 1840 the Mashpee's right to worship was secured.

Control of the land remained a critical issue for the Mashpee. By late in the seventeenth century, the area surrounding the homes and land of the "South Sea Indians" had been consolidated and organized into a permanent Indian plantation. The Mashpee's relationship to this land, however, remained legally problematic for the commonwealth. In 1842, Massachusetts determined that the land was to be divided among individual Mashpee Tribe members, but their power over it was closely circumscribed; they could sell it only to other members of the tribe. The plantation could tax the land, but the land could not be taken for nonpayment of those taxes. In 1859, a measure was proposed to permit the Mashpee to sell land to outsiders and to make the Mashpee full citizens of the commonwealth. This proposal was rejected by the tribe's governing council. In 1870, however, the Mashpee were granted rights to alienate their property as "full-fledged citizens" and their land was organized by fiat into the town of Mashpee.[14]

It was the land that had moved out of Indian control, eleven thousand acres of undeveloped land estimated to be worth $50 million, that the Mashpee Wampanoag Tribal Council sued to reclaim in 1976. Some of the land had been lost in the intervening years, and more was in danger of being lost or reduced to nonexclusive occupancy. The council based its claim on the 1790 Non-Intercourse Act,[15] which prohibits the alienation of Indian lands[16] without federal approval. The Non-Intercourse Act applies to transactions between Indians and non-Indians and, despite its inherent paternalism, serves to protect tribal integrity.

The Non-Intercourse Act applied only if the Mashpee had retained their "tribal identity" (defined, however, by the whites' rules of the game) from the mid-seventeenth century until they filed their land claim action in 1976. To fall within the scope of the act's protection, the Mashpee had to prove first that they were indeed a tribe and that their status as such had not changed throughout this period. If the Mashpee were no longer a tribe (or if they never had constituted a tribe in the first place), the protection provided by the Non-Intercourse Act evaporated. If, however, the Indians retained their tribal status, then the transactions that resulted in the loss of their village were invalid. At the very heart of the dispute was whether the Mashpee were legally a people and thus entitled to legal protection.[17]

Many of the facts underlying the Mashpee's suit were not disputed. What the parties fought about was the *meaning* of what happened. Seen from the perspective of the Mashpee, the facts that defined the Indians as a tribe also invalidated the transactions divesting them of their lands. From the perspective of the property owners in the town, however, those same acts proved that the Mashpee no longer existed as a separate people. How, then, is an appropriate perspective to be chosen? As told by the defendants, the Mashpee's story was one about "a small, mixed community fighting for equality and citizenship while abandoning, by choice or coercion, most of its aboriginal heritage."[18]

Using the same evidence, the plaintiffs told a very different story. It was the story of cultural survival: "[T]he residents of Mashpee had managed to keep alive a core of Indian identity over three centuries against enormous odds. They had done so in supple, sometimes surreptitious ways, always attempting to control, not reject, outside influences."[19] Which of the two conflicting perspectives is the "proper" one from which to assess the facts underlying the Mashpee's claim?

NOTES

1. See generally P. Brodeur, Restitution: The Land Claims of the Mashpee, Passamaquoddy, and Penobscot Indians of New England (1985). During the late 1960s and early 1970s, several Indian tribes pursued legal actions aimed at reclaiming land alienated from them by various means during the sixteenth, seventeenth, eighteenth, and nineteenth centuries: the Passamaquoddy and Penobscot in Maine; the Gay Head Wampanoag in Massachusetts; the Narragansett in Rhode Island; the Western Pequot, Schaghticote, and Mohegan in Connecticut; the Oneida, Cayuga, and St. Regis Mohawk in New York; the Catawba in South Carolina; the Chitimacha in Louisiana; and the Mashpee of Cape Cod in Massachusetts, to name a few.

2. 447 F. Supp. 940 (D. Mass. 1978), aff'd sub nom. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979).

3. See J. F. Lyotard, The Postmodern Condition: A Report on Knowledge (G. Bennington & B. Massumi trans., 1984) (The crisis of modernity is examined as a lack of belief in the grand narratives that legitimized the modern social order, for example, liberalism and Marxism.).

4. C. MacKinnon, Feminism Unmodified: Discourses on Life and Law 39 (1987) (articulation of feminism as a critique of the gendered system of social hierarchy and social power).

5. 25 U.S.C. §177 (1988) (derived from Act of June 30, 1834, ch. 161, §12, 4 Stat. 730). This act provides, "No purchase, grant, lease, or other conveyance of lands, . . . from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." *Id.* The original language read, "That no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license for that purpose under the hand and seal of the superintendent of the department." Act of July 22, 1790, ch. 33, §1, 1 Stat. 137.

6. Montoya v. United States, 180 U.S. 261, 266 (1901).

7. Record at 40:7 (Jan. 4, 1978); Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899 (D. Mass. 1977) (No. Civ. A No. 76-3190-S) (instructions to jury on burden of proof); see also *Mashpee Tribe*, 447 F. Supp. at 943.

8. Record, *supra* note 7, at 36:189 (Dec. 28, 1977).

9. Paul Brodeur notes:

> Mashpee [the region] was never really settled in any formal sense of the word. It was simply inhabited by the Wampanoags and their Nauset relatives, whose ancestors had been coming there to fish for herring and to gather clams and oysters since the earliest aboriginal times, and whose descendants currently represent, with the exception of the Penobscots and the Passamaquoddies of Maine, the largest body of Indians in New England.

Brodeur, *supra* note 1, at 7–9; see also J. Clifford, The Predicament of Culture: Twentieth-Century Ethnography, Literature, and Art 289 (1988) ("[The Mashpee people] did have a place and a reputation. For centuries Mashpee had been recognized as an Indian town. Its boundaries had not changed since 1665, when the land was formally deeded to a group called the South Sea Indians by the neighboring leaders Tookonchasun and Weepquish").

The irony of this "documentation" is that either as journalism or as anthropology it recounts a telling that is not documentation for purposes of the dispute.

10. Brodeur, *supra* note 1, at 15.

11. *Id.*

12. Clifford, *supra* note 9, at 306–07.

13. Brodeur, *supra* note 1, at 17.

14. *Id.* at 19–20.

15. 25 U.S.C. §177 (1988); see *supra* note 5 (quoting the relevant provisions of the act).

16. Under the Non-Intercourse Act, protected "Indian lands" are the lands a tribe claims title to on the basis of prior possession or ownership. See 25 U.S.C. §194 (1988). Section 194 provides:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

17. See 25 U.S.C. §177 (1988) (referring to "Indian nation" and "tribe of Indians" as those covered by statute).

18. Clifford, *supra* note 9, at 302.

19. *Id.*

12. Alchemical Notes

Reconstructing Ideals from Deconstructed Rights

PATRICIA J. WILLIAMS

The Brass Ring and the Deep Blue Sea

The Meta-Story

Once upon a time, there was a society of priests who built a Celestial City whose gates were secured by word-combination locks. The priests were masters of the Word, and those who learned ascendingly intricate levels of Word Magic could access ascending levels of power and treasure within the City. At the very top level, the priests became gods; and because they then had nothing left to seek, they passed the long hours of eternity by engaging in games. In particular, they liked to ride their strong, sure-footed steeds, around and around the perimeter of heaven: now jumping word-hurdles, now playing polo with the concepts of the moon and of the stars, now reaching up to touch that pinnacle, that fragment, that splinter of Refined Understanding that was called Superstanding, the brass ring of their merry-go-round.

In time, some of the priests-turned-gods tired of this sport, denounced it as meaningless. They donned the garb of pilgrims, seekers once more, and passed beyond the gates of the Celestial City. In this recursive passage, they acquired the knowledge of Undoing Words.

Beyond the walls of the City lay a Deep Blue Sea. The priests built themselves small boats and set sail, determined to explore the uncharted courses, the open vistas of this new and undefined domain. They wandered for many years in this manner, until at last they reached a place that was half a circumference of their world away from the Celestial City. From this point, the City appeared as a mere shimmering illusion; and the priests knew that at last they had reached a place that was Beyond the Power of Words. They let down their anchors, the plumb lines of their reality, and experienced godhood once more.

A version of this chapter previously appeared as Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 Harv. C.R.-C.L. L. Rev. 401 (1987). Originally published in the *Harvard Civil Rights–Civil Liberties Law Review.*

The Story

Under the Celestial City, dying mortals called out their rage and suffering, battered by a steady rain of sharp hooves whose thundering, sound-drowning path described the wheel of their misfortune.

At the bottom of the Deep Blue Sea, drowning mortals reached silently and desperately for drifting anchors dangling from short chains far, far overhead, which they thought were lifelines meant for them.

I wrote the above parable in response to a friend who asked me what Critical Legal Studies (CLS) was *really* all about; the Meta-Story was my impressionistic attempt to explain. Then my friend asked me if there weren't lots of blacks and minorities, organizers and grassroots types, in an organization so diametrically removed from tradition. Her question immediately called to mind my first days on my first job out of law school: armed with fresh degrees and shiny new theories, I walked through the halls of the Los Angeles Criminal and Civil Courthouses, from assigned courtroom to assigned courtroom. The walls of every hall were lined with waiting defendants and families of defendants,[1] almost all poor, Hispanic and/or black. As I passed, they stretched out their arms and asked me for my card; they asked me if I was a lawyer; they called me "sister" and "counselor." The power of that memory is fused with my concern about the disproportionately low grassroots membership in or input to CLS. CLS wields significant power in shaping legal strategies that affect—literally from on high—the poor and oppressed. The irony of that reproduced power imbalance prompted me to complete "The Brass Ring and the Deep Blue Sea" with the Story.

In my experience, most noncorporate clients looked to lawyers almost as gods. They were frightened, pleading, dependent (and resentful of their dependence), trusting only for the specific purpose of getting help (because they had no choice), and distrustful in a global sense (again, because they most often had no choice). Subservience is one way I have heard the phenomenon described (particularly by harried, well-meaning practitioners who would like to see their clients be more assertive, more responsible, and more forthcoming), but actually I think it is something much worse, and more complexly worse.

I think what I saw in the eyes of those who reached out to me in the hallways of the courthouse was a profoundly accurate sense of helplessness—a knowledge that without a sympathetically effective lawyer (whether judge, prosecutor, or defense attorney) they would be lining those halls and those of the lockup for a long time to come. I probably got more than my fair share of outstretched arms because I was one of the few people of color in the system at that time; but just about every lawyer who has frequented the courthouse enough has had the experience of being cast as a savior. I have always tried to take that casting as a real request—not as a literal message that I am a god but as a rational demand that I work the very best of whatever theory-magic I learned in law school on their behalves. CLS has a good deal of powerful theory-magic of its own to offer; but I think it has failed to make its words and un-words tangible, *reachable*, and applicable to those in this society who need its powerful assistance most.

In my Story, the client-mortals reached for help because they needed help; in CLS, I have sometimes been left with the sense that lawyers and clients engaged in the pursuit

of "rights" are viewed as foolish, "falsely conscious," benighted, or misled. Such an attitude indeed gives the courthouse scenario a cast not just of subservience but of futility. More important, it may keep CLS from reaching back or, more ironically still, keep CLS reaching in the wrong direction, locked in refutation of formalist legal scholarship.

This chapter is an attempt to detail my discomfort with that part of CLS that rejects rights-based theory, particularly that part of the debate and critique that applies to the black struggle for civil rights.

I by no means want to idealize the importance of rights in a legal system in which rights are so often selectively invoked to draw boundaries, to isolate, and to limit. At the same time, it is very hard to watch the idealistic or symbolic importance of rights being diminished with reference to the disenfranchised, who experience and express their disempowerment as nothing more or less than the denial of rights. It is my belief that blacks and whites do differ in the degree to which rights assertion is experienced as empowering or disempowering. The expression of these differing experiences creates a discourse boundary, reflecting complex and often contradictory societal understandings. It is my hope that in redescribing the historical alchemy of rights in black lives, the reader will experience some reconnection with that part of the self and of society whose story unfolds beyond the neatly staked bounds of theoretical legal understanding.

A Tale with Two Stories

Mini-Story (In Which Peter Gabel and I Set Out to Teach Contracts in the Same Boat While Rowing in Phenomenological Opposition)

Some time ago, Peter Gabel[2] and I taught a contracts class together. Both recent transplants from California to New York, each of us hunted for apartments in between preparing for class and ultimately found places within one week of each other. Inevitably, I suppose, we got into a discussion of trust and distrust as factors in bargain relations. It turned out that Peter had handed over a $900 deposit, in cash, with no lease, no exchange of keys, and no receipt, to strangers with whom he had no ties other than a few moments of pleasant conversation. Peter said that he didn't need to sign a lease because it imposed too much formality. The handshake and the good vibes were for him indicators of trust more binding than a distancing form contract. At the time, I told Peter I thought he was stark raving mad, but his faith paid off. His sublessors showed up at the appointed time, keys in hand, to welcome him in. Needless to say, there was absolutely nothing in my experience to prepare me for such a happy ending.

I, meanwhile, had friends who found me an apartment in a building they owned. In *my* rush to show good faith and trustworthiness, I signed a detailed, lengthily negotiated, finely printed lease firmly establishing me as the ideal arm's length transactor.

As Peter and I discussed our experiences, I was struck by the similarity of what each of us was seeking, yet in such different terms, and with such polar approaches. We both wanted to establish enduring relationships with the people in whose houses we would be living; we both wanted to enhance trust of ourselves and to allow whatever closeness, whatever friendship, was possible. This similarity of desire, however, could not reconcile our very different relations to the word of law. Peter, for example, appeared to be extremely self-conscious of his power potential (either real or imagistic) as a white or male

or lawyer authority figure. He therefore seemed to go to some lengths to overcome the wall that image might impose. The logical ways of establishing some measure of trust between strangers were for him an avoidance of conventional expressions of power and a preference for informal processes generally.[3]

I, on the other hand, was raised to be acutely conscious of the likelihood that, no matter what degree of professional or professor I became, people would greet and dismiss my black femaleness as unreliable, untrustworthy, hostile, angry, powerless, irrational, and probably destitute. Futility and despair are very real parts of my response. Therefore it is helpful for me, even essential for me, to clarify boundary; to show that I can speak the language of lease is my way of enhancing trust of me in my business affairs. As a black, I have been given by this society a strong sense of myself as already too familiar, too personal, too subordinate to white people. I have only recently evolved from being treated as three-fifths of a human,[4] a subpart of the white estate. I grew up in a neighborhood where landlords would not sign leases with their poor, black tenants and *demanded* that rent be paid in cash; although superficially resembling Peter's transaction, such "informality" in most white-on-black situations signals distrust, not trust. Unlike Peter, I am still engaged in a struggle to set up transactions at arms' length, as legitimately commercial, and to portray myself as a bargainer of separate worth, distinct power, sufficient *rights* to manipulate commerce, rather than to be manipulated as the object of commerce.

Peter, I speculate, would say that a lease or any other formal mechanism would introduce distrust into his relationships and that he would suffer alienation, leading to the commodification of his being and the degradation of his person to property. In contrast, the lack of a formal relation to the other would leave me estranged. It would risk a figurative isolation from that creative commerce by which I may be recognized as whole, with which I may feed and clothe and shelter myself, by which I may be seen as equal—even if I am stranger. For me, stranger-stranger relations are better than stranger-chattel.

The unifying theme of Peter's and my experiences (assuming that my hypothesizing about Peter's end of things has any validity at all) is that one's sense of empowerment defines one's relation to the law, in terms of trust-distrust, formality-informality, or rights–no rights (or "needs"). In saying this I am acknowledging and affirming points central to CLS literature: that rights may be unstable[5] and indeterminate.[6] Despite this recognition, however, and despite a mutual struggle to reconcile freedom with alienation, and solidarity with oppression, Peter and I found the expression of our social disillusionment lodged on opposite sides of the rights/needs dichotomy.

On a semantic level, Peter's language of circumstantially defined need—of informality, of solidarity, of overcoming distance—sounded dangerously like the language of oppression to someone like me who was looking for freedom through the establishment of identity, the formation of an autonomous social self. To Peter, I am sure, my insistence on the protective distance that rights provide seemed abstract and alienated.

Similarly, while the goals of CLS and of the direct victims of racism may be very much the same, what is too often missing from CLS works is the acknowledgment that our experiences of the same circumstances may be very, very different; the same symbol may mean different things to each of us. At this level, for example, the insistence of Mark Tushnet, Alan Freeman, and others[7] that the "needs" of the oppressed should be emphasized rather than their "rights" amounts to no more than a word game. It merely says

that the choice has been made to put "needs" in the mouth of a rights discourse—thus transforming "need" into a new form of right. "Need" then joins "right" in the pantheon of reified representations of what it is that you, I, and we want from ourselves and from society.

While rights may not be ends in themselves, it remains that rights rhetoric has been and continues to be an effective form of discourse for blacks. The vocabulary of rights speaks to an establishment that values the guise of stability and from which social change for the better must come (whether it is given, taken, or smuggled). Change argued for in the sheep's clothing of stability (i.e., "rights") can be effective, even as it destabilizes certain other establishment values (i.e., segregation). The subtlety of rights' real instability thus does not render unusable their persona of stability.

What is needed, therefore, is not the abandonment of rights language for all purposes but an attempt to become multilingual in the semantics of each other's rights-valuation. One summer when I was about six, my family drove to Maine. The highway was very straight and hot and shimmered darkly in the sun. My sister and I sat in the back seat of the Studebaker and argued about what color the road was. I said black. My sister said purple. After I had successfully harangued her into admitting that it was indeed black, my father gently pointed out that my sister still saw it as purple. I was unimpressed with the relevance of that at the time, but with the passage of years, and much more observation, I have come to see endless overheated highways as slightly more purpley than black. My sister and I will probably argue about the hue of life's roads forever. But the lesson I learned from listening to her wild perceptions is that it really is possible to see things—even the most concrete things—simultaneously yet differently and that seeing simultaneously yet differently is more easily done by two people than one but that one person can get the hang of it with lots of time and effort.

In addition to our differing word usage, Peter and I had qualitatively different *experiences* of rights. For example, for me to understand fully the color my sister saw when she looked at a road involved more than my simply knowing that her "purple" meant my "black." It required as well a certain "slippage of perception" that came from my finally experiencing how much her purple *felt* like my black.

In Peter's and my case, such a complete transliteration of each other's experiences is considerably harder to achieve. If it took years for me to understand fully my own sister, probably the best that Peter and I can do—as friends and colleagues but very different people—is to listen intently to each other so that maybe our respective children can bridge the experiential distance. Bridging such gaps requires listening at a very deep level to the uncensored voices of others. To me, therefore, one of the most troubling positions advanced by some in CLS is that of rights' actual disutility in political advancement. That position seems to discount entirely the voice and the experiences of blacks in this country, for whom politically effective action has occurred mainly in connection with asserting or extending rights.

For blacks, therefore, the battle is not deconstructing rights in a world of no rights; nor is it constructing statements of need in a world of abundantly apparent need. Rather, the goal is to find a political mechanism that can confront the *denial* of need. The argument that rights are disutile, even harmful, trivializes this aspect of black experience specifically, as well as that of any person or group whose genuine vulnerability has been protected by that measure of actual entitlement that rights provide.

For many white CLSers, the word "rights" seems to be overlaid with capitalist connotations of oppression, universalized alienation of the self, and excessive power of an external and distancing sort. The image of the angry bigot locked behind the gun-turreted, barbed wire walls of his white-only enclave, shouting, "I have my rights!!" is indeed the rhetorical equivalent of apartheid. In the face of such a vision, "token bourgeoisification"[8] of blacks is probably the best—and the worst—that can ever be imagined. From such a vantage point, the structure of rights is akin to that of racism in its power to constrict thought, to channel broad human experience into narrowly referenced and reified stereotypes. Breaking through such stereotypes would naturally entail some "unnaming" process.

For most blacks, on the other hand, running the risk—as well as having the power—of "stereo-typing" (a misuse of the naming process; a reduction of considered dimension rather than an expansion) is a lesser historical evil than having been unnamed altogether. The black experience of anonymity, the estrangement of being without a name, has been one of living in the oblivion of society's inverse, beyond the dimension of any consideration at all. Thus, the experience of rights assertion has been one of both solidarity and freedom, of empowerment of an internal and very personal sort; it has been a process of finding the self.

The individual and unifying cultural memory of black people is the helplessness, the uncontrollability of living under slavery. I grew up living in the past: The future, some versions of which had only the sheerest possibility of happening, was treated with the respect of the already-happened, seen through the expansively prismatic lenses of what had already happened. Thus, when I decided to go to law school, my mother told me that "the Millers were lawyers, so you have it in your blood." Now, the Millers were the slaveholders of my maternal grandmother's clan. The Millers were also my great-great-grandparents and great-aunts and who knows what else. My great-great-grandfather Austin Miller, a thirty-five-year-old lawyer, bought my eleven-year-old great-great-grandmother, Sophie, and her parents (being "family Negroes," the previous owner sold them as a matched set). By the time she was twelve, Austin Miller had made Sophie the mother of a child, my great-grandmother Mary. He did so, according to family lore, out of his desire to have a family. Not, of course, a family with my great-great-grandmother but with a wealthy white widow whom he in fact married shortly thereafter. He wanted to *practice* his sexual talents on my great-great-grandmother. In the bargain, Sophie bore Mary, who was taken away from her and raised in the Big House as a house servant, an attendant to his wife, Mary (after whom Sophie's Mary, my great-grandmother, had been named), and to his legitimated white children.

In ironic, perverse obeisance to the rationalizations of this bitter ancestral mix, the image of this self-centered child molester became the fuel for my survival during the dispossessed limbo of my years at Harvard—the *Bakke* years, the years when everyone was running around telling black people that they were very happy to have us there, but after all they did have to lower the standards and readjust the grading system, but Harvard could *afford* to do that because Harvard was Harvard. And it worked. I got through law school, quietly driven by the false idol of the white-man-within-me, and I absorbed a whole lot of the knowledge and the values that had enslaved me and my foremothers.

I learned about images of power in the strong, sure-footed arm's length transactor. I learned about unique power-enhancing lands called Whiteacre and Blackacre, and the mystical fairy rings that encircled them, called restrictive covenants. I learned that

excessive power overlaps generously with what is seen as successful, good, efficient, and desirable in our society.

I learned to undo images of power with images of powerlessness; to clothe the victims of excessive power in utter, bereft naiveté; to cast them as defenseless supplicants raising—pleading—defenses of duress, undue influence, and fraud. I learned that the best way to give voice to those whose voice had been suppressed was to argue that they had no voice.

Some time ago, a student gave me a copy of *Pierson v. Post*[9] as reinterpreted by her six-year-old, written from the perspective of the wild fox. In some ways it resembled Peter Rabbit with an unhappy ending; most importantly it was a tale retold from the doomed prey's point of view, the hunted reviewing the hunter. I had been given this story the same week that my sister had gone to the National Archives and found something that may have been the contract of my great-great-grandmother Sophie's sale (whether hers or not, it was someone's) as well as the census accounting that listed her, along with other, inanimate evidence of wealth, as the "personal property" of Austin Miller.

In reviewing those powerfully impersonal documents, I realized that both she and the fox shared a common lot, were either owned or unowned, never the owner. And whether owned or unowned, rights over them never filtered down *to* them; rights to their persons never vested in them. When owned, issues of physical, mental, and emotional abuse or cruelty were assigned by the law to the private tolerance, whimsy, or insanity of an external master. And when unowned—that is, free, freed, or escaped—again their situation was uncontrollably precarious, for as objects *to be* owned, they and the game of their conquest were seen only as potential enhancements to some other self. They were fair game from the perspective of those who had rights; but from their own point of view, they were objects of a murderous hunt.

This finding of something that could have been the contract of sale of my great-great-grandmother irretrievably personalized my analysis of the law of her exchange. Repeatedly since then, I have tried to analyze, rationalize, and rescue her fate, employing the tools I learned in law school: adequacy of valuable consideration, defenses to formation, grounds for discharge and remedies (for whom?). That this was to be a dead-end undertaking was all too obvious, but it was interesting to see how the other part of my heritage, Austin Miller, the lawyer, and his confreres had constructed their world so as to nip quests like mine in the bud.

The very best I could do for my great-great-grandmother was to throw myself, in whimpering supplication, upon the mercy of an imaginary, patriarchal court and appeal for an exercise of its extraordinary powers of conscionability and "humanitarianism."[10] I found that it helped to appeal to that court's humanity, and not to stress the fullness of her own. I found that the best way to get anything for her, whose needs for rights were so compellingly, overwhelmingly manifest, was to argue that she, poor thing, had no rights.[11] It is this experience of having, for survival, to argue our own invisibility in the passive, unthreatening rhetoric of "no-rights" that, juxtaposed with the CLS abandonment of rights theory, is both paradoxical and difficult for minorities to accept.

To say that blacks never fully believed in rights is true; yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before. We held onto them, put the hope of them into our wombs, and mothered them—not

just the notion of them. We nurtured rights and gave rights life. And this was not the dry process of reification, from which life is drained and reality fades as the cement of conceptual determinism hardens round—but its opposite. This was the resurrection of life from four-hundred-year-old ashes, the parthenogenesis of unfertilized hope.

The making of something out of nothing took immense alchemical fire: the fusion of a whole nation and the kindling of several generations. The illusion became real for only a very few of us; it is still elusive and illusory for most. But if it took this long to breathe life into a form whose shape had already been forged by society and that is therefore idealistically if not ideologically accessible, imagine how long would be the struggle without even that sense of definition, without the power of that familiar vision. What hope would there be if the assignment were to pour hope into a timeless, formless futurism? The desperate psychological and physical oppression suffered by black people in this society makes such a prospect either unrealistic (i.e., experienced as unattainable) or otherworldly (as in the false hopes held out by many religions of the oppressed).

It is true that the constitutional foreground of "rights" was shaped by whites, parcelled out to blacks in pieces, ordained in small favors as random insulting gratuities. Perhaps the predominance of that imbalance obscures the fact that the recursive insistence of those rights is also defined by black desire for them, desire fueled not by the sop of minor enforcement of major statutory schemes like the Civil Rights Act but by knowledge of, and generations of existing in, a world without any meaningful boundaries. And "without boundary" for blacks has meant not untrammelled vistas of possibility but the crushing weight of totalistic—bodily and spiritual—*intrusion*. "Rights" feels so new in the mouths of most black people. It is still so deliciously empowering to say. It is a sign for and a gift of selfhood that is very hard to contemplate reconstructing (deconstruction is too awful to think about!) at this point in history. It is the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no-power. The concept of rights, both positive and negative, is the marker of our citizenship, our participatoriness, our relation to others.

In many mythologies, the mask of the sorcerer is also the source of power. To unmask the sorcerer is to depower.[12] So CLS' unmasking rights mythology in liberal America is to reveal the source of much powerlessness masquerading as strength. It reveals a universalism of need and oppression among whites as well as blacks.

In those ancient mythologies, however, unmasking the sorcerer was only part of the job. It was impossible to destroy the mask without destroying the balance of things, without destroying empowerment itself. Therefore, the mask had to be donned by the acquiring shaman and put to good ends. As rulers range from despotic to benign, as anarchy can become syndicalism, so the power mask in the right hands can transform itself from burden into blessing.

The task for CLS, therefore, is not to discard rights but to see through or past them so that they reflect a larger definition of privacy and of property, so that privacy is turned from exclusion based on self-regard into regard for another's fragile, mysterious autonomy and so that property regains its ancient connotation of being a reflection of that part of the self that by virtue of its very externalization is universal. The task is to expand private property rights into a conception of civil rights, into the right to expect civility from others.[13]

In discarding rights altogether, one discards a symbol too deeply enmeshed in the psyche of the oppressed to lose without trauma and much resistance. Instead, society must give them away. Unlock them from reification by giving them to slaves. Give them to trees. Give them to cows. Give them to history. Give them to rivers and rocks. Give to all of society's objects and untouchables the rights of privacy, integrity, and self-assertion; give them distance and respect. Flood them with the animating spirit that rights mythology fires in this country's most oppressed psyches, and wash away the shrouds of inanimate object status, so that we may say not that we own gold but that a luminous golden spirit owns us.

NOTES

1. Few plaintiffs ever seemed to wait around as much as defendants did. In part, this was due to the fact that, in the courts in which I practiced, unlike, for example, a family court, the plaintiffs were largely invisible entities—like the state or a bank or a corporate creditor—whose corporeal manifestations were their lawyers.

2. Peter Gabel was one of the first to bring critical theory to legal analysis; as such he is considered one of the "founders" of Critical Legal Studies.

3. See generally R. Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 Wis. L. Rev. 1359.

4. See U.S. Const. art. I, §2.

5. "Can anyone seriously think that it helps either in changing society or in understanding how society changes to discuss whether [someone is] exercising rights protected by the First Amendment? It matters only whether they engaged in politically effective action." M. Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1363, 1370–71 (1984); see also The Politics of Law: A Progressive Critique (D. Kairys ed. 1982); G. Frug, *The Ideology of Bureaucracy in American Law*, 97 Harv. L. Rev. 1276 (1984); P. Gabel, *Reification in Legal Reasoning*, 3 Res. L. & Soc. 25 (1980); P. Gabel & P. Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. Rev. L. & Soc. Change 369 (1982–83); D. Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buff. L. Rev. 205 (1979); D. Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976).

6. See Tushnet, *supra* note 5, at 1375; see also R. Gordon, *Historicism in Legal Scholarship*, 90 Yale L.J. 1017 (1981); R. Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561 (1983).

7. See Tushnet, *supra* note 5; A. Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049 (1978); see also D. Hay et al., Albion's Fatal Tree (1975).

8. A. Freeman, *Antidiscrimination Law: A Critical Review*, in The Politics of Law: A Progressive Critique 96, 114 (D. Kairys ed., 1982).

9. "Post, being in possession of certain dogs and hounds under his command, did, 'upon a certain wild and uninhabited, unpossessed and waste land, called the beach, find and start one of those noxious beasts called a fox,' and whilst there hunting, chasing and pursuing the same with his dogs and hounds, and when in view thereof, Pierson, well knowing the fox was so hunted and pursued, did, in the sight of Post, to prevent his catching the same, kill and carry it off." 3 Cal. R. 175,175 (N.Y. Sup. Ct. 1805).

10. See S. Elkins, Slavery: A Problem in American Institutional and Intellectual Life 237 (2d ed. 1963), in which the "conduct and character" of slave traders is described as follows: "Between these two extremes [from 'unscrupulous' to 'guilt-ridden'] must be postulated a wide variety of acceptable, genteel, semipersonalized, and doubtless relatively *humane* commercial transactions whereby slaves in large numbers could be transferred in exchange for money" (emphasis added).

11. See D. Bell, *Social Limits on Basic Protections for Blacks*, in Race, Racism, and American Law 280 (1980).

12. The "unmasking" can occur in a number of less-than-literal ways: killing the totemic animal from whom the sorcerer derives power; devaluing the magician as merely the village psychotic; and,

perhaps most familiarly in our culture, incanting sacred spells backwards. C. Levi-Strauss, The Raw and the Cooked 28 (1979); M. Adler, Drawing Down the Moon 321 (1979); W. La Barre, The Ghost Dance 315–19 (1970). Almost every culture in the world has its share of such tales: Plains Indian, Eskimo, Celtic, Siberian, Turkish, Nigerian, Cameroonian, Brazilian, Australian, and Malaysian stories—to name a few—describe the phenomenon of the power mask or power object. See generally L. Andrews, Jaguar Woman and the Wisdom of the Butterfly Tree 151–76 (1985); J. Halifax, Shamanic Voices (1979); A. Kamenskii, *Beliefs About Spirits and Souls of the Dead*, in Ravens Bones 67 (A. Hope III ed., 1982); J. Frazer, The Golden Bough 810 (1963).

13. *He had to choose. But it was not a choice*
Between excluding things. It was not a choice
Between, but of. He chose to include the things
That in each other are included, the whole,
The complicate, the amassing harmony.

W. Stevens, *Notes Toward a Supreme Fiction*, in The Collected Poems of Wallace Stevens 403 (1981).

13. A Furious Kinship

Critical Race Theory and the Hip-Hop Nation

ANDRÉ DOUGLAS POND CUMMINGS

Two explosive movements were born in the United States in the 1970s. While the founding of both movements was humble and lightly noticed, both grew to become global phenomena that have profoundly changed the world. Founded by prescient agitators, these two movements were born of disaffection, disappointment, and the desperate need to give voice to oppressed and dispossessed peoples. America in the 1970s bore witness to the founding of two furious movements: critical race theory and hip-hop.

Critical race theory arrived as a response to what had been deemed a sputtering civil rights agenda in the United States. Driven by law professors of color, it primarily targeted the law by exposing the racial inequities supported by U.S. law and policy. Hip-hop, on the other hand, was founded by budding artists, musicians, and agitators in the South Bronx neighborhoods of New York City—most of them young, African American, and disaffected—as a response to a faltering music industry and abject poverty. Separated by presentation, arena, and point of origin, these two movements nevertheless share startling similarities, including the use of narrative, a deep desire to give voice to a discontent brewed by silence, and a dedication to the continuing struggle for race equality in the United States.

Critical Race Theory

Critical race theory (CRT) took root in the 1970s when leading legal academics began to realize that the civil rights movement of the 1950s and 1960s had stalled and that many of its initial gains were beginning to erode after only a decade. Founding theorists critiqued the "objective" rationalist nature of U.S. law and how it served to advantage the privileged, wealthy, and powerful while suppressing the poor and oppressed, blocking their access to the courts as a means of redress for racial exploitation and discrimination.

A version of this chapter previously appeared as andré douglas pond cummings, *A Furious Kinship: Critical Race Theory and the Hip Hop Nation*, 48 U. Louisville L. Rev. 499 (2010). Originally published in the *University of Louisville Law Review*.

Out of this growing critique of the role of race and law in society, a new, fiery, and brash strand of scholarship emerged.

Critical race theorists intuitively perceived the dearth of voices of color at any of the historic decision-making councils in the United States and identified the influence of white male privilege throughout U.S. law and legislation. In so doing, they espoused a different approach, advocating that law and contemporary society begin to "look to the bottom."[1] One of the greatest weaknesses of American law—which remains today—is that the U.S. justice system is fundamentally based on a top-down development formula. From its inception, that system has been developed and refined by the privileged and the powerful, who have little experience or understanding of poverty, despair, voicelessness, or victimization.

CRT rests on several foundational pillars: First, racism is a relentless daily fact of life in American society, and the ideology of racism and white supremacy are ingrained in the political and legal structures so as to be nearly unrecognizable. Racism is a constant, not aberrant, occurrence in American society. "Because racism is an ingrained feature of our landscape, it appears ordinary and natural to persons in the culture."[2] Second, "as a form of oppositional scholarship, CRT challenges the experience of White European Americans as the normative standard" against which societal norms are measured.[3] "CRT grounds its conceptual framework in the distinctive . . . experiences of people of color and racial oppression through the use of literary narrative knowledge and storytelling to challenge the existing social construction of race."[4] Third, CRT questions liberalism and the ability of a system of law built on it to create a just society. An interest convergence critique posits that white elites will tolerate or encourage racial advances for blacks only when such advances also promote white self-interest.[5] Fourth, CRT seeks to expose the flaws in the color-blind view of everyday social relations and the administration of law by positing that ending discrimination and racism through legal means has not occurred because of the contradiction between a professed belief in equality and justice and a societal willingness to tolerate and accept racial inequality and inequity.[6]

Armed with these principles and values, CRT pioneers began to trek through a barren academic badland, wielding pens as swords aimed at the legal academy by drafting academic pieces that attempted to pierce the status quo apologist rhetoric. The words that flowed from the CRT founders formed an oasis of ideas and concepts that would eventually quench the intellectual thirst of those who had labored in the racial desert wasteland for decades.

CRT unequivocally rejects a number of entrenched, mainstream beliefs about racial injustice, including that blindness to race will eliminate racism. They also reject

> that racism is a matter of individuals, not systems. The goal of antidiscrimination law, as understood historically, was to search for perpetrators and victims: perpetrators could be identified through "bad" acts and intentions, while victims were (only) those who could meet shifting, and increasingly elusive, burdens of proof.[7]

Finally, CRT rejects the notion that one can fight racism without paying attention to sexism, homophobia, economic domination, and other forms of injustice. In rejecting these beliefs, critical race theorists have located everyday, operative racism at a

structural—rather than just an individual—level, seeing racism as inherent in the criminal justice system itself, for example, and not merely present in individual bad-apple police officers, or as engrained in the educational structures of segregation and wealth transmission, and not just individual views of bigoted school board members.

For decades, legal academic scholarship was deemed effective only if it followed a traditional approach: identifying a problem or gap in the law, analyzing the various approaches to the gap, surveying the relevant academic scholarship, and then proposing a novel solution to the problem. The analysis could follow only a staid, down-the-line examination of the law, relying exclusively on case law and previously written scholarly legal commentary as valid sources of support. Any type of legal scholarship that diverged from this traditional model was dismissed as unintellectual, ineffective, and unworthy. CRT founders rejected this traditional approach to legal academic scholarship and advocated instead a new, aggressive style of legal commentary that thoroughly challenged the status quo and sometimes took the form of storytelling.

CRT fully disrupted the analytical gaze that had captured the law and the legal academy since the beginning. CRT programs and scholars now thrive in undergraduate universities and programs throughout the United States, growing in power and influence. In surprising ways, the origin and evolution of CRT mirrors many of the paths traversed by hip-hop in its own origin and development.

Hip-Hop: From South Bronx to a Global Footprint

Forged in the fires of the South Bronx, New York, and Kingston, Jamaica, hip-hop became the clarion call of youth rebellion and a generation-defining movement. In the post-civil-rights era defined by deindustrialization and globalization, hip-hop music and culture crystallized a multiracial, polycultural generation's worldview and significantly transformed American politics and culture. "Modern[-]day rap music finds its immediate roots in the toasting and dub talk over elements of reggae music."[8] In the early 1970s, a Jamaican disc jockey (DJ) known as DJ Kool Herc moved from Kingston, Jamaica, to New York City's West Bronx. In New York, Kool Herc adapted his style of chanting improvised rhymes over the instrumental or percussion sections of the day's popular records. This simple act of rhyming in verbal cadence over the hooks and loops of popular records became a runaway cultural phenomenon that captured the imagination of not just disaffected black and Latino youth but, ultimately, fans around the world.

Following success in the streets and parks of the South Bronx, young African American and Latino youngsters began mimicking Kool Herc by reciting their own original phrases and rhyming over familiar records' loops and instrumental sections. "Call and response" became a trendy style of DJing, in which a popular or catchy phrase rapped by the DJ "would evoke a response from a crowd who began to call out their own names and slogans. As this phenomenon evolved, the party shouts became more elaborate," giving young African American and Latino youth a chance to freely express themselves.[9]

Hip-hop, as an art form, flourished immediately because it was accessible to all comers. "One didn't need a lot of money or expensive resources to rhyme. One didn't need to invest in lessons, or anything like that. Rapping was a verbal skill that could be practiced and honed to perfection at almost anytime."[10] Rap appealed to disaffected minority youth because it offered unlimited challenges and opportunities with no set rules other

than to be original and rhyme in time to the beat of music. Rap as a cultural movement allowed one to accurately and efficiently inject personality. A laid-back MC could rap at a slow pace. A fast-paced MC could rap quickly and rhythmically. No two MCs rapped the same, even when reciting the same words. Thus, hip-hop nestled comfortably into the historic tradition of African American culture and its musical expression.

Like all black art forms before it, hip-hop culture embraced its own specific subculture, including graffiti art, break dancing, DJing (cutting and scratching), and rapping. Hip-hop culture became a lifestyle "with its own language, style of dress, music, and mindset that is continually evolving."[11] Initially, all of hip-hop's major facets were forms of countercultural self-expression accompanied by an express disregard for the law. "The driving force behind all these activities was people's desire to be seen and heard."[12] Because it originated in the 1970s, hip-hop reflected the political, social, and economic conditions of the time directly following the civil rights movement. (For discussion of the further evolution and spread of hip-hop culture, see Chapter 53.)

Sharing a Parallel Universe

When many of the founding members of CRT met in 1989 at a workshop at the St. Benedict Center in Madison, Wisconsin, launching a global academic movement was likely not at the forefront of their minds. Meeting together was more about support and survival within the white-male-dominated legal academy than about spawning a movement that would change the debate on race in America. Similarly, when DJ Kool Herc and Afrika Bambaataa began spinning records on turntables in the parks of the South Bronx and rhyming over the instrumental hooks, launching a global cultural and musical movement was surely not their objective. The roots of both launches were humble, unassuming, and sparsely witnessed. Yet CRT and hip-hop both sprang from the creative and aggressive minds of a few forward-thinking progressives who simply had to find a forum in which to express very different ways of communicating, thinking, writing, and philosophizing.

From the movement's inception, critical race theorists championed storytelling and narrative as evidence of reality and the human experience, while rejecting traditional forms of legal studies, pedagogy, and civil rights leadership. Hip hop, too, is narrative in form; the best, most recognizable hip-hop artists use storytelling as their most fundamental communicative method. Further, early hip-hop culture and rap music rejected the traditional legal, judicial, and educational systems, decrying—often in journalistic fashion—the status quo system established by the white majority. In the same vein, critical race theorists rejected the straight-white-male perspective pervading the legal academy, proposing instead a much different approach to teaching and writing. As one writer put it:

> [Y]outh utilize[] hip hop music in multiple and overlapping ways, engaging hip hop music as both a pedagogy that centers the perspectives of people of color and a framework to examine daily life. Specifically, youth use[] hip hop discourse to make sense of the ways race operates in their daily lives; to more broadly understand their position in the U.S. racial/ethnic hierarchy; and to critique traditional schooling for failing to critically incorporate their racial-

ized ethnic/cultural identities within official school dialogues and curricula in empowering ways.[13]

Hip-hop reinforces the basic insights of CRT, including the notion that racism is a normal and relentless fact of daily life. Both genres recognize that white elites will tolerate or encourage racial advances for blacks only when such advances promote white self-interest. In response to cultural marginalization, African Americans have utilized hip-hop lyrics to disempower the white cultural elite. Hip-hop serves as white America's introduction to the rest of minority society, exposing traditional America to life in the inner city. Both KRS-One and Chuck D, for example, began using their voices as a revolutionary mechanism to politicize youth and as a tool for consciousness, education, and awareness of the common stereotypes of the day. Because of hip-hop's bold and unapologetic representation of the culture of inner-city youth to mainstream America, the public eventually had no choice but to listen and accept a different reality.

By the same token, many critical race theorists believe that a principal obstacle to genuine racial reform in the United States is the majoritarian mind-set: an experientially limited bundle of presuppositions, received wisdoms, and shared cultural understandings that persons in the majority bring to discussions of race. To analyze and challenge these power-laden beliefs, many CRT pioneers employed counterstories, parables, chronicles, and anecdotes aimed at revealing the contingency, cruelty, and self-serving nature of majoritarian rule. Similarly, in educating the hip-hop generation, Grandmaster Flash and the Furious Five recorded "The Message"; Public Enemy famously recorded "Fight the Power," "Don't Believe the Hype," "Black Steel in the Hour of Chaos," and "911 Is a Joke"; N.W.A. notoriously released "Fuck Tha Police" and "100 Miles and Runnin'"; Tupac Shakur released "Brenda's Got a Baby," "Keep Ya Head Up," and "Changes"; Ice Cube released the explosive *AmeriKKKa's Most Wanted* featuring "Endangered Species (Tales from the Darkside)" and later "Dead Homiez"; KRS-One released an entire album he styled *Edutainment* featuring "Love's Gonna Getcha." Each release represented an urban tale, a story known intimately by the authors/artists; each aimed to introduce an audience of fans and listeners to the inequities and discrimination inherent in a criminal justice system that to this day systematically targets and disproportionately imprisons minority and urban youth.

Like the seminal hip-hop records mentioned above, CRT founders dropped narrative and intellectual bombs in their early countercultural legal writing. In making the legal academy, and the world in general, aware of the deeply entrenched racism underlying American institutions, Derrick Bell wrote the profound "The Space Traders," "Serving Two Masters," "Minority Admissions and the Usual Price of Racial Remedies," and the "Interest Convergence Dilemma"; Richard Delgado published the explosive "Imperial Scholar" and "A Plea for Narrative"; Kimberlé Crenshaw authored the inspired "Race, Reform, and Retrenchment"; Charles Lawrence published the groundbreaking "The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism"; Mari Matsuda wrote "Looking to the Bottom"; and Neil Gotanda published "A Critique of 'Our Constitution Is Color-Blind.'" Each publication represented an effort on the part of the CRT pioneers to educate and enlighten the civil rights generation, emerging scholars of color, and the rest of the legal world about the inequities and discrimination inherent in a legal system that systematically disadvantages minority citizens in the United States.

Backlash

Both CRT and hip-hop were soon battered by a backlash that was intent on destroying each movement. Taking different paths, the vitriolic responses represented not just a fundamental disrespect for African American and minority expression but also a deep-seated irrational fear held by the majority status quo and an unadulterated loathing for an unfamiliar manner of self-expression. The reprisal against the two movements proved eerily similar.

In the 1980s, as hip-hop began to expand its reach into suburban America and its youth, and as hip-hop artists and groups began to wield political power and deliver countercultural messages that resonated with those youth, an aggressive and hostile countering reaction emerged. A fearful response from law enforcement, activist groups, and government agencies came soon after seminal releases by Public Enemy, N.W.A., Boogie Down Productions and KRS-One, and Ice-T.

Similarly, when CRT emerged and began to gain genuine traction in the legal academy, the response from the establishment was acerbic and intense. Of course, those invested and entrenched in protecting traditional legal scholarship criticized the emerging CRT scholarship as ungrounded, overly passionate and polemic, and neither academic nor intellectual. The traditional academy sought to expose the narrative tradition of CRT as nonscholarly, unempirical, unrepresentative, and untrustworthy. In addition, opponents of the movement criticized CRT for promoting a myth that people of color share a specific or unified voice and held therefore that it should not be recognized as fundamentally important on issues of race. (See Chapters 70 and 72.)

Nevertheless, both hip-hop and CRT shook off the criticism and controversy and continued to offer powerful alternatives to contemporary music and mainstream legal scholarship. CRT scorned the invitation to ground its relevance in traditional "accepted" methodologies. CRT scholars, true to CRT's purpose and the power of its narrative, endeavored to produce scholarship and advocate for the oppressed and voiceless. Hip-hop's artists created, for a time, the most powerfully relevant and critical music of its generation. CRT and hip-hop both continue to grow in influence and reach.

Parallel Universes

The launching of CRT shares a parallel universe with hip-hop's inception, just as the backlash against hip-hop mirrors the initial academic rejection of CRT. In significant ways the early messages of the CRT pioneers and the political critiques offered by hip-hop founders, while different in delivery and context, are powerfully similar in tone, content, and effect. Millions of Americans and eventually hundreds of millions of human beings worldwide were inspired, moved, and changed by the similar messages dropped by CRT scholars and hip-hop poets.

Derrick Bell and Chuck D and Public Enemy

Professor Derrick Bell shares a peculiar kinship with Chuck D and the hip-hop supergroup Public Enemy. When Professor Bell wrote and delivered the ominous "The Space Traders," he narrated a future odyssey that still brings chills. (See Chapter 1.)

Describing an apocalyptic racial encounter with space aliens, Bell in prophetic fashion depicted a nation that would ultimately willingly sacrifice its entire African American population in return for fiscal and environmental stability in the twenty-first century.[14] Reading "The Space Traders" today is both thrilling and devastating, because Bell accurately predicted the continuing racism and discrimination that continues more than thirty years after CRT's founding. Bell's bold and shocking critique resonated as pure and true with minority academics upon release and inspired a generation of scholars to critically examine a civil rights movement that had been hailed as revolutionary just a decade earlier.

In "The Space Traders," Bell sought to capture and expose the latent hostility held by many whites in the United States against African Americans. This exposition, while surprising to some, sounded honest and familiar to many, particularly those minorities and others who lived and worked in the nation's crosshairs of the criminal justice system and dominant legal regime.

In an even more dramatic fashion, Professor Bell developed and introduced his interest convergence theory as perhaps his most explosive contribution to the early CRT revolution. The theory squarely accused white male privileged judiciary and legislatures of supporting equality for African Americans in the United States only when it dovetailed with and supported white interests. Taking *Brown v. Board of Education* as his main example, Bell posited that the landmark decision arrived not to provide equal opportunity to blacks but rather to improve the image of the United States in the 1950s in the eyes of uncommitted Third World nations and thus advance the United States' Cold War objectives. This is certainly a devastating accusation for those who hail *Brown v. Board of Education* as America's acknowledgment and realization of its racist history and its first effort to remedy its hateful and discriminatory past.

Just as Professor Bell's teaching and writing created a firestorm of controversy and recognition, Chuck D and Public Enemy created an equally controversial firestorm as hip-hop provocateurs when they recorded and released *It Takes a Nation of Millions to Hold Us Back*, *Fear of a Black Planet*, and *Apocalypse '91: The Enemy Strikes Black*. They introduced a new social critique of racism in America with the explosive tracks "Fight the Power," "Don't Believe the Hype," "Can't Truss It," "Black Steel in the Hour of Chaos," and "Prophets of Rage," among others. Before Public Enemy, hip-hop had flirted with social commentary and critical relevance, but when Chuck D, Flavor Flav, Terminator X, and Professor Griff joined to narrate the American experience from an inner-city African American perspective, they blew the roof. In stark, narrative fashion, Public Enemy described continuing racism in America and exposed fans and listeners to the institutional nature of continuing discrimination and inequality in vibrant, rebellious, violent, and furious tones.

"Fight the Power," arguably Public Enemy's most celebrated artistic contribution and the theme to Spike Lee's controversial motion picture *Do the Right Thing*, was an anthem call to listeners and fans around the world challenging young folks to resist, question, protest, and demand equality.

From the heart
It's a start, a work of art
To revolutionize, make a change nothin's strange

People, people we are the same
No we're not the same
'Cause we don't know the game
What we need is awareness, we can't get careless
You say what is this?
My beloved, let's get down to business
Mental self defensive fitness
(Yo) Bum rush the show
You gotta go for what you know
To make everybody see, in order to fight the powers that be
Lemme hear ya say
Fight the Power.
. . .
Elvis was a hero to most
But he never meant shit to me you see
Straight up racist, that sucker was
Simple and plain
Motherfuck him and John Wayne
'Cause I'm black and I'm proud
I'm ready and hyped plus I'm amped
Most of my heroes don't appear on no stamps
Sample a look back, you look and find
Nothing but rednecks for 400 years if you check.[15]

To millions of Americans today, those familiar strains still resonate, insisting that the United States live up to its promise of equal protection for all people.

In "Black Steel in the Hour of Chaos," Chuck D and Public Enemy screamed a stark critique of America's military and its industrial prison complex:

I got a letter from the government the other day
I opened and read it, it said they were suckers
They wanted me for their Army or whatever
Picture me givin' a damn—I said never
Here is a land that never gave a damn
About a brother like me and myself because they never did
I wasn't wit' it, but just that very minute
It occurred to me, the suckers had authority. . . .
Public Enemy servin' time—they drew the line y'all
To criticize me for some crime, Never the less
They could not understand that I'm a Black man
And I could never be a veteran
On the strength, the situation's unreal
I got a raw deal, so I'm goin' for the steel.
They got me rottin' in the time that I'm servin'
Tellin' you what happened the same time they're throwin'
Four of us packed in a cell like slaves—oh well

The same motherfucker got us livin' in his hell
You have to realize, that it's a form of slavery organized
Under a swarm of devils, straight up—word 'em up on the level
The reasons are several, most of them federal.[16]

In urgent tones, Public Enemy sought to expose the U.S. military as an institution that had been served by people of color historically but had never served people of color fairly or with equal attention. In addition, "Black Steel" indicted the American penal system as one that perpetuates discrimination against people of color and acts as a form of modern slavery organized against African Americans. In 1989 these charges were not just blistering; they were also widely disseminated and deeply felt in the black community.

Further, in true activist form, Public Enemy released *Apocalypse '91: The Enemy Strikes Black*, featuring the most overtly political messages of the era. *The Enemy Strikes Black* featured "Can't Truss It" (excoriating slavery), "Nighttrain" (vilifying thieves and drug dealers), "A Letter to the New York Post" (striking back at ultranegative stories and publicity about hip-hop in general and Public Enemy in particular), "Get the Fuck Outta Dodge" (indicting U.S. law enforcement for profiling and brutality), and the explosive "By the Time I Get to Arizona," in which the group directly confronted Arizona governor Evan Mecham (who was later impeached) and the state of Arizona for its refusal to honor Martin Luther King, Jr. Public Enemy and Chuck D refused to play concerts in the state, encouraged a nationwide boycott, and then penned these fierce rhymes:

Read between the lines
Then you see the lie
Politically planned
But understand that's all she wrote
When we see the real side
That hide behind the vote
They can't understand why he the man
I'm singin about a King
They don't like it
When I decide to mic it
Wait, I'm waitin' for the date
For the man who demands respect
'Cause he was great, come on
I'm on the one mission
To get a politician
To honor or he's a goner
By the time I get to Arizona.[17]

Derrick Bell and Chuck D, from their different worlds, deliver shared realities and messages with intent to educate, inspire, and motivate change. Their stance was often professorial, deeply motivated by a desire to expose, teach, and inform. Chuck D famously called hip-hop the "Black CNN," as Public Enemy was intent on informing, exposing, and educating. He seized the opportunity to transform the hip-hop message, ultimately ushering in a generational revolution simply by seizing a microphone and

delivering powerful, intellectual messages of defiance and purpose. Similarly, Derrick Bell galvanized a stalled civil rights movement, exposing the weaknesses in something that had been hailed as thoroughly triumphant. Intent on motivating, inspiring, and exposing through protest, resignation, explosive writing, and inspired mentoring, Bell seized the opportunity to change the law and the system of legal education. The parallel critiques of American mores and traditions by Professor Bell and Public Enemy were stark, bold, and biting. These critiques powerfully influenced a generation.

Kimberlé Crenshaw and Queen Latifah

Kimberlé Crenshaw shares a kinship with Queen Latifah. When Professor Crenshaw published "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law," she exposed formal legal color blindness as incapable of recognizing the indeterminacy of civil rights laws. Crenshaw surgically rejected the "New Right's" neoconservative approach to civil rights that sought to "single[] out race-specific civil rights policies as one of the most significant threats to the democratic political system." Crenshaw also rejected the "New Left's" critical legal studies (CLS) approach that, while agreeing with the goal of racial equality, disdained the pursuit of that objective through the use of legal rights. For CLS "even engaging in rights discourse is incompatible with a broader strategy of social change." For Crenshaw, the "key flaw" in the CLS scholars' writing "is that it overlooks the relationship of racism to hegemony."[18]

At bottom, Professor Crenshaw demanded a voice and place at the table for critical scholars of color by rejecting both the conservative white neoconservative approach and the liberal white CLS approach to inequality, discrimination, and social justice in the United States. Professor Crenshaw thus aggressively confronted and rejected the two dominant paradigms of the 1980s civil rights and equality debates. Instead, she posited a thoroughly different vision that centralizes its focus on race consciousness and subordination. Crenshaw situated the fundamental underpinnings of CRT by engineering a radical critique of both the left and right and proposing a race-conscious, self-conscious alternative approach. Her vision inspired a generation.

Similarly, in 1989, Queen Latifah revealed an alternative vision to the hip-hop generation that inspired a nation. When Latifah burst onto the hip-hop scene with "Ladies First,"[19] she provided a fresh, female voice to the traditionally male-dominated scene. Queen Latifah's bold, feminist presence was a harbinger of the gravity that she would bring to the hip-hop movement. Queen Latifah added her voice to the burgeoning political contributions that hip-hop artists were laying on the listening public. In "Ladies First," Queen Latifah announced her arrival with grace:

I break into a lyrical freestyle
Grab the mic, look at the crowd and see smiles
'Cause they see a woman standing up on her own two
Sloppy slouching—it's something I won't do
Some think that we can't flow
Stereotypes they got to go
I'm a mess around and flip the scene into reverse
(With what?) With a little touch of Ladies First.

Who said the ladies couldn't make it?, you must be blind
If you don't believe, well here, listen to this rhyme
Ladies first, there's no time to rehearse
I'm divine and my mind expands throughout the universe
A female rapper with the message to send
The Queen Latifah is a perfect specimen.

Queen Latifah seized the attention of the hip-hop nation, the United States, and eventually the world with her positive, socially conscious feminist sensibilities. In her role as a teacher and political figure, Queen Latifah delivered the following in "A King and Queen Creation":

Rhymes are smoking, concentration can't be broken
Queen Latifah's outspoken
Use your imagination, picture this
Any male or female rapper trying to diss
Here for excitement and enticement
With my competitors killed I go build with my enlightenment
Teach the youth, feed the needy
Confident descendent of Queen Nefertiti
The mother of civilization will rise
Like the cream and still build the strong foundation
Secondary but necessary to reproduce
Acknowledge the fact that I'm black and I don't lack
Queen Latifah is giving you a piece of my mind
A rhyme spoken by a feminine teacher.[20]

Since her coming out, Queen Latifah has risen to become an internationally renowned artist and actor, inspiring millions of women and men with her infectious embrace of life and liberty.

Following Queen Latifah's emergence as a hip-hop force to be reckoned with, she later delivered an overtly political, feminist message. In responding to the bravado and misogyny prevalent in some hip-hop, Latifah released "Fly Girl," offering a blueprint of independence, respect, and self-reliance:

Tell me why is it when I walk past the guys, I always hear, "yo, Baby?"
I mean like what's the big idea?
I'm a Queen, 'nuff respect
Treat me like a lady
And no, my name ain't "yo" and I ain't got your baby. . . .
[Male voice:] (Desire!) I know you want me;
(You're fine!) Thank you
But I'm not the kind of girl that you think I am
I don't jump into the arms of every man
(But I'm paid) I don't need your money
(I love you!) You must be mad

Easy lover is somethin' that I ain't
Besides, I don't know you from a can of paint.[21]

Professor Crenshaw and Queen Latifah join in an enlightened call for radical social change. Both identify continuing ills and conditions of oppression but name them differently, less furiously, with race-conscious, self-conscious, and intersectional feminist responses. Both take the position that the ruling elite, including all men and whites, are responsible for creating the existing paradigm and that recognizing this responsibility creates pathways to rise above the historical repression. Crenshaw and Latifah raise commanding voices of self-sufficiency and self-empowering black female power. Both are intersectional in their approach, writing text and lyrics that examine race equity issues as they intersect with gender equity issues from a boldly feminist perspective.

Kimberlé Crenshaw and Queen Latifah, both powerful African American women, descended on the legal academy and the hip-hop community like bolts of lightning—intense, powerful, and fierce. While accompanied by other impressive trailblazers (Emma Coleman Jordan, Peggy Davis Cooper, Patricia Williams, Stephanie Phillips, and Linda Greene for Crenshaw and MC Lyte, Roxanne Shante, Salt-n-Pepa, and Yo-Yo, among many others, for Queen Latifah), Professor Crenshaw and Queen Latifah represented a new voice: unapologetic, aggressive, bold, and intellectually powerful. Crenshaw and Latifah left no doubt—a voice of power had emerged and demanded acknowledgment.

For three decades, CRT and hip-hop have been radically engaging the traditional majority in this country. Both of these radical engagements share many of the same characteristics and goals. In furiously challenging American norms, CRT advocates and hip-hop artists brashly suggest a reality completely different from the rest of the country and the world. Through narrative storytelling and funky base lines, CRT and hip-hop seek to educate, inspire, and motivate a generation. The hip-hop nation is growing up and joining the ranks of lawyers, doctors, engineers, teachers, laborers, professors, and service industry employees. The CRT founders are actively writing and engaging with others but also looking to a new generation of scholars and teachers to assume the weight and responsibility of continuing their message. The perfect storm is arriving.

NOTES

1. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 324 (1987).

2. Introduction to Critical Race Theory: The Cutting Edge xvi (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) [hereinafter The Cutting Edge].

3. Laurence Parker, *Critical Race Theory and Africana Studies: Making Connections to Education* 2–3 (The Cavehill Philosophy Symposium, Working Paper 2008), available at http://www.cavehill.uwi.edu/fhe/histphil/Philosophy/CHiPS/2008/papers/parker2008.pdf.

4. *Id.* at 3; see also The Cutting Edge, *supra* note 2, at xvii.

5. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 523 (1980).

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18. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1334, 1335, 1337, 1341–42, 1369–70, 1387 (1988).

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From the Editors

Issues and Comments

Does law—court opinions, statutes, briefs, and the like—have a story or stories? Or is the law a collection of facts, prescriptions, and guidelines? If it does contain implicit stories, what are they, and how should we analyze them? Is whiteness itself such a story? When outsiders like Derrick Bell and Patricia Williams tell stories do they, too, become part of "law"?

Are any dangers implicit in legal storytelling or in seeing law as a mass of stories and narratives? Can a story be false or dishonest or manipulative?

Is law, as Gerald Torres and Kathryn Milun imply, a kind of official storycide, a system that murders or prevents the telling of certain stories such as those of the Mashpee Indians? If so, is the solution a furious kinship between rap artists and critical legal scholars, as andré cummings proposes?

For further work on telling and retelling, see Parts III (on revisionist history) and XIV (on critical race feminism, in which writers examine and revise dominant stories about women). For a discussion on judges as storytellers and story hearers, see the article by Richard Delgado and Jean Stefancic listed in the Suggested Readings below. For a subtle exploration of the stories of lawyers and lay lawyers, see the *UCLA Law Review* article by Gerald López in the Suggested Readings for Part XVI.

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PART III

REVISIONIST INTERPRETATIONS OF HISTORY AND CIVIL RIGHTS PROGRESS

SOME OF THE best critical writing has concerned itself with the history, development, and interpretation of U.S. race relations law. Many criticalists write about whether the arrow of progress is pointing forward or backward and why change is so often cyclical, consisting of alternating periods of advance and retrenchment. This part's authors explore the role of conquest, colonialism, economic exploitation, or white self-interest in driving legal relations between the majority group and minority communities of color.

An opening selection by American Indian scholar Robert Williams shows how the crude discourses of earlier times, which sought to justify ruthless treatment of Native Americans, retain their malevolent efficacy today.

Mary Dudziak then puts forward the surprising thesis that progressive sentiment and altruism played a relatively small role in *Brown v. Board of Education*; as she sees it, white self-interest and the needs of elite groups engaged in opposing communism worldwide called the tune.

Richard Delgado then shows how timidity and fear of change prompted certain top university administrators to purge their faculties of radical professors in the early seventies, and describes what the displaced scholars did with their lives.

Ariela Gross then explains how dominant whites—and sometimes Latinos themselves—constructed Latinos as white or nonwhite to serve interests that shifted over time.

In closing, James Gordon puts forward the astonishing thesis that Robert Harlan, a light-skinned, blue-eyed man who grew up in the household of James Harlan, father of the future Supreme Court Justice John Marshall Harlan, author of the famous dissent in *Plessy v. Ferguson*, was black. The young justice-to-be thus might have had a black brother, and his special relation to Robert might have shaped his dream of an America free of the scourge of race and racism.

14. Documents of Barbarism

The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law

ROBERT A. WILLIAMS, JR.

As an eastern Indian who moved west, I have become more appreciative of the importance of a central theme of all American Indian thought and discourse, the circle. To come to the West and listen to so many Indian people speak and apply a vital and meaningful discourse of tribal sovereignty, has been a redemptive experience. It has enabled me to envision what must have been for all Indian peoples before Europeans established their hegemony in America.

As an eastern Indian moved west, I continually reflect on the cycles of confrontation between white society and American Indian tribalism. I am most alarmed by the structural similarities that can be constructed between the early nineteenth-century Indian Removal Act era and the modern West today. In the early nineteenth century, white society confronted the unassimilability of an intransigent tribalism in the East and responded with an uncompromising and racist legal discourse of opposition to tribal sovereignty. The full-scale deployment of this discourse resulted in tribalism's virtual elimination from the eastern United States. In the modern West today, white society again finds itself confronting a resurgent discourse of tribal sovereignty as its intercourse with once remote Indian Nations increases. The revival of an uncompromising and racist legal discourse of opposition to tribal sovereignty, articulated by many segments of white society today, just as certainly seeks tribalism's virtual elimination from the western United States. While there are many differences between the Removal era confrontations with tribalism and the confrontations occurring today in Indian Country over the place and meaning of tribal sovereignty in contemporary U.S. society, the importance of the circle in American Indian thought and discourse particularly alerts me to many alarming similarities.

A version of this chapter previously appeared as Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 Ariz. L. Rev. 237 (1989). Originally published in the *Arizona Law Review*.

The Removal of Tribalism in the East

Documents of Civilization: The Cherokees' Discourse of Tribal Sovereignty

In his illuminating *Theses on the Philosophy of History*, written in 1940, a few months before his death in the face of Hitler's final solution, the German-Jewish writer Walter Benjamin observed that there is no document of civilization that is not at the same time a document of barbarism.[1] By all documented accounts, the United States' forced removal of the Five Civilized Tribes of the Indians—the Cherokees, Creeks, Chickasaws, Choctaws, and Seminoles—from their ancestral homelands in the south across the Great Father of Waters was an act of barbarism. In his classic and ironically titled text *Democracy in America*,[2] Alexis de Tocqueville, who was *there* when the Choctaws crossed the Mississippi at Memphis in 1831, described the horrible scene as follows:

> It was then in the depths of winter, and that year the cold was exceptionally severe; the snow was hard on the ground, and huge masses of ice drifted on the river. The Indians brought their families with them; there were among them the wounded, the sick, newborn babies, and old men on the point of death. They had neither tents nor wagons, but only some provisions and weapons. I saw them embark to cross the great river, and the sign will never fade from my memory. Neither sob nor complaint rose from that silent assembly. Their afflictions were of long standing, and they felt them to be irremediable.[3]

While Tocqueville was a witness to Removal, his most famous insight into the American character was his notation of a national obsession with the legal process. Thus, Tocqueville's digressions in *Democracy in America* on U.S. Indian policy in general contain a special poignancy in light of his reflections on the Choctaw removal. Commenting on the history of the nation's treatment of Indian tribal peoples, Tocqueville noted the United States' "singular attachment to the formalities of law" in carrying out a policy of Indian extermination.[4] Contrasting the Spaniards' Black Legend of Indian atrocities, Tocqueville's *Democracy in America* complimented the United States for its clean efficiency in "legally" dealing with its Indian problem. It would be "impossible to destroy men with more respect for the laws of humanity," the Frenchman declared in mock admiration of the Americans' Indian policy.[5]

The cases, treatises, and other scholarly commentary that compose the textual corpus of modern federal Indian law discourse revere the documents of an ineffectual U.S. Supreme Court declaring the Cherokee Nation's impotent rights to resist the forces intent on their destruction. In particular, the celebratory narrative traditions of federal Indian law scholarship regard the Marshall Court's 1832 decision in *Worcester v. Georgia*,[6] recognizing the inherent sovereignty of Indian tribes, as perhaps the Removal era's most important legacy for American tribalism. But there was a competing legal discourse in the early nineteenth century on tribalism's rights and status east of the Mississippi that denied, and in fact overcame, the assertions of tribal sovereignty contained in the Marshall Court's much-celebrated *Worcester* opinion.

The dominant forces of political and legal power in U.S. society effectively ignored Chief Justice John Marshall's declaration in *Worcester* that the Cherokee Nation "is a

distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter."[7] The Cherokees, along with the other southern tribes, were coerced into abandoning their territory and were resettled in the West. The laws of Georgia are now in force in the Cherokees' ancestral homelands; in fact, the traces of many once vital forms of tribalism east of the Mississippi can be found only in the pages of the historian and place names on road maps. And as noted by the witness Tocqueville, it was all accomplished with a "singular attachment to the formalities of law"; a law violently opposed to that laid down by Chief Justice Marshall in his *Worcester* opinion.

The period's best-preserved discourse of tribal sovereignty is that articulated by the Cherokee Nation. Having survived their military subjugation by the United States in the post-Revolutionary period, the Cherokees' war against white repression was continued through other means, by law and politics. Thus, a large corpus of official documents declaring Cherokee resistance is preserved in enabling acts of Cherokee self-government, memorials to Congress, and arguments made before U.S. tribunals of justice. The basic themes of this discourse asserted the Cherokees' fundamental human right to live on the land of their elders, their right to the sovereignty and jurisdiction over that land, and the United States' acknowledgment and guarantee of those rights in treaties negotiated with the tribe.

The tribe's 1830 memorial to Congress contains perhaps the most concise summary of the principal themes of the Cherokees' discourse of sovereignty. The Cherokees presented their petition to the national government shortly after the passage of the Removal Act. The Cherokee memorial declared the tribe's firm opposition to abandoning its eastern homeland in the following terms:

> We wish to remain on the lands of our fathers. We have a perfect and original right to remain without interruption or molestation. The treaties with us, and the laws of the United States made in pursuance of treaties, guaranty our residence and privileges, and secure[] us against intruders. Our only request is, that these treaties may be fulfilled, and these laws executed.[8]

The Cherokees' discourse of resistance, with its organizing theme of an Indian tribe's fundamental human right to retain and rule over its ancestral homeland, asserted itself most threateningly in an adamant refusal to remove voluntarily from Georgia westward to an Indian territory beyond the Mississippi River. It was the Cherokees' refusal to abandon their homeland that rendered their discourse so "presumptuous" and intolerable to those segments of U.S. society determined to see tribalism eliminated within the borders of white civilization.

In response to the Cherokees' legal discourse of sovereignty over their ancestral lands, Georgia enacted a series of laws that partitioned the Cherokee country among several of the state's counties, extended Georgia's jurisdiction over the territory, and declared all Indian customs null and void. Under these laws, Indians were also deemed incompetent to testify in Georgia's courts in cases involving whites.

These positive expressions of Georgia's intent to exercise political jurisdiction over the Cherokee country were accompanied by a legal discourse stridently opposed to the Cherokees' own discourse of tribal sovereignty. This legal discourse of opposition to

tribal sovereignty was not, however, directed only at the Cherokees and was not the exclusive possession of the Georgians. The themes of this discourse focused beyond the Cherokee controversy and were embraced by many members of the dominant white society who denied all Indian tribes the right to retain sovereignty over their ancestral lands. According to this discourse, tribal Indians, by virtue of their radical divergence from the norms and values of white society regarding use of and entitlement to lands, could make no claims to possession or sovereignty over territories that they had not cultivated and that whites coveted. Treaties of the federal government allegedly recognizing tribal rights to ancestral homelands had been negotiated primarily to protect the tribes from certain destruction. Destruction of the tribes now appeared inevitable, however, as the territories reserved to the tribes east of the Mississippi were being surrounded by land-hungry whites.[9] Because conditions had changed so dramatically from the time of the treaties' negotiation, the treaties could no longer be regarded as binding. Only removal could save the tribes from inevitable destruction.

In 1830, Georgia governor George C. Gilmer summed up the basic thesis of the legal discourse legitimating the breach of treaties required by the Removal policy as follows: "[T]reaties were expedients by which ignorant, intractable and savage people were induced without bloodshed to yield up what civilized peoples had a right to possess by virtue of that command of the Creator delivered to man upon his formation—be fruitful, multiply and replenish the earth, and subdue it."

Georgia congressman, later governor, Wilson Lumpkin made virtually the same claim in his speech before the House of Representatives in support of the 1830 Removal Act, which would facilitate the expulsion of all remaining tribal Indians to the western Indian territory:

> The practice of buying Indian lands is nothing more than the substitute of humanity and benevolence, and has been resorted to in preference to the sword, as the best means for agricultural and civilized communities entering into the enjoyment of their natural and just right to the benefits of the earth, evidently designed by *Him* who formed it for purposes more useful than Indian hunting grounds.[10]

The Georgians consistently stressed that tribalism's claims to sovereignty and ownership over lands coveted by a civilized community of cultivators were inconsistent with natural law. Tribalism's asserted incompatibility with U.S. society east of the Mississippi was in fact the most frequently articulated theme in the argument of all the advocates of the Removal policy. President John Quincy Adams, in a message to Congress in 1828, recognized the need for a "remedy" to the anomaly of independence-claiming tribal communities in the midst of white civilization. This remedy, of course, was removal of the Indians to the West, an idea that has been debated as the final solution to the "Indian problem" since Jefferson's 1803 Louisiana Purchase.[11] Noting that the nation had been far more successful in acquiring the eastern tribes' territory "than in imparting to them the principles of inspiring in them the spirit of civilization,"[12] Adams observed that

> in appropriating to ourselves their hunting grounds we have brought upon ourselves the obligation of providing them with subsistence; and when we have had

> the same good fortune of teaching them the arts of civilization and the doctrines of Christianity we have unexpectedly found them forming in the midst of ourselves communities claiming to be independent of ours and rivals of sovereignty within the territories of the members of our Union. This state of things requires that a remedy should be provided—a remedy which, while it shall do justice to those unfortunate children of nature, may secure to the members of our confederates their right of sovereignty and soil.[13]

Even so-called friends of the Indian argued that tribalism's incompatibility with the values and norms of white civilization left removal as the only means to save the Indian from destruction. In 1829 Thomas L. McKenney, head of the national government's Office of Indian Affairs, organized New York's Board for the Emigration, Preservation, and Improvement of the Aborigines. McKenney formed the board to gain support from missionaries and clergymen for the government's removal plan. He asked former Michigan territorial governor Lewis Cass, a well-regarded expert on the Indian in early nineteenth-century white society, to publish the argument in favor of the Removal policy in the widely circulated *North American Review*.[14] As Cass explained in one article:

> A barbarous people, depending for subsistence upon the scanty and precarious supplies furnished by the chase, cannot live in contact with a civilized community. As the cultivated border approaches the haunts of the animals, which are valuable for food or furs, they recede and seek shelter in less accessible situations. . . . [W]hen the people, whom [the animals] supply with the means of subsistence, have become sufficiently numerous to consume the excess annually added to the stock, it is evident, that the population must become stationary, or, resorting to the principle instead of the interest, must, like other prodigals, satisfy the wants of to-day at the expense of to-morrow.[15]

Cass further argued that any attempt by the tribes to establish independent sovereign governments in the midst of white civilization "would lead to their inevitable ruin."[16] The Indians had to be removed from the path of white civilization for their own good.

John Locke's Contributions to the Narrative Tradition of Tribalism's Inferior Land Rights

On both sides of the Atlantic and throughout the seventeenth and eighteenth centuries, the narrative tradition of tribalism's incompatibility with white civilization generated a rich corpus of texts and legal arguments for dispossessing the Indian. These texts and arguments, while enriching and extending the tradition itself, enabled English Americans to better understand and relate the true nature of the Indian problem confronting their transplanted New World society. John Locke's chapter on property, contained in his widely read *Second Treatise of Government*,[17] was but one famous and influential text that can be located within this tradition. Written toward the end of the seventeenth century, Locke's text illustrates the widely diffused nature of the impact of more than seventy years of English colonial activity in the New World on so many aspects of English life and society.

Locke himself was a one-time functionary in the slave plantation enterprise of the colonial proprietors of South Carolina.[18] His late seventeenth-century philosophical discussion on the natural law rights of an individual to acquire "waste" land and common lands by labor assumed the status of a canonical text in a number of still-vital narrative traditions emerging out of early U.S. political and legal culture.[19] With respect to the narrative tradition of tribalism's incompatibility with white norms and values, Locke's famous text represents the principal philosophical delineation of the normative arguments supporting white civilization's conquest of America.

The *Second Treatise*'s legitimating discourse of a civilized society of cultivators' superior claim to the "waste" and underutilized lands roamed by savage tribes provided a more rigidly systematized defense of the natural law—a grounded set of assumptions by which white society had traditionally justified dispossessing Indian society of the New World. The primary philosophical problem set out in Locke's famous property chapter in his *Second Treatise* was a demonstration of "how men might come to have a property in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners."[20] Thus, Locke's text constructed its methodically organized argument for dispossessing the Indian of the presumed great "common" that was America in indirect fashion, through abstraction. Locke sought to demonstrate, through a series of carefully calculated contrasts between English and American Indian land use practices, how individual labor on the commons removes "it out of the state of nature" and "begins the [private] property."[21] For Locke, the narrative tradition of tribalism's normative deficiency provided the needed illustrations for his principal argument that "'tis labour indeed that puts the difference of value on everything."[22] In turn, this "difference" was the source of a cultivator society's privileges to deny the wasteful claims of tribalism to the underutilized "commons" of America. Locke wrote:

> There cannot be a clearer demonstration of any thing, than several Nations of the Americans are of this [the value added to land by labor], who are rich in Land, and poor in all Comforts of Life; whom Nature having furnished as liberally as any other people, with the materials of Plenty, i.e., a fruitful soil, apt to produce in abundance, what might serve for food, rayment, and delight; yet for want of improving it by labour, have not one hundredth part of the Conveniences we enjoy; and the king of a large fruitful territory there feeds, lodges, and is clad worse than a day labourer in England.[23]

Locke's argument was firmly grounded in a narrative tradition familiar to any late seventeenth-century Englishman who had heard the countless sermons or read the voluminous promotional literature designed to encourage English colonization of the unenclosed, uncultivated expanses of territory in America claimed by Indian tribes. Locke's gross anthropological overgeneralizations of the living conditions of the kings "of several Nations of the Americans"[24] illustrate his basic theme that land without labor-added value, such as Indian-occupied land, remains in the state of nature free for individual English appropriation as property. This use of the Indian's "difference" as a shorthand device to demonstrate the value added to uncultivated land by labor illuminates the economizing and legitimating functions of a narrative tradition when skillfully deployed in expository and rhetorical discourses.

Locke's famous argument in his *Second Treatise* that land lying waste and uncultivated has no owner and can therefore be appropriated by labor actually contained an express normative judgment on the Indian's claims under natural law to the "in-land parts of America."[25] Drawing on the narrative tradition's dominant theme of tribalism's deficiency and unassimilability respecting land use, Locke declared toward the end of his text:

> [Y]et there are still *great tracts of ground* to be found, which (the inhabitants thereof not having joined with the rest of mankind, in the consent of the use of their common money) lie waste, and are more than the people, who dwell on it, do, or can make use of, and so still be in common. Tho' this can scarce happen amongst that part of mankind, that have consented to the use of money.[26]

Locke's refrain in the closing sentences of his discussion in "Property" that "thus, in the beginning, all the world was America,"[27] was therefore far more than a metaphorical illustration of the conditions of the state of nature from which private property emerged. The oft-quoted allusion was also a tactical deployment of a principal theme of a narrative tradition that had legitimated and energized the call to colonization of the vast "commons" that was supposedly the Indian's America since the beginnings of the English invasion of the New World.

Locke's natural law theme of the Indian's failure to adopt the supposedly universal "rational" norms by which Englishmen assessed claims to natural rights drew heavily on the narrative tradition of tribalism's normatively deficient land use practices. In supporting the claims of a society of cultivators to the Indian's America, Locke in turn strongly reinforced and extended that same tradition. But while extremely influential, Locke's philosophical text simply supplemented the cumulative burden already placed on Indian land rights in a narrative tradition focused on tribalism's difference from white culture. Nevertheless, Locke more systematically rationalized the privileges flowing to white society by virtue of that difference, and for a society that valued systemic rationalization as a confirmation of divinely inspired natural law,[28] this was indeed an enlightening achievement.

The Discourse of Opposition to Tribal Sovereignty in Contemporary United States Society: The Task of Hearing What Has Already Been Said

The pre-nineteenth-century narrative tradition on tribalism's deficiency and unassimilability with white civilization provided the Removal era's legal discourse of opposition to tribal sovereignty with a number of valuable and venerable themes and thematic devices. Its central vision of tribalism's normative deficiency respecting land use grounded the claims of Georgia and the other southern states to superior rights of ownership and sovereignty over Indian Country. Its intimately connected themes of tribalism's unassimilability and doomed fate in the face of white civilization's superior difference and privileges arising from that difference perfectly complemented the advocates of Removal's claims that the only way to save the tribes was to banish them from the midst of white civilization.

As has been illustrated, the idea that tribalism east of the Mississippi was incompatible with the territorial ambitions and superior claims of U.S. society had been an integral component of U.S. public discourses on Indian policy long before the emergence of the Removal era's dominant legal discourse of opposition to tribal sovereignty. The widely asserted position of the early nineteenth-century advocates of Removal that tribalism was doomed to extinction in its confrontation with U.S. civilization east of the Mississippi was appropriated from a narrative tradition refined by Europeans in the New World in the course of two centuries of colonial contact with American Indians.

Just as it is possible to reconstruct the emergence of the early nineteenth-century Removal era's dominant legal discourse of opposition to tribal sovereignty out of a broader legitimating narrative tradition on tribalism's normative deficiency and unassimilability with white civilization, so too can this tradition itself be explained as a localized extension of a more global discursive legacy. That legacy, of course, would be the colonizing discourses and discursive strategies of the West's thousand-year-old tradition of repression of peoples of color.[29] For so many of the world's peoples of color, their history has been dominated by the seemingly eternal recurrence of the West's articulation and rearticulation of the privileges of its superior difference in their homelands.[30]

To say that it has all been heard before does not trivialize the significance of the circle in the thought of so many of the world's peoples of color, particularly the tribal peoples of America. Rather, it resignifies the importance of the circle's organizing vision that, borrowing from an apostate's discourse of opposition to the West's mythos of historical linearity,[31] "a meaning has taken shape that hangs over us, leading us forward in our blindness, but awaiting in the darkness for us to attain awareness before emerging into the light of day and speaking."[32]

While the strategy of stressing the Indian's difference has been frequently deployed throughout the history of public discourses on U.S. Indian policy, the modern U.S. Supreme Court also frequently cites tribalism's continuing difference from the norms of the dominant society in its opinions articulating the inherent limitations on tribal sovereignty.[33] The strategy of stressing difference to intensify the exclusion by which tribalism was placed outside white civilization clearly animates the discussion of Justice William Rehnquist's 1978 majority opinion in *Oliphant v. Suquamish Indian Tribe*.[34] *Oliphant* is the modern Supreme Court's most important discussion on the inherent limitations on tribal sovereignty. The Court held in *Oliphant* that Indian tribes lacked the inherent sovereign power to try and punish non-Indians for minor crimes committed in Indian Country.[35] The decision constrained the exercise of tribal sovereign power so as not to interfere with the interests of U.S. citizens to be protected from "unwarranted intrusions" on their personal liberty.[36] The decision also obviously constrained the ability of tribal government to maintain law and order in Indian Country according to a possibly divergent tribal vision.[37]

Rehnquist's *Oliphant* text legitimated these Supreme Court–created constraints on modern tribalism by first noting the following historical distinctions marking the administration of tribal criminal jurisdiction:

> Until the middle of this century, few Indian tribes maintained any semblance of a formal court system. Offenses by one Indian against another were usually handled by social and religious pressure and not by formal judicial processes; emphasis was on restitution rather than on punishment. In 1834 the Commis-

> sioner of Indian Affairs described the then status of Indian criminal systems: "With the exception of two or three tribes . . . the Indian tribes are without laws, and the chiefs without much authority to exercise any restraint."[38]

Having identified this historical difference by which the exercise of tribal criminal jurisdiction was placed outside white civilization, Rehnquist's opinion in *Oliphant* declared that this difference had been essentially continued in the contemporary divergence of modern tribal court systems from the norms governing the exercise of criminal jurisdiction in the dominant society's courts.[39] Citing to the Indian Civil Rights Act of 1968, a congressional act extending to tribal court criminal defendants "many of the due process protections accorded to defendants in federal or state criminal proceedings,"[40] Rehnquist observed that the protections afforded defendants in tribal court "are not identical" to those accorded defendants in non-Indian courts.[41] "Non-Indians, for example, are excluded from . . . tribal court juries" in a tribal criminal prosecution, Rehnquist noted, even if the defendant is a non-Indian.[42] It was this and other substantive differences stated and implied throughout the opinion between tribal and federal and state court proceedings[43] that determined, in Rehnquist's opinion, that Indian tribes do not possess the "power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[44] Quoting from an 1834 House of Representatives report,[45] Rehnquist declared that the "principle" that tribes, by virtue of their difference, lacked criminal jurisdiction over non-Indians

> would have been obvious a century ago when most Indian tribes were characterized by a "want of fixed laws [and] of competent tribunals of justice." It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents.[46]

Rehnquist's implication in *Oliphant* was clear; despite their "dramatic advances," tribal courts operate according to norms that are too radically different from those governing U.S. courts. Tribes cannot be permitted to exercise their deficient forms of criminal jurisdiction over white society.[47]

Conclusion

The legacy of a thousand years of European colonialism and racism can be located in the underlying shared assumptions of Indian cultural inferiority reflected in the narrative tradition of tribalism's normative deficiency, the Removal era's dominant discourse of opposition to tribal sovereignty, and in those contemporary Indian policy discourses seeking to constrain tribalism. Since its invasion of America, white society has sought to *justify*, through law and legal discourse, its privileges of aggression against Indian people by stressing tribalism's incompatibility with the superior values and norms of white civilization. For half a millennium, the white man's rule of law has most often served as the fundamental mechanism by which white society has absolved itself of injustices arising from its assumed right of domination over Indian people.

European-derived racist-imperialist discourse illuminates the continuing determinative role of racism and cultural imperialism in U.S. public discourses on the legal rights and status of Indian tribes. The racist attitude, focusing on the tribal Indian's

cultural inferiority as the source of white society's privilege of acting as rightful judge over the Indian, can be located in the discourses of seventeenth-century Puritan divines, nineteenth-century Georgia legislators, and twentieth-century members of Congress, the federal judiciary, and the federal executive branch.

The relationship between the thousand-year-old legacy of European racism and colonialism and U.S. public discourses of law and politics regarding Indian rights and status can be more precisely defined by focusing on the racist attitude itself. This racist attitude can be found recurring throughout the history of white society's contact with Indian tribalism. *The legacy of European colonialism and racism in federal Indian law and policy discourses can be located most definitively, therefore, in those Indian policy discourses that seek to justify white society's privileges or aggression in the Indian's country on the basis of tribalism's asserted deficiency and unassimilability.* That so many contemporary Indian policy discourses unhesitatingly cite tribalism's deficient difference as the legitimating source of white society's role as rightful judge over Indian people understandably causes great alarm to those who appreciate the significance of the circle in American Indian thought. The genocidal legacy of European racism and colonialism in the narrative traditions of federal Indian law continues to threaten tribalism with elimination from what once was the Indian's America.

NOTES

1. W. Benjamin, Illuminations 256–57 (H. Arendt ed., 1969).

2. A. de Tocqueville, Democracy in America 298–99 (J. Mayer & M. Lerner eds., G. Lawrence trans., 1966).

3. Quoted in F. Prucha, 1 The Great Father: The United States Government and the American Indians 218 (1984).

4. A. de Tocqueville, 1 Democracy in America 336–55 (H. Reeve trans., 1945), quoted in R. Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. Ran. L. Rev. 713, 718 (1986).

5. Quoted in R. Strickland, Fire and the Spirits 718 (1975).

6. 31 U.S. (6 Pet.) 515 (1832).

7. *Id.* at 561.

8. A. Guttman, States' Rights and Indian Removal 58 (1965).

9. See, e.g., *Andrew Jackson's First Annual Message to Congress* (Dec. 8, 1829), in 2 A Compilation of Messages and Papers of the Presidents 456–59 (J. Richardson ed., 1907).

10. W. Lumpkin, The Removal of the Cherokee Indians from Georgia 83, 196 (1969).

11. See Prucha, *supra* note 3, at 183–84.

12. *John Quincy Adams' Message to Congress* (Dec. 2, 1828), in 2 A Compilation of Messages, *supra* note 9, at 415.

13. *Id.* at 416.

14. *Governor Cass on the Need for Removal*, 30 N. Am. Rev. 62–121 (1830), reprinted in Guttman, *supra* note 8, at 30–36.

15. *Id.* at 31.

16. *Id.* at 35.

17. J. Locke, Two Treatises of Government (P. Laslett ed., rev. ed. 1963).

18. See K. Stamp, The Peculiar Institution: Slavery in the Antebellum South 18 (1956). It was Secretary Locke who drafted the Carolina Lord Proprietors' 1669 "Fundamental Constitutions," which granted every English colonial freeman "absolute power and authority over his negro slaves." See *id.*

19. See, e.g., R. Epstein, Takings (1987). For varying assessments of Locke's contributions to the narrative traditions of Anglo-American political and legal culture, see, e.g., C. Macpherson, The

Political Theory of Possessive Individualism (1962); J. Tully, A Discourse on Property: John Locke and His Adversaries (1980); L. Hartz, The Liberal Tradition in America (1955).

20. Locke, *supra* note 17, at 327.

21. *Id.* at 330.

22. *Id.* at 338.

23. *Id.* at 338–39.

24. There were "several" *hundred* American tribal nations, with widely disparate land use practices, traditions of wealth accumulation, and political organization at the time Locke wrote. See generally H. Driver, Indians of North America (2d ed. 1975).

25. Locke, *supra* note 17, at 343.

26. *Id.* at 341.

27. *Id.* at 343.

28. See generally R. Williams, *Jefferson, the Norman Yoke, and American Indian Lands*, 29 Ariz. L. Rev. 165 (1987).

29. R. Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 Wis. L. Rev. 219.

30. We are, after all, borrowing Foucault's haunting words: "doomed historically to history, to the patient construction of discourses about discourses, and to the task of hearing what has already been said." M. Foucault, The Birth of the Clinic: An Archaeology of Medical Perception xv–xvi (1975).

31. See M. Foucault, *Nietzsche, Genealogy, History*, in Language, Counter-Memory, Practice 139–64 (1977), which contains the best short account of Foucault's problematization of the idea of historical linear development in Western thought.

32. Foucault, *supra* note 30, at xv–xvi.

33. See Williams, *supra* note 29, at 267–89.

34. 435 U.S. 191 (1978).

35. *Id.* at 210.

36. *Id.*

37. See Williams, *supra* note 29, at 272–74.

38. *Oliphant*, 435 U.S. at 197.

39. *Id.* at 194–94.

40. *Id.* at 194.

41. *Id.*

42. *Id.*

43. See Williams, *supra* note 29, at 267–74.

44. *Oliphant*, 435 U.S. at 210.

45. *Id.* (quoting H.R. Rep. No. 474, 23d Cong., 1st Sess. 18 (1834)).

46. *Id.*

47. See Williams, *supra* note 29, at 272–74.

15. Desegregation as a Cold War Imperative

MARY L. DUDZIAK

At the height of the McCarthy era, when congressional committees were exposing "communist infiltration" in many areas of American life, the Supreme Court was upholding loyalty oath requirements, and the executive branch was ferreting out alleged communists in government, the U.S. attorney general filed a pro–civil rights brief in what would become one of the most celebrated civil rights cases in American history: *Brown v. Board of Education.* Although seemingly at odds with the restrictive approach to individual rights in other contexts, the U.S. government's participation in the desegregation cases during the McCarthy era was no anomaly.

In the years following World War II, racial discrimination in the United States received increasing attention from other countries. Newspapers throughout the world carried stories about discrimination against nonwhite visiting foreign dignitaries, as well as against American blacks. At a time when the United States hoped to reshape the postwar world in its own image, the international attention given to racial segregation was troublesome and embarrassing. The focus of American foreign policy at this point was to promote democracy and contain communism. However, the international focus on U.S. racial problems meant that the image of American democracy was tarnished. The apparent contradictions between American political ideology and practice led to particular foreign policy difficulties with countries in Asia, Africa, and Latin America. U.S. government officials realized that their ability to sell democracy to the Third World was seriously hampered by continuing racial injustice at home. Accordingly, efforts to promote civil rights within the United States were consistent with, and important to, the more central U.S. mission of fighting world communism.

The literature on desegregation during the 1940s and 1950s has failed to consider the subject within the context of other important aspects of American cultural history during the postwar era. Most scholars seem to assume that little outside the subject of race relations is relevant to the topic.[1] As a result, historians of *Brown* seem to write about a different world than do those who consider other aspects of postwar American culture.

A version of this chapter previously appeared as Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 Stan L. Rev. 61 (1988). Originally published in the *Stanford Law Review*.

The failure to contextualize *Brown* reinforces the sense that the movement against segregation somehow happened in spite of everything else that was going on. During a period when civil liberties and social change were repressed in other contexts, somehow, some way, *Brown* managed to happen.

This chapter begins an examination of the desegregation cases within the context of the cultural and political period in which they occurred. The wealth of primary historical documents on civil rights during the Cold War that explicitly draw connections between civil rights and anticommunism suggests that an effort to examine desegregation within the context of Cold War American culture may be more than an interesting addition to a basically well-told tale. It may ultimately cause us to recast our interpretations of the factors motivating the critical legal and cultural transformation that *Brown* has come to represent.

In one important deviation from the dominant trend in scholarship on desegregation, Derrick Bell has suggested that the consensus against school segregation in the 1950s was the result of a convergence of interests on the part of whites and blacks and that white interests in abandoning segregation were in part a response to foreign policy concerns and an effort to suppress the potential of black radicalism at home. According to Bell, without a convergence of white and black interests in this manner, *Brown* would never have occurred.[2] While Bell's work is important and suggestive, neither Bell nor other scholars have developed this approach historically.

One need not look far to find vintage 1950s Cold War ideology in primary historical documents relating to *Brown*. For example, the amicus brief filed in *Brown* by the U.S. Justice Department argued that desegregation was in the national interest in part because of foreign policy concerns. According to the Justice Department, the case was important because "[t]he United States is trying to prove to the people of the world, of every nationality, race and color, that a free democracy is the most civilized and most secure form of government yet devised by man."[3] Following the decision, newspapers in the United States and throughout the world celebrated *Brown* as a "blow to communism" and as a vindication of American democratic principles. As was true in so many other contexts during the Cold War era, anticommunist ideology was so pervasive that it set the terms of the debate on all sides of the civil rights issue.

In addition to its important consequences for U.S. race relations, *Brown* served U.S. foreign policy interests. The value of a clear Supreme Court statement that segregation was unconstitutional was recognized by the State Department. Federal government policy on civil rights issues during the Truman administration was framed with the international implications of U.S. racial problems in mind. And through a series of amicus briefs detailing the effect of racial segregation on U.S. foreign policy interests, the administration impressed on the Supreme Court the necessity for world peace and national security of upholding black civil rights at home.

As has been thoroughly documented by other historians, the federal government's efforts in the late 1940s and early 1950s to achieve some level of racial equality had much to do with the personal commitment of some in government to racial justice and with the consequences of civil rights policies for domestic electoral politics. In addition to these motivating factors, the effect of U.S. race discrimination on international relations during the postwar years was a critical motivating factor in the development of federal government policy. Without attention to the degree to which desegregation served

important foreign policy interests, the federal government's posture on civil rights issues in the postwar years cannot be fully understood.

American Racism in the Eyes of the World

Apart from pressure from civil rights activists and electoral politics at home, the Truman administration had another reason to address domestic racism: other countries were paying attention to it. Newspapers in many corners of the world covered stories of racial discrimination against visiting nonwhite foreign dignitaries and Americans. And as tension between the United States and the Soviet Union increased in the years after the war, the Soviets made effective use of U.S. failings in this area in anti-American propaganda. Concern about the effect of U.S. race discrimination on Cold War American foreign policy led the Truman administration to consider a pro–civil rights posture as part of its international agenda to promote democracy and contain communism.

In one example of foreign press coverage, in December 1946 the *Fiji Times and Herald* published "Persecution of Negroes Still Strong in America." According to the Fiji paper, "[T]he United States has within its own borders, one of the most oppressed and persecuted minorities in the world today." In the Southern states, "hundreds of thousands of negroes exist today in an economic condition worse than the out-and-out slavery of a century ago." Treatment of blacks was not merely a question of race discrimination; "it is frequently a question of the most terrible forms of racial persecution."

The article described the 1946 lynching of four blacks in Georgia. "This outrage," the article continued, followed Supreme Court action invalidating Georgia voting restrictions. "The decision gave the negro the legal right to vote but [Georgia governor Herman] Talmadge challenged him to exercise it. He also flung a defiance to the Court itself and asked the voters of his State to back him up, which they did." According to the paper, "Very few negroes dared to vote, even though the country's highest tribunal had found them entitled to. Most of those who did, or tried to, were badly mauled by white ruffians." The article noted that federal antilynching legislation had been proposed in the past, and "further attempts are certain in the next Congress."

The *Times and Herald* was not entirely critical. Reporting that a recent dinner honoring black journalists had brought together blacks and white Southerners, the paper concluded that "[t]he point is that the best culture of the south, in America, is opposed to the Bilbo-Talmadge anti-negro oppression and seems today more than ever inclined to join with the north in fighting it." Efforts against racial intolerance had particular consequences in the United States, for "there cannot be, on the basic tenants [*sic*] of Americanism, such a thing as second class citizenship." The issue also had broader implications, however. "The recognition and acceptance of the concept of a common humanity should, and must, shatter the longstanding bulwarks of intolerance, racial or otherwise, before anything entitled to call itself true civilisation can be established in America or any other country."

The American consulate in Fiji was unhappy with the *Times and Herald* article, which it saw as "an indication of certain of the anti-American and/or misinformation or propaganda now carried" in the paper. A response to the article seemed appropriate and necessary. "If and when a favorable opportunity occurs, the matter of the reasonableness or justification in the publication of such biased and unfounded material, obviously

prejudicial to American prestige throughout this area, will be tactfully broached to the Editor and appropriate government officials."

In Ceylon, American embassy officials were concerned about what they considered to be "Asian preoccupation with racial discrimination in the United States." Ceylon newspapers ran stories on U.S. racial problems picked up from Reuters wire service. In addition, a Ceylon *Observer* columnist focused on the issue, particularly the seeming contradiction of segregation in the capital of American democracy. Lakshman Seneviratne in an article quoted *Time* as saying, "In Washington, the seated figure of Abraham Lincoln broods over the capital of the U.S. where Jim Crow is the rule." According to Seneviratne, in Washington "the colour bar is the greatest propaganda gift any country could give the Kremlin in its persistent bid for the affections of the coloured races of the world, who, if industrialized, and technically mobilized, can well dominate, if domination is the obsession, the human race."

The effect of U.S. race discrimination on the country's leadership in postwar world politics was discussed in the Chinese press. The Shanghai *Ta Kung Pao* covered the May 2, 1948, arrest of U.S. senator Glen Taylor for violating Alabama segregation laws. Criticizing Taylor's arrest, the paper noted that "[t]he Negro problem is a problem of U.S. internal politics, and naturally, it is unnecessary for anybody else to meddle with it." However, the issue had international ramifications:

> [W]e cannot help having some impressions of the United States which actually already leads half of the world and which would like to continue to lead it. If the United States merely wants to "dominate" the world, the atomic bomb and the U.S. dollar will be sufficient to achieve this purpose. However, the world cannot be "dominated" for a long period of time. If the United States wants to "lead" the world, it must have a kind of moral superiority in addition to military superiority.

According to the paper, "[T]he United States prides itself on its 'liberal traditions,' and it is in the United States itself that these traditions can best be demonstrated."

The American consul general in Shanghai believed that the *Ta Kung Pao* editorial "discusse[d] the Negro problem in the U.S. in a manner quite close to the Communist Party line." The consul general preferred an editorial in the *China Daily Tribune* that cast American race discrimination as a problem generated by a small minority who were acting against the grain. According to that paper, "Prejudice against people of color seems to die hard in some parts of the United States despite all that President Truman and the more enlightened leaders of the nation are doing to ensure that race equality shall become an established fact."

Indian newspapers were particularly attuned to the issue of race discrimination in the United States. According to the American consul general in Bombay, "The color question is of intense interest in India." Numerous articles with titles like "Negro Baiting in America," "Treatment of Negroes a Blot on U.S.," and "Untouchability Banished in India: Worshipped in America" appeared in the Indian press. Regarding the latter article, the American consul general commented that it was "somewhat typical of the irresponsible and malicious type of story on the American Negro which appears not too infrequently in segments of the Indian press." The article was written by Canadian George T. Prud'homme, whom the consul general described as a "communist writer." It

concerned a trip through the South and included a photograph of a chain gang. According to Prud'homme, "The farther South one travels, the less human the Negro status becomes, until in Georgia and Florida it degenerates to the level of the beast in the field."

Prud'homme described an incident following his attempt to speak to blacks seated behind him on a segregated bus. He was later warned "not to talk to 'those damned niggers.'"

> "We don't even talk to niggers down here," said [a] blond young man. "You better not either . . . unless you want to get beaten up."
>
> I replied I didn't think the Negroes would attempt to beat me up with the bus half-filled with whites.
>
> *"It isn't the niggers that will beat you up, it's the whites you have to look out for,"* confided the driver. *"This ain't the North. Everything is different down here."*

Prud'homme's article discussed segregation, the history of the Ku Klux Klan, and the denial of voting rights through poll taxes and discriminatory voter registration tests. He believed that American treatment of blacks "strangely resembles the story of India under British domination." The "only bright spot in this picture" was provided by individuals such as a white Baptist pastor who was committed to racial equality. But the minister told Prud'homme, "If one of us fights for true democracy and progress, he is labelled a Communist. . . . That is an effective way of shutting him up."

Of particular concern to the State Department was coverage of U.S. racism by the Soviet media. The U.S. embassy in Moscow believed that a number of articles in 1946 "may portend stronger emphasis on this theme as [a] Soviet propaganda weapon." In August 1946, the U.S. embassy in Moscow sent the State Department a translation of an editorial from the periodical *Trud* that was "representative of the frequent Soviet press comment on the question of Negro discrimination in the United States." The *Trud* article was based on information the Soviets had gathered from the "progressive American press," and it concerned lynching and black labor in the South.

According to *Trud*, American periodicals had reported "the increasing frequency of terroristic acts against negroes," including "the bestial mobbing of four negroes by a band of 20 to 25 whites" in July 1946 in Monroe, Georgia. In another incident near Linden, Louisiana, "a crowd of white men tortured a negro war veteran, John Jones, tore his arms out and set fire to his body. The papers stress the fact that the murderers, even though they are identified, remain unpunished." U.S. census figures indicated that three-quarters of American blacks lived in the South. In the Southern "Black Belt," "the negroes are overwhelmingly engaged in agriculture, as small tenant-farmers, sharecroppers and hired hands. Semi-slave forms of oppression and exploitation are the rule." Blacks were denied economic rights because of the way the legal system protected the interests of the landowners upon whose property sharecroppers and tenant farmers labored. In addition, "[t]he absence of economic rights is accompanied by the absence of social rights. The poll tax, in effect in the Southern States, deprives the overwhelming majority of negroes of the right to vote." *Trud* observed that "[t]he movement for full economic, political and social equality is spreading among the negro population" but that "[t]his movement has evoked exceptional fury and resistance." According to the paper, "The progressive public opinion of the USA is indignant at the baiting of negroes,

and rightly sees in this one of the means by which reaction is taking the offensive against the working people."

By 1949, according to the U.S. embassy in Moscow, "the 'Negro question' [was] [o]ne of the principal Soviet propaganda themes regarding the United States." "[T]he Soviet press hammers away unceasingly on such things as 'lynch law,' segregation, racial discrimination, deprivation of political rights, etc., seeking to build up a picture of an America in which the Negroes are brutally downtrodden with no hope of improving their status under the existing form of government." An embassy official believed that "this attention to the Negro problem serves political ends desired by the Soviet Union and has nothing whatsoever to do with any desire to better the Negro's position." The "Soviet press seizes upon anything showing the position of the US Negro in a derogatory light while ignoring entirely the genuine progress being made in America in improving the situation."

A powerful critique of U.S. racism, presented before the United Nations, came from American blacks. On October 23, 1947, the NAACP filed a petition in the United Nations protesting the treatment of blacks in the United States called *An Appeal to the World*. The petition denounced U.S. race discrimination as "not only indefensible but barbaric." It claimed that racism harmed the nation as a whole. "It is not Russia that threatens the United States so much as Mississippi; not Stalin and Molotov but Theodore Bilbo and John Rankin; internal injustice done to one's brothers is far more dangerous than the aggression of strangers from abroad." The consequences of American failings were potentially global. "[T]he disfranchisement of the American Negro makes the functioning of all democracy in the nation difficult; and as democracy fails to function in the leading democracy in the world, it fails the world." According to W.E.B. Du Bois, the principal author of the petition, the purpose behind the appeal was to enable the UN "to prepare this nation to be just to its own people."

The NAACP petition "created an international sensation." It received extensive coverage in the American and foreign media. Meanwhile, U.S. attorney general Tom Clark remarked, "I was humiliated . . . to realize that in our America there could be the slightest foundation for such a petition." Although she was a member of the board of directors of the NAACP, Eleanor Roosevelt, who was also a member of the American UN delegation, refused to introduce the NAACP petition in the United Nations out of concern that it would harm the international reputation of the United States. The Soviet Union, however, proposed that the NAACP's charges be investigated. On December 4, 1947, the UN Commission on Human Rights rejected that proposal, and the UN took no action on the petition. Nevertheless, the *Des Moines Register* remarked that the petition had "accomplished its purpose of arousing interest in discrimination." Although the domestic press reaction was generally favorable, the West Virginia *Morgantown Post* criticized the NAACP for "furnishing Soviet Russia with new ammunition to use against us."

The Truman Justice Department first participated as amicus curiae in civil rights cases involving restrictive covenants.[4] In previous civil rights cases, the solicitor general participated when the litigation involved a federal agency[5] and when the question in the case concerned the supremacy of federal law.[6] A different sort of federal interest was involved in the restrictive covenant cases. According to Solicitor General Phillip Perlman, racially restrictive covenants hampered the federal government "in doing its duty in the fields of public health, housing, home finance, and in the conduct of foreign affairs."[7]

The brief for the United States in *Shelley v. Kraemer*[8] relied on the State Department's view that "the United States has been embarrassed in the conduct of foreign relations by acts of discrimination taking place in this country."[9] To support this argument, the brief quoted at length from the letter acting secretary of State Acheson had written to the Fair Employment Practices Commission in 1946.

Although not addressing the international implications of the case, the Supreme Court agreed with the result sought by the Justice Department. The Court ruled that enforcement of racially restrictive covenants in state courts constituted state action that violated the rights of blacks to equal protection of the laws.[10]

The solicitor general's office continued its efforts in civil rights cases in 1949. In *Henderson v. United States*,[11] the Justice Department took a position contrary to the Interstate Commerce Commission on the question of the validity of railroad dining-car segregation under the Interstate Commerce Act.[12] As in *Shelley*, an important motivation behind the government's antisegregation position was the international implications of segregation.[13] The *Henderson* brief elaborated more fully on the problem. One area in which international criticism of the United States manifested itself was the United Nations. The brief quoted from statements made by representatives of other governments in a UN subcommittee meeting that "typify the manner in which racial discrimination in this country is turned against us in the international field."[14] For example, a representative of the Soviet Union had commented, "Guided by the principles of the United Nations Charter, the General Assembly must condemn the policy and practice of racial discrimination in the United States and any other countries of the American continent where such a policy was being exercised."[15] Similarly, the representative from Poland "did not . . . believe that the United States Government had the least intention to conform to the recommendations which would be made by the United Nations with regard to the improvement of living conditions of the coloured population of that country.[16]

As it had in *Shelley*, the Justice Department made reference to foreign press coverage of U.S. race discrimination, noting that "[t]he references to this subject in the unfriendly foreign press are frequent and caustic."[17] This time the brief bolstered this claim with examples from Soviet publications. *The Bolshevik*, for example, carried an article claiming:

> The theory and practice of racial discrimination against the negroes in America is known to the whole world. The poison of racial hatred has become so strong in post-war America that matters go to unbelievable lengths; for example a Negress injured in a road accident could not be taken to a neighbouring hospital since this hospital was only for "whites."[18]

Through its reliance on UN statements and the Soviet press, the *Henderson* brief powerfully made the point that racial segregation hampered the U.S. government's fight against world communism.

The Impact of *Brown* on American Foreign Policy Interests

When *Brown v. Board of Education* was decided, the opinion gave the State Department the counter to Soviet propaganda it had been looking for, and the State Department wasted no time in making use of it. Within an hour after the decision was handed down,

the Voice of America broadcast the news to Eastern Europe.[19] An analysis accompanying the "straight news broadcasts" emphasized that "the issue was settled by law under democratic processes rather than by mob rule or dictatorial fiat."[20] The *Brown* broadcast received "top priority on the Voice's programs" and was to be "beamed possibly for several days, particularly to Russian satellites and Communist China." The *New York Times* quoted a Voice of America official as commenting that "[i]n these countries . . . the people would know nothing about the decision except what would be told them by the Communist press and radio, which you may be sure would be twisted and perverted. They have been told that the Negro in the United States is still practically a slave and a declassed citizen."[21]

The *Brown* decision had the kind of effect on international opinion that the U.S. government had hoped for. Favorable reaction to the opinion spanned the globe. On May 21, 1954, for example, the president of the municipal council of Santos, São Paulo, Brazil, sent a letter to the U.S. embassy in Rio de Janeiro celebrating the *Brown* decision. The council had passed a motion recording "a vote of satisfaction" with the ruling. They viewed *Brown* as "establishing the just equality of the races, essential to universal harmony and peace." The council desired that "the Consul of that great and friendly nation be officially notified of our desire to partake in the rejoicing with which the said decision was received in all corners of the civilized world."

Newspapers in Africa gave extensive coverage to the decision. According to a dispatch from the American consul in Dakar, Senegal, *Brown* was "greeted with enthusiasm in French West Africa although the press has expressed some slight skepticism over its implementation." *Afrique Nouvelle*, a weekly paper that was a "highly vocal opponent of all racial discrimination," carried an article under the headline "At last! Whites and Blacks in the United States on the same school benches." The dispatch noted that the writer was concerned that there would be

> "desperate struggles" in some states against the decision but expresses the hope that the representatives of the negroes and the "spiritual forces" of the United States will apply themselves to giving it force and life. The article concludes by saying that "all the peoples of the world can salute with joy this measure of progress."

The American consul concluded the dispatch by observing:

> While it is, of course, too soon to speculate on the long range effects of the decision in this area, it is well to remember that school segregation more than any other single factor has lowered the prestige of the United States among Africans here and the over-all results, therefore, can hardly fail to be beneficial.

Although the initial decision to participate in *Brown* had been made by the Truman administration, the Republican National Committee (RNC) was happy to take credit for it. On May 21, 1954, the RNC issued a statement that claimed that the decision "falls appropriately within the Eisenhower Administration's many-frontal attack on global Communism. Human equality at home is a weapon of freedom. . . . [I]t helps guarantee the Free World's cause."[22]

Conclusion

The desegregation cases came before the Court at a time when the sanctity of American democracy had tremendous implications for U.S. foreign policy interests. The United States hoped to save the world for democracy and promoted its ideology and form of government as providing for greater personal freedom. In the United States, the Voice of America proclaimed, the Bill of Rights and the Constitution protected American citizens from state tyranny. Yet as news story after news story of voting rights abuses, state-enforced segregation, and lynchings appeared in the world media, many questioned whether American constitutional rights and democratic principles had any meaning. In many African and Asian countries, where issues of race, nationalism, and anticolonialism were of much greater import than Cold War tensions between the superpowers, the reality of U.S. racism was particularly problematic. America could not save the Third World for democracy if democracy meant white supremacy. The Soviet Union's efforts to take advantage of this American dilemma reinforced its Cold War implications.

In responding to foreign critics, State Department officials attempted to characterize American racism as a regional, rather than a national, problem and as something that was on its way out. They argued that democracy was working and that it would eventually overcome the anachronistic practices of a marginal few. The desegregation cases posed a threat to this characterization. If the Supreme Court had ruled in favor of the defendants in *Shelley*, *Henderson*, *Sweatt*, *McLaurin*, and *Brown*, the Court would have reaffirmed the idea that the American Constitution accommodated the racist practices challenged in those cases. American embassy officials in Nigeria would have found it difficult to counter arguments that the Communist Party was more committed to the interests of people of color if the Court had interpreted the document embodying the principles of democracy and individual rights to be consistent with racial segregation.

NOTES

1. As Gerald Horne has noted, "The fact that the *Brown* ruling came in the midst of a concerted governmental campaign against international and domestic communism is one of the most overlooked aspects of the decision." G. Horne, Black and Red: W.E.B. Du Bois and the Afro-American Response to the Cold War, 1944–1963, at 227 (1986).

2. D. Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518 (1980), reprinted in D. Bell, Shades of Brown: New Perspectives on School Desegregation (1980); see also D. Bell, *Racial Remediation: An Historical Perspective on Current Conditions*, 52 Notre Dame L. Rev. 5, 12 (1976).

3. Brief for the United States as Amicus Curiae at 6, Brown v. Bd. of Educ., 347 U.S. 483 (1954).

4. See Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948). According to Solicitor General Phillip Perlman, the brief filed in the restrictive covenant cases was "the first instance in which the Government had intervened in a case to which it was not a party and in which its sole purpose was the vindication of rights guaranteed by the Fifth and Fourteenth Amendments." J. Elliff, The United States Department of Justice and Individual Rights 1937–1962, at 258 (1987) (quoting address by Perlman to the National Civil Liberties Clearing House (Feb. 23, 1950)).

Because my purpose is to examine the Truman administration's participation in these cases, this chapter does not dwell on the crucial role in the cases played by the NAACP. For excellent treatments of the NAACP's litigation efforts, see M. Tushnet, The NAACP's Legal Strategy Against Segregated Education, 1925–1950 (1987); R. Kluger, Simple Justice (1975).

5. See Mitchell v. United States, 313 U.S. 80 (1941).

6. See Taylor v. Georgia, 315 U.S. 25 (1942).

7. Oral argument of Solicitor General Perlman, 16 U.S.L.W. 3219 (Jan. 20, 1948) (paraphrased account of argument); see also C. Vose, Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases 200 (1959).

8. 334 U.S. 1 (1948). In *Shelley*, whites sold residential property to blacks in violation of a covenant among landowners prohibiting sales to nonwhites. State supreme courts in Missouri and Michigan had ruled that the covenants were enforceable. *Id.* at 6–7. The question in *Shelley* was whether judicial enforcement of the covenants constituted state action violating the Fourteenth Amendment rights of the blacks who purchased the property. The Supreme Court ruled that it did. *Id.* at 20.

9. Brief for the United States as Amicus Curiae at 19, Shelley v. Kraemer, 334 U.S. 1 (1948) (quoting letter from Ernest A. Gross, legal adviser to the secretary of state, to the attorney general (Nov. 4, 1947)).

10. 334 U.S. at 20.

11. 339 U.S. 816 (1950).

12. The Interstate Commerce Act provided that "[i]t shall be unlawful for any common carrier . . . to make, give, or cause any undue or unreasonable preference or advantage to any particular person . . . in any respect whatsoever; or to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Interstate Commerce Act, ch. 722, §5(a), 54 Stat. 898, 902, 49 U.S.C. §3(1) (1946) (codified as amended at 49 U.S.C. §1074(b) (1982)). The Interstate Commerce Commission ruled that the Southern Railway Company's practice of providing separate seating behind a curtain in dining cars for black passengers did not violate the act. See Henderson v. United States, 339 U.S. 816, 820–22 (1950). On appeal, the ICC defended its interpretation of the act, and the Justice Department filed a brief on behalf of the United States arguing that (1) dining car segregation violated the act, and (2) segregation violated the Equal Protection Clause. See Brief for the United States at 9–11, Henderson v. United States, 339 U.S. 816 (1950).

13. The brief quoted from the same letter from Dean Acheson that the department had relied on in *Shelley*. See Brief for the United States at 60–61, Henderson, 339 U.S. at 816.

14. *Id.* at 61.

15. *Id.* (quoting United Nations, General Assembly, *Ad Hoc* Political Committee, Third Session, Part II, Summary Record of the Fifty-Third Meeting (May 11, 1949), at 12).

16. *Id.* (quoting United Nations, General Assembly, *Ad Hoc* Political Committee, Third Session, Part II, Summary Record of Fifty-Fourth Meeting (May 13, 1949), at 6).

17. *Id.*

18. *Id.* at 61 n.73 (quoting G. P. Frantsov, *Nationalism—The Tool of Imperialist Reaction*, The Bolshevik (U.S.S.R.), no. 15, 1948).

In another example, a story in the Soviet *Literary Gazette* titled "The Tragedy of Coloured America" stated:

> It is a country within a country. Coloured America is not allowed to mix with the other white America, it exists within it like the yolk in the white of an egg. Or, to be more exact, like a gigantic ghetto. The walls of this ghetto are invisible but they are nonetheless indestructible. They are placed within cities where the Negroes live in special quarters, in buses where the Negroes are assigned only the back seats, in hairdressers where they have special chairs.

Id. (quoting Berezko, *The Tragedy of Coloured America*, Literary Gazette (U.S.S.R.), no. 51, 1948).

19. N.Y. Times, May 18, 1954, at 1, col. 7. The Voice of America's ability to effectively use the decision was enhanced by the fact that the opinion was short and easily understandable by lay persons. Chief Justice Earl Warren said, "[I wrote] a short opinion so that any layman interested in the problem could read the entire opinion [instead of getting just] a little piece here and a little piece there. . . . I think most of the newspapers printed the entire decision." J. Wilkinson, From Brown to Bakke: The Supreme Court and School Integration, 1954–1978, at 30 (1979) (quoting H. Abraham, Freedom and the Court 372 n.90 (3d ed. 1977)).

20. N.Y. Times, May 18, 1954, at 1, col. 7.

21. *Id.*

22. Republican National Committee, News Release, May 21, 1954, at 3, White House Files—Civil Rights—Republican National Committee 1954, Box 37, Philleo Nash Papers, Harry S. Truman Library.

President Eisenhower himself was less enthusiastic. He repeatedly refused to publicly endorse *Brown*. See Robert Burk, The Eisenhower Administration and Black Civil Rights 144, 162, 165–66 (1984). See generally Michael Mayer, *With Much Deliberation and Some Speed: Eisenhower and the* Brown *Decision*, 52 J. S. Hist. 43 (1986). Eisenhower criticized "foolish extremists on both sides" of the school desegregation controversy, Burk, *supra*, at 163, and in an effort to distance his administration from the Supreme Court's ruling, he "rebuked Vice President Nixon for referring to Earl Warren as the 'Republican Chief Justice.'" *Id.* at 162. Chief Justice Warren was angered by Eisenhower's stance. He believed that if Eisenhower had fully supported *Brown*, "we would have been relieved . . . of many of the racial problems that have continued to plague us." E. Warren, The Memoirs of Earl Warren 291 (1977); see Wilkinson, *supra* note 19, at 24.

16. Liberal McCarthyism

How Four Radical Professors Lost Their Jobs and How Their Displacement Contributed to the Dissemination of Critical Thought

RICHARD DELGADO

In the late 1960s and early 1970s, a wave of firings of left-wing professors swept academia. I focus on four because each, years later, played a part in the birth of critical legal studies and critical race theory. Each of these professors lost his job because of liberal, not conservative, pressure and action. These cases are only the proverbial tip of the iceberg. The discipline of sociology might have suffered as many as two hundred losses during this period for political reasons. Intriguingly, Canada also saw a similar minipurge of leftists. Each of the professors—and probably many others—lost his job under circumstances suggesting that his superiors did not want him consorting with, mobilizing, serving as a role model for, or teaching leftist philosophy and social analysis to the many students of color who were arriving on campus around this time. An earlier excerpt (see Chapter 6) gives examples of this attitude and mind-set among top educational leaders. Here I show how these forces played out in specific careers.

David Trubek

David Trubek was a young, Yale-trained professor who taught at Yale Law School during the turbulent late 1960s through the early 1970s. He attended college at the University of Wisconsin, after which he enrolled at Yale Law School. Trubek excelled academically, serving on the *Yale Law Journal* and earning honors from the Order of the Coif. Upon joining the faculty of Yale Law School, in addition to teaching his classes, he directed a research program on the role of law in Third World countries. Earlier, Trubek had worked as an attorney for the State Department and as a legal adviser at the Agency for International Development mission in Brazil. He also served as a consultant for the State Department in Africa and for the Ford Foundation in Brazil.

Despite his establishment credentials, Trubek provoked the ire of some of the older faculty when he took part in a study group at Yale that included students Duncan Kennedy and Mark Tushnet and led, a few years later, to the formation of the critical legal studies movement. The old guard took an even dimmer view of him when, along

A version of this chapter previously appeared as Richard Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 Iowa L. Rev. 1505 (2009). Originally published in the *Iowa Law Review*.

with five other young left-leaning faculty members, he sided with the students who were clamoring for change at the law school. Yale was then shell-shocked by the protests that had rocked the school beginning earlier in the decade and in no mood for more. The school was particularly leery of the possibility that the new generation of black students who were beginning to arrive would turn out to be just as hard to control as the white students who had been protesting the war, racial injustice, and grading policy.

The Yale law faculty were champions of legal realism—a school of thought that saw law as a tool of social reform. When student protesters charged them with being liberal apologists for an unjust system, the faculty were shocked and taken aback. Many of them had advocated for civil rights in the South, established the Peace Corps, and served in liberal administrations. Yet their own students were accusing them of being incremental reformers and apologists for an unfair social order.

The faculty must have thought that the students—all from good families—would settle down one day. But what about the blacks? If they became radicalized, all of Yale's investment in them would be wasted. Accordingly, when six professors—Trubek, Richard Abel (discussed below), and four other young radical professors—sided with the students, the older faculty must have been particularly concerned over the influence they might have on the first generation of blacks who had made Yale Law School their home.

Yale Law School dean Louis Pollak was particularly outspoken in his belief that Yale must train black leaders, not revolutionaries. Meanwhile, his faculty worried about black radicals and the Black Law Student Union more than their noisier, more numerous white counterparts in the protest movement. When some of the six professors supported closing Yale Law School to enable a student moratorium and a teach-in to proceed, faculty attitudes against the group hardened.

When, in a short span, Yale Law School denied tenure to each of the six, Trubek among them, one termed it—probably correctly—a structural firing, not a series of individual actions, necessary to reestablish Yale's center. Some of the six wore long hair and sided conspicuously with the students. All had excellent records—one was a double Supreme Court clerk—and had published, in some cases, copiously.

After leaving Yale, Trubek secured a position at the University of Wisconsin, where he played a part in strengthening that school's law-and-society emphasis and, later, its international programs. In an ironic twist, his excellence as a teacher and publisher led, years later, to an offer to serve as a visiting professor at Harvard Law School. During his visiting term at Harvard, the law faculty voted to make him a permanent offer, which President Derek Bok vetoed, most likely on political grounds. Trubek thus suffered a double purge at the hands of the nation's two leading law schools.

Trubek never relaxed his efforts on behalf of social reform, however. Back at Wisconsin a second time, he worked to strengthen the Hastie Fellow program, which trains promising minority law graduates for careers in teaching. His efforts on behalf of one of that program's star graduates, Kimberlé Crenshaw, played a direct role in the development of critical race theory when he advised her in connection with a dissertation that became a landmark critical race theory article.[1] Years later, when Crenshaw, then a University of California, Los Angeles, law professor, proposed to convene a small group of professors of color at a convent outside Madison, Wisconsin, Trubek readily agreed to sponsor the event, which turned into the founding critical race theory conference mentioned in an earlier chapter.

Richard Abel

Richard Abel was also one of the six young faculty members purged at Yale in the late 1960s. Like Trubek, he was interested in comparative legal sociology, as well as African law. A graduate of Columbia, his interests and personal style were nontraditional; his scholarship and thought, forceful and, at times, scathing. He believed American law was poorly theorized and inadequate in its conception of society. With the New Haven Black Panther trial approaching, Abel focused his torts class on the police-citizen relationship. Later, he began offering classes that focused on family law and the relation of families to the state.

As a junior faculty member, Abel produced a relatively large volume of scholarship, some of which took the form of critical reviews of his Yale colleagues' work. When he regularly sided with the students and opposed the university's policy of neutrality vis-à-vis the Vietnam War, dressed more casually than the other professors, and avoided eating with them in the law-school cafeteria, his fate was sealed.

Abel left Yale quietly, without challenging the faculty's decision, after being told that if he did so the law school would not stand in the way of his finding another job. He secured a position at UCLA, where he wrote a great deal and became editor of the prestigious *Law and Society Review* and president of the national association of the same name. Abel later said that he believed the firing of "so many in his generation" was the product of a broadly felt desire to appease conservative interests and ensure that schools performed their function of passing on cultural values without discordant notes.

Like Trubek, Abel would go on to play an important, although indirect, role in the formation of critical legal studies and critical race theory. He had been a member of the Conference of Critical Legal Studies (CLS) dating back to his student days. As a UCLA professor, he served on the planning committee of that organization's national conference in Los Angeles in the mid-1980s. When two young minority professors requested a forum at the conference to present their critique of the CLS position on race, Abel readily agreed and organized a panel where a group of young professors of color delivered the papers that laid the foundations of critical race theory.

Staughton Lynd

Unlike the other professors shown the door at Yale during this period, Staughton Lynd was a professor of history rather than of law. The son of sociologists Robert Staughton Lynd and Helen Lynd—the authors of a groundbreaking study ("Middletown") of social relations in Muncie, Indiana—Lynd absorbed some of the socialist idealism and scholarly drive of his prominent parents. After serving in a noncombatant, conscientious-objector role in the U.S. military, Lynd earned his doctorate at Columbia and began his teaching career at a historically black college, Spelman, where he met Howard Zinn.

During the early 1960s, Lynd directed a Student Nonviolent Coordinating Committee (SNCC) educational program in the South before relocating with his wife, Alice, and three children to New Haven, where he accepted a position teaching history at Yale.

Early in his career, Lynd emerged as an outspoken opponent of the Vietnam War, basing his objections to it on his nonviolent pacifism, nurtured in the Quaker religion. He drew intense criticism from the public and many in the Yale community when he

made an unauthorized trip to North Vietnam, causing many Yale alumni to erupt in indignation and demand that Kingman Brewster fire him. Many of his colleagues shook their heads, as well.

Brewster criticized the young scholar's judgment in going to Vietnam and getting his head bloodied in demonstrations, yet he adamantly defended Lynd's right to protest against the war. At that time, Lynd was developing an approach to history that was both activist and concerned with "history from below"—the stories of workers, blacks, and war resisters who shaped history through small, nearly invisible actions—rather than the traditional version emphasizing generals, kings, and wars; for example, Lynd wrote one book that expressly linked black radicals to principles of American democracy and noted that they were truer to those principles than were the founding fathers.

Lynd became a frequent speaker at rallies and demonstrations and authored a series of well-received books on history, resistance, and radical politics. When it became clear that, like Trubek and Abel, he would not receive tenure at Yale, he began searching for history jobs at lesser schools, including ones in Chicago. Roosevelt University offered him an appointment, which he accepted. However, the university rescinded its offer in the face of public pressure.

Lynd then understood that he could not teach history at any American university and was effectively blacklisted. He thus enrolled at the University of Chicago Law School, determined to learn and practice labor law. His wife, Alice, followed his path a few years later, earning her law degree from the University of Pittsburgh. Lynd then settled in nearby Youngstown, Ohio, a steel town, where he practiced labor law, represented unions, and has devoted the rest of his career to improving the life of America's working men and women.

Even after he left academic life, Lynd continued to publish books and articles about workers, U.S. history, and nonviolent socialism. A number of his writings appear excerpted in Derrick Bell's casebook *Race, Racism, and American Law*, where they document various vital points, enabling Bell to establish his material-determinist view of American racial history. Among other things, Bell cites Lynd to support Bell's view that the framers implicitly aimed the Constitution at protecting the institution of slavery through no fewer than six clauses, none of them mentioning the word but nevertheless calculated to ensure its continuation in a nation ostensibly committed to equality for all.

Like the abovementioned figures, Lynd played a significant role in setting the stage for critical race theory. Even after his expulsion from the academy, Lynd contributed to a climate—and, indirectly, through his influence on Bell—that enabled radical history and critical approaches to law to develop and flourish.

Anthony Platt

When Anthony Platt arrived in Berkeley in the mid-1960s to begin a tenure-track professorship in the School of Criminology, he was, in his own words, "the golden-haired boy." With a degree from Cambridge, a doctorate from the University of California, Berkeley, and a book in the works that was to become *The Child Savers*, an award-winning study of the American juvenile-justice system, Platt's prospects seemed limitless. When his classes on crime and policing became hugely popular, drawing hundreds of students and filling large lecture halls, his tenure seemed assured.

And so it continued through the succession of committee votes, all enthusiastic, including the seemingly inevitable final approval by Chancellor Albert Bowker. Platt's file had proceeded through every single university step but the last, approval by the University of California Board of Regents, when something unprecedented happened.

Platt, who was as sympathetic to student causes as were Trubek, Abel, and Lynd on the East Coast, had gone as an official observer to a demonstration in 1969 at People's Park in Berkeley. This traditional grassy gathering place for street people, students, protesters, speakers, and campus hangers-on was in transition. The university claimed it, planning to develop it for a new campus facility. The town wanted it closed in the interim, so that it would not continue to serve as a magnet for drug dealers and petty criminals. A large, floating contingent of radicals, students, and street people claimed it as their own.

When word of an impending clash, with the park's defenders on one side and the city of Berkeley and campus police on the other, reached Platt, he went to the park with the intention of helping keep order and preventing violence. When the demonstration did turn violent, Platt approached a police officer who was forcibly subduing one of the protesters. Identifying himself as a University of California, Berkeley, faculty member, Platt asked the officer whether it was absolutely necessary to beat the young man, who was not resisting arrest but merely trying to shield himself from the rain of blows the officer was inflicting on him. The officer immediately placed Platt under arrest. The incident became a minor cause célèbre when the local and national press covered the event, mentioning the arrest of a University of California professor.

On learning of the incident, the regents withdrew Platt's file from consideration and sent it back to the chancellor for further review. Ordinarily, files that reach the regents receive rubber-stamp approval. But this one did not. The regents were then a conservative body, and any whiff of an antiauthority attitude from a professor could easily arouse their attention.

When the case reached Bowker a second time, he convened a committee to reexamine Platt's scholarship, teaching, and other credentials and advise him whether they justified tenure. The second committee caught the chancellor's drift and, after reviewing Platt's file, recommended against tenure. Shortly after that, a Berkeley jury acquitted Platt of charges arising out of his People's Park arrest. He returned to his classes and filed a series of university appeals, all of which were unavailing. After winning his criminal case, he filed a civil case in a local court for false arrest, winning a substantial judgment.

The golden-haired boy's career at elite UC Berkeley was over. Unlike Staughton Lynd, however, Platt was able to secure a position teaching social work at California State University, Sacramento. Unlike the elite campuses of the UC system, which enroll only those in the top one-eighth of their high school classes (and in Berkeley's case, much higher), California State campuses like the one in Sacramento where Platt got his second job cater to those in the top one-third, and neither offer doctorate degrees nor emphasize research in the way the UC schools do. Platt married a prominent historian, Cecilia O'Leary, who currently teaches at California State University, Monterey Bay, and is the author of leading books and articles. Platt continued to write about politics and analysis of the social order, including a book about the Nuremberg Laws. He also serves on the editorial board of *Social Justice*, a leading outlet for left-wing thought that has published a great deal of work on critical criminology, race, and critiques of capitalism.

Life in the Hinterlands: How Four Radical Professors Experienced Life After Elite Academia

As mentioned, each of the professors considered above continued teaching and writing about law, history, or sociology after suffering rejection from an elite school. Each made peace with his departure, either with a new career (Lynd) or life at a school outside the top tier (Abel, Trubek, Platt). Each wrote books or articles contributing to radical scholarship and taught students, some of whom, like Kimberlé Crenshaw, went on to make contributions almost equal to those of their mentors and teachers.

One, Abel, helped form a new legal movement (CLS) and played a part in helping give birth to another (critical race theory). A second, Trubek, went on to contribute to two leftist movements in the law (law and society and CLS). He also helped nurture Kimberlé Crenshaw's career and scholarship, and when she decided to convene the founding conference of critical race theory, his institute at the University of Wisconsin sponsored the event.

Lynd continued to write, speak, and litigate on behalf of unions and workers' rights. His work found its way into one of the founding documents of critical race theory, Derrick Bell's casebook, six editions of which have been influencing generations of law students.

Platt taught the largest number of students. Over a nearly forty-year career, he has taught thousands of California youth, many of them nonwhite, and has written scholarship and edited a journal that has published the work of many scholars across the nation of a persuasion similar to his.

None of the scholars stole away into oblivion. Each continued teaching and writing about radical thought. Far from discouraging them, the establishment merely forced them—at some inconvenience, to be sure—to carry out their work somewhere else. A fair observer would conclude that this is something that each did with dispatch and more than a little success.

Why It Is Hard to Kill an Idea

Critical race theory grew and thrived in part because of the imaginative and organizational skills of small groups of scholars and organizers. But it also appeared at a particular moment and on a set scene. An earlier purge of campus leftists, hounded out of their jobs by a liberal educational establishment, ironically released energies and talents that produced writing, student scholarship programs, mentors, journals, and specialized classes in a number of nonelite colleges and universities. Administrators at elite schools believed they were acting in the best interests of minority students, who were beginning to arrive at their campuses in great numbers. But by purging their ranks of nonconforming professors, they ended by increasing the dissemination of radical thought around the nation.

What lessons might we draw from this sequence of events? First, if Karl Marx was even partially right about the instability of a system of rigid capitalism, it would appear that ideological rigidity is apt to produce its own paradoxical effect as well. Ideas are not easy to kill, and education is an inherently destabilizing force that cannot readily

be contained. The young seem, by nature, particularly receptive to new ideas, especially when the person in front of the classroom offers provocative insights.

Will the lesson of the late 1960s and early 1970s have any bearing on today's scene? As the United States confronts a growing population of color, economic contraction, the war on terror, worldwide religious fundamentalism, and challenges from overseas competitors, elite forces in government and education seem poised to respond with pressures for conformity to maintain the current order as long as possible. If so, the handful of celebrated cases (such as Ward Churchill and Norman Finkelstein, sidetracked at the University of Colorado and DePaul, respectively) appearing in the headlines may be harbingers of things to come. More intellectual diasporas may lie ahead, resulting in a further cycle of incubation, gathering forces, and organizing into the foreseeable future.

NOTE

1. The article is Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331 (1988), in which Crenshaw thanks Trubek and cites his scholarship. A landmark of the critical race theory genre, Crenshaw's article points out the defects of both liberal and conservative approaches to antidiscrimination law and calls for a new, critical alternative.

17. The "Caucasian Cloak"

Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest

ARIELA J. GROSS

> I do not think the Mexicans in this County are intelligent enough and speak English well enough and know enough about the law to make good jurors. Besides, their customs and ways are different to ours and I do not consider them, for that reason, to be well enough qualified as Jurors. . . . The court has never at any time by act or otherwise said or done anything that . . . indicated . . . discrimination with reference to races.[1]

> Mexican people . . . are not a separate race but are white people of Spanish descent.[2]

> [A]bout the only time that so-called Mexicans—many of them Texans for seven generations—are covered with the Caucasian cloak is when the use of that protective mantle serves the ends of those who would shamelessly deny to this large segment of the Texas population the fundamental right to serve as jury commissioners, grand jurors, or petit jurors.[3]

The history of Mexican Americans and Jim Crow in the Southwest suggests the danger of allowing state actors or private entities to discriminate on the basis of language or cultural practice. Race in the Southwest was produced through the practices of Jim Crow, which were not based explicitly on race but rather on language and culture inextricably tied to race. When one considers three sets of encounters between Mexican Americans and the state in mid-twentieth-century Texas and California—trials concerning miscegenation, school desegregation, and jury exclusion—one sees how state actors used Mexican Americans' nominal white identity under the law to create and protect Jim Crow. Whiteness operated as a "Caucasian cloak" to obscure the practices of Jim Crow and make them appear benign, whether in the jury or school setting. If Mexican Americans were white, then they were represented as long as whites were. At the same time, Mexican American civil rights leaders as well as ordinary individuals in the courtroom did not simply identify as white; some showed a more complex understanding of "Mexican" as a mestizo race, while others pointed to the idea of race

A version of this chapter previously appeared as Ariela J. Gross, *The "Caucasian Cloak": Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*, 95 Geo. L.J. 337 (2007). Originally published in the *Georgetown Law Journal*.

as a status produced by racist practice. In twentieth-century Texas and California, cultural discrimination was racial discrimination, so that discrimination on the basis of language ability and other cultural attributes, even today, requires careful scrutiny under antidiscrimination law.

In 1954, two weeks before the U.S. Supreme Court handed down its famous decision in *Brown v. Board of Education*, it decided the case of *Hernandez v. Texas*, striking down Pete Hernandez's murder conviction because Mexican Americans had been systematically excluded from the Texas jury that tried him. The Court held that Mexican Americans, whether or not they were legally white, had been treated as a "separate class in Jackson County, distinct from 'whites.'" Decades later, in the 1991 case of *Hernandez v. New York*, the Supreme Court approved a prosecutor's use of peremptory challenges to strike Latinos from the jury, based on the "race-neutral" explanation that Spanish speakers would not accept the translator's version of the trial testimony. By one view, the story of these two *Hernandez* cases makes perfect sense: the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution prohibits discrimination on the basis of race or national origin but allows it on other rational bases, such as language or culture.

The history of Mexican Americans in the Southwest generally demonstrates that state officials have been describing their discriminatory practices in terms of language and culture for most of the twentieth century, even when they were engaging in fairly explicit racial discrimination. Thus, the county sheriff quoted above could, in the same breath, explain his belief that Mexican Americans were unintelligent and also assert that they were excluded from jury service on the basis of their customs, skills, and language ability rather than their race.

In the twentieth-century Southwest, employers, schools, social institutions, and government actors tied race to culture. As the appellant in *Hernandez v. Texas* argued, these private and state actors used presumed language ability as an excuse for segregation and threw a "Caucasian cloak" over discrimination, arguing that Mexican Americans were white and therefore were represented on juries as long as whites were represented.

Mexican Americans occupy a unique position in the history of race in the United States, shaped heavily by formal, positive law. When Texas and California became part of the United States as a result of the Mexican-American War, thousands of people already living there, who had been Mexican, became U.S. citizens by the terms of the Treaty of Guadalupe Hidalgo. This treaty guaranteed to them U.S. citizenship as well as rights to property unless they declared their intent to remain Mexican citizens within the year. Nevertheless, while a small elite of Mexican American landholders who could prove that they were "Spanish" maintained white status, the majority of "Mexicans" were viewed and treated by Anglos as a separate race.

Most "Mexicans" worked first on the railroads and then in agriculture. The mass of agricultural workers, like African Americans in the Southeast, were sharecroppers for white landlords and were excluded from schools, political institutions, and public accommodations. As Mexican immigrants flooded into the United States in the early twentieth century, they swelled the ranks of poor agricultural laborers isolated in segregated labor markets. Unlike European immigrants to Northern cities who were able to move up out of urban ghettoes through access to education and political patronage, Mexican Americans, like African Americans, faced a more thoroughgoing exclusion.

However, despite the institutional similarities between the forms of discrimination experienced by Mexican Americans and African Americans under Jim Crow, the two groups' legal statuses were significantly different. State segregation statutes did not specifically target Mexican Americans; much of the discrimination they faced was de facto. Yet they were also in a different position from early twentieth-century Asian immigrants, whose right to naturalize as formal citizens depended on the 1790 Immigration and Naturalization Act reserving citizenship for "free white person[s]." Because the Treaty of Guadalupe Hidalgo had guaranteed citizenship to Mexicans in Texas in 1848, federal courts interpreted the treaty to make all future Mexican immigrants eligible for naturalization. Thus, unlike the Japanese and South Asian Indians who argued before federal courts that they should be citizens because they were white, Mexican Americans were held by federal and state courts to be white because they were citizens—"white by treaty."[4]

This unique legal status meant that the far-reaching exclusion of Mexican Americans from full social and political citizenship had to be justified on cultural, rather than racial, grounds. State officials in Texas and California—county attorneys, sheriffs, school board presidents—who viewed Mexican Americans as an inferior race and treated them that way learned over the course of the mid-twentieth century to explain their exclusion of Mexican Americans on the basis of language and culture rather than race.

In the decades before *Hernandez* and *Brown*, Mexican American as well as African American civil rights litigators had been attempting to use the Fourteenth Amendment guarantee of equal protection to gain access to full citizenship and achieving only limited gains. Yet despite Mexican Americans' repeated defeats in the courts, the constitutional prohibition on overt racial discrimination by the state meant that the parties in trials were much more circumspect about what they said regarding race and status. State officials—like Cecil Walston, the Menard County sheriff—were often extraordinarily unselfconscious about admitting their beliefs that Mexican Americans were an inferior race or, at the very least, an inferior group of people. But they made certain to couch their bias in cultural terms.

Twentieth-century Americans were struggling just as much as their nineteenth-century counterparts to determine how race would shape citizenship. It may be tempting to imagine that this equation between race and culture—so familiar in our own time to the readers of Dinesh D'Souza and Thomas Sowell (both neoconservative writers)—was readily available to the actors in these cases and that white officials could simply invoke it freely to deny access to a group they perceived as nonwhite. On the contrary, this notion of cultural racism and the ways it might be used to segregate and disenfranchise a group of people were actually being worked out via these very trials and others like them elsewhere in the United States (as well as in the writings of academics, the debates of legislators, and so on). Just as it had taken work to create the antebellum binary system of black and white (not at all obvious in a society that was in fact multiracial and diverse) and just as it had taken work to create the Jim Crow system of absolute racial segregation (not at all obvious in a society that was in fact created of a wide variety of interracial relationships), so did it take work to establish this contemporary view of race, in which racial inequality is justified on the grounds of not biology but culture. While the trials I explore may not lay bare the psychology of the participants, they do reveal state officials working out their strategies of cultural racism, even as Mexican American civil rights litigators adjusted their own strategies in response.

Particularly hard to answer is the question of how Mexican Americans viewed themselves. Only perhaps in the miscegenation cases do we see relatively untutored witnesses describing the racial identity of neighbors and struggling to explain what they mean by "Mexican." In civil rights cases, as well as in letters, petitions, and other forms of advocacy, Mexican Americans used a spectrum of languages to identify their racial and national identity, so that it is difficult to know which statements they really meant and which ones were attempts to score points with white lawmakers, judges, or juries. It is also quite possible that individuals who articulated more than one version of self-identification might have asserted different notions of their own identity, depending on the setting. It need not be that these divergences were all rational and strategically planned.

Groundbreaking new work in the last several years, in particular by the historian Neil Foley and the legal scholar Ian Haney López, has focused attention on Mexican Americans' fraught relation to white identity. Often this new scholarship has indicted civil rights leaders for their "Faustian pact with whiteness." According to this narrative, mid-twentieth-century Mexican American organizations and their lawyers claimed whiteness as a political and legal strategy—culminating in *Hernandez v. Texas*—until they finally abandoned it in the 1970 case of *Cisneros v. Corpus Christi Independent School District*. Some scholars portray whiteness claims as primarily strategic, while others see them as a deeper impulse toward assimilation and rejection of other people of color. In either case, the critics have to some extent adopted the perspective of the 1970s Chicano movement, taking the previous generation to task for its lack of racial pride and refusal to join coalitions with African Americans.

I urge shifting the perspective away from apportioning blame to Mexican American civil rights litigators and political advocates for their strategic choices and away from the unanswerable question of whether Mexican Americans were or are "really" white. Instead, I suggest focusing on the way state actors used Mexican American whiteness to create and protect Jim Crow practices. As a strategy, whiteness was used against Mexican Americans far more often than on their behalf.

It would certainly be a mistake, however, to assume that all Mexican Americans identified as white or even that whiteness was the chief strategy they employed in seeking rights. From the early twentieth century onward, many ordinary Mexican Americans—as well as litigators in their private correspondence—exhibited a more complex understanding of racial identity as produced by racist practice: Because we are treated as a race, we are a race.

The notion of *mestizaje*, or racial mixture, also created a sense of the fluidity among groups and reinforced the importance of culture in defining identity: Mexican Americans often saw themselves and their culture as stronger because they were a mixed-race, or mestizo, people. Beginning in the 1930s, Mexican American activists began to assert whiteness to government agencies but often referred to the "Mexican race" and to their whiteness in the same breath; people who would never identify as "Mexican" in English continued to call themselves "mexicano" in Spanish. Texas Mexican plaintiffs brought *racial* discrimination lawsuits throughout the 1930s and 1940s at the same time they sought to be redefined as "white" on the U.S. census and all state classification forms. While some Mexican American organizations sought to distance themselves from African Americans and from Mexican nationals, others cooperated with African American

activists. During the 1950s and 1960s, civil rights litigators sought to make use of the limited gains they had achieved with a definition of Mexican whiteness before abandoning it for minority status. In short, even strategic uses of whiteness were self-conscious and contested among civil rights lawyers and activists. And even in the cases in which Mexican American advocates most strongly pushed a strategy of whiteness, they also argued, even more strongly, that whether Mexican Americans were really white, they were treated as a separate race, and therefore, in practice, were one.

Early Mexican American Whiteness

Before the 1930s no Mexican American advocacy organization self-consciously strategized about whiteness in court. But that does not mean that state officials and even courts did not address the question of whether Mexican Americans were white. Indeed, the era can be divided into three stages relating to the conceptualization of Mexican American whiteness: In the first, during most of the nineteenth century, whether Mexican Americans were white was largely a matter of local practice; in the second, beginning in 1897, *In re Rodriguez* decreed Mexican Americans to be white for the purposes of naturalization; and in the third, during the first decades of the twentieth century, a series of miscegenation cases extended this presumption of whiteness to the marital setting. But while Mexican American identity was established as formally white, it emerged as considerably more ambiguous in courtroom testimony.

The Nineteenth Century

In Spanish Texas and California, whether Mexican Americans were white or a distinct race depended on class and geography. In the debates over the annexation of Texas in the 1840s, Anglo politicians often referred to the inferiority of the "Mexican race," using metaphors of dirt as well as the epithet "greaser," which probably derives from the work some Mexicans performed greasing the axles of mule carts. Yet during the years of the Texas Republic, although only white heads of household could buy land, some Texas Mexicans were able to do so by claiming whiteness through pure "Spanish blood." Anglos who married Mexican women "whitened" their spouses by calling them Spanish, and many Mexican immigrants "learned whiteness and 'whitening' . . . before coming to the United States."[5] Racial distinctions to some extent tracked class and landholding. In Texas, patterns of Mexican-white segregation map onto the divisions between "ranch counties," where Mexicans continued to be landholders, and "farm counties," where commercial farming took over in the first decades of the twentieth century and Mexicans were sharecroppers for white landholders. Simply put, where Mexicans held land, they were far less likely to be excluded from schools and other public accommodations and "Mexican" was less likely to be a racialized identity.

The 1848 Treaty of Guadalupe Hidalgo guaranteed U.S. citizenship to all Mexican citizens in the Mexican Cession without reference to racial identity. Before the federal courts considered the matter, U.S.-Mexico border officials made their own racial determinations, placing some Mexicans in the category "Spanish race," and others—usually darker skinned people—in the category "Mexican race." As Neil Foley explains, "It was

understood that 'Spanish' was a marker of whiteness and that 'Mexican' meant 'mixed-blood' or Indian."[6] It was fifty years before a U.S. court considered whether Mexicans could be eligible for naturalization on the basis of identification as "white" or some other basis.

White by Treaty—In Re Rodriguez

When the District Court for the Western District of Texas finally considered the matter of Mexican American citizenship in the case of *In re Rodriguez*, it decided to treat Mexican Americans as white, avoiding the issues raised at trial and in the briefs on appeal about Mexicans' "mixed blood."

In 1896 Ricardo Rodriguez filed an application for naturalization papers in San Antonio, Texas. According to the district court's statement of the case, "[a]s to color, he may be classed with the copper-colored or red men. He has dark eyes, straight black hair, and high cheek bones." The lawyers at trial tried to elicit testimony from Rodriguez to place him in either a "Spanish"—white—or "Indian" racial category, but Rodriguez resisted this dichotomy. When asked, "Do you not believe that you belong to the original Aztec race in Mexico?" Rodriguez answered, "No, sir." Counsel then asked, "Do you belong to the aborigines or original races of Mexico?" Again Rodriguez answered, "No, sir." "Where did your race come from? Spain?" asked the lawyer. Answer: "No, sir." Finally: "Where did your race come from?" Answer: "I do not know where they came from." Rodriguez insisted that he was a "pureblooded Mexican" and neither Indian nor Spanish. He resisted the idea that "Spanish" and "Indian" represented two distinct streams of blood in a Mexican's veins.

Several San Antonio politicians submitted amicus briefs to the court regarding Rodriguez's racial identity and eligibility for naturalization on the basis of whiteness. One based his discussion on Rodriguez's "appearance," as well as on scientific experts who, he claimed, placed the "aborigines of this continent" outside the white race. He concluded that Rodriguez was not white, whether "by the scientific classification" or "in the sense in which these words are commonly used and understood in the everyday life of our people," and therefore believed that Rodriguez should be denied the right of citizenship. Another amicus brief also relied on scientific expertise, quoting Dana's American Encyclopedia regarding the population of Mexico, more than half of which it said were "Indians of un-mixed blood"; since Rodriguez was obviously one of these, he was neither white nor eligible for citizenship.

Despite the focus in both the trial testimony and briefs on Rodriguez's whiteness, the district court decided the question based primarily on the Treaty of Guadalupe Hidalgo. Although the court agreed with the amicus briefs that Rodriguez was probably not white according to ethnologists, nor perhaps even to laypeople, it concluded that the treaty required the United States to bestow citizenship on Mexicans regardless of their race. The court avoided reaching a conclusion about whether Mexicans *were* white but treated them legally *as though* they were white. Because U.S. law reserved naturalization for free white persons and people of African descent, becoming naturalized in effect meant Mexicans received a presumption of whiteness. Whether this is what the *Rodriguez* court intended, that is what the precedent came to stand for.

Sex Across Racial Borders: Popular and Legal Ideas of the "Mexican Race"

Rodriguez provided the backdrop for all future litigation involving Mexican Americans in state courts. Later courts treated *Rodriguez*'s court-declared racial identity as a presumption that Mexicans were Spanish—white—unless proven otherwise; in court, this presumption led to an effort to tease out an individual's Spanish and Indian ancestry, an effort most Mexicans stubbornly resisted. In miscegenation cases, state courts began with the presumption that Mexican Americans were white when enforcing statutes criminalizing white-black marriage.

In 1910, Francisco Flores was convicted of "unlawfully marrying a negro . . . within the third degree" and sentenced to two years in the penitentiary. According to the appellate court, Flores was "Mexican, or at least of Spanish extraction," whereas his wife, Ellen Dukes, was identified as having "negro blood in her veins," a Mexican mother and a father with "some negro blood."[7] Likewise, the testimony at trial revolved around the physical appearance, reputation, and social associations of both husband and wife. For example, the deputy constable at Nacogdoches testified that he had warned Flores that he could not marry a Negro woman. The constable reported that Flores had denied having "a drop of negro blood in [him]" but explained that Dukes's mother was Mexican. Flores apparently considered his fiancée to be Mexican because of her mother's identity.

When the lawyer for the state asked the constable to testify about Dukes's race, Flores's lawyer objected: "Unless he knows her antecedents, he can't say unless he qualifies himself." In other words, Flores's lawyer argued that the basis for testimony about racial identity had to be either personal knowledge of an individual's ancestry or scientific expertise. The court, however, ruled that the witness could "describe her physical features." He answered, "She has the physical appearance of a negro, she is kinky headed and very dark, what we would call a dark yellow color." The constable was then asked, "Any other physical appearances of a negro?" and answered, "Well just a plain old fat negro woman is all," which was stricken from the testimony at Flores's objection. On cross-examination the constable elaborated:

> It is not a fact that she favors a Mexican greazer more so than she does a negro; her skin is a different color from that of a black negro; I suppose her skin is more of the color of a Mexican than it is a negro of that peculiar hue or type, it is a copper color, Mexicans most of them have a copper color. . . . I would determine the quantity of negro blood in her by her kinky hair.[8]

Similarly, another state witness judged Dukes "from her personal appearance . . . [as] at least half negro" but could not say "what extent of negro blood she has in her" because she was "not a negro geologist [*sic*]."

The state also called as a witness a woman, who probably identified as a "negro," who testified that Dukes "married a Mexican" at her house and that Dukes stayed over at her house "with negroes" and that "she [would] eat at [her] table." On cross-examination she admitted, "I don't know of my own knowledge whether she is a negro or not but she looks like one to me; she is a little brighter color than I is." The sheriff of Angelina County testified, "[D]uring the years I have known [Dukes] I have never known her

to associate with white people in a social way, she has always associated with negroes." Yet on cross-examination he admitted that association with "negroes" did not necessarily mean nonwhiteness if Mexicans were defined as white, and he said, "Mexicans, such as this defendant here, that we commonly term as greasers generally associate with negroes. I would not undertake to say whether these greasers have any negro blood in them or not, I was not there at the beginning."

In her own testimony, Dukes not only evinced the fluidity of her own identity but uncertainty about her husband's as well:

> My mother was a Mexican; my father had some negro blood in him; I do not know just how much . . . my father's color was very bright, he was a great deal brighter color than I am; my father's hair was not kinky or nappy like the ordinary negro, his hair was not as bad as my hair, it was straighter. . . . Flores always associated with negroes and not with white people. . . . When I was at home I always associated with the Mexicans; since I have been in Angelina or Nacogdoches Counties I have not associated with the white people or white race.[9]

Dukes appeared to consider Mexicans to be white but considered her own identity to be somewhere in between, associating at times with Mexicans and at times with Negroes. Likewise, her husband, who was Mexican, associated only with Negro people.

The trial judge charged the jury to determine only the definitions of "negro" and "white person" under the state miscegenation statute, including whether "Mexicans . . . shall be deemed a 'white person' within the meaning of this law." Flores moved for a new trial, arguing that the state had failed to prove both that Flores was white and that Dukes was black. Flores's motion complained that

> at best, the witnesses stated that 'he (defendant) looked like a Mexican,' . . . on the other hand, the testimony disclosed that the defendant associated with and commingled with negroes all the time, and did not associate with the white people at all, which was a circumstance of his being part negro.[10]

Furthermore, Flores argued that "none of the witnesses in this case testified as to knowing of the antecedents of the woman, and knew none of her ancestors, and testified only to 'her appearances as being of mixed blood and appearing to have negro blood.'"[11] On appeal, the judge accepted this argument, reversing the lower court decision and remanding for a new trial.

Flores v. State reveals something about popular and legal understandings of Mexican and Negro identity in Texas. On the one hand, it was fairly clear from the testimony that some Mexicans and blacks associated with one another socially and that some intermarried. On the other hand, the law defined Mexicans as "white" and proscribed Mexican-black marriage. While the state attempted to demonstrate Dukes's Negro identity by her associations, this proved difficult because of the evidence that Mexicans associated at times with both whites and blacks. And although the trial judge allowed, as in most racial identity trials, testimony about appearance, associations, reputation, and performance, the Court of Criminal Appeals accepted the defendant's argument that the state had not met its burden of proof in establishing the couple's ancestry.

The Politics of Whiteness in the 1930s and 1940s

In the 1930s and 1940s, Mexican Americans in the Southwest began to organize in response to the increasing antagonism they experienced from their Anglo neighbors. During this period, exclusionary practices—from deportation to segregation—spread, and Mexican Americans responded through political advocacy. One of the strategies they employed was to claim the rights of white citizens. But this was never the only strategy, and it often coexisted with appeals to race pride and solidarity with other victims of racism.

Jim Crow in the Southwest

We tend to think of segregation as a Southern problem, associating Jim Crow with the exclusion of African Americans from private and public institutions in the southeastern United States. But segregation was limited neither to African Americans nor to the Southeast. Mexican Americans also suffered under a Jim Crow regime not only in Texas but across the entire Southwest. In California, Mexican Americans as well as Asian Americans, Indians, and blacks were excluded from white schools. Additionally, thousands of all-white "sundown" towns and suburbs across the West and North kept out not only African Americans but also Asian Americans and Mexican Americans. They were known as "sundown" towns because people of color were warned not to let the sun set on them within the town limits.

In California and Texas, discrimination against Mexicans in the second half of the nineteenth century varied according to class and geography. But massive immigration from Mexico, as well as the economic effects of the Great Depression, led to the expansion of Jim Crow beyond the agricultural regions that had been its core in earlier years.

From 1890 to 1930, between 1 million and 1.5 million Mexicans immigrated to the United States, especially in the aftermath of the Mexican Revolution in 1910. In the 1920s alone, the Mexican population of California tripled from 121,000 to 368,000. This massive influx fed an enormous expansion of agriculture that transformed the Southwest. In 1880, only 7,436 miles of railroad track crisscrossed the Southwest; by 1920, that mileage had increased nearly fivefold, to 36,000. In 1890, there were over 1.5 million acres of irrigated land in California, Nevada, Utah, and Arizona combined; by 1909, that acreage stood at 14 million. The expansion of railroads and irrigation enabled massive increases in agricultural production.

Despite (and perhaps because of) the dependence of Southwestern agriculture on Mexican workers, immigration stirred little opposition before the 1920s. The first national immigration restriction to affect Mexicans was the imposition of a literacy test in 1917. In 1924, the year that Congress passed an immigration act setting quotas limiting immigration from Europe, attention turned to Mexicans, especially the "wetbacks" who crossed the Rio Grande River without documentation. As one congressman from Indiana complained in April 1924, "What is the use of closing the front door to keep out undesirables from Europe when you permit Mexicans to come in here by the back door by the thousands and thousands?" In response, the Bureau of Immigration established the Border Patrol that year to monitor illegal immigration. Until the Depression, authorities had expended little effort to restrict Mexican immigration, but the rising anti-Mexican

sentiment expressed itself in a tightening of Jim Crow. Beginning in the 1930s, nearly half a million Mexican immigrants were repatriated to Mexico, some voluntarily, but the majority against their will. Those who remained found themselves second-class citizens.

In Texas in the 1930s and 1940s, as in much of the Southwest and California, most Mexican American children attended separate schools; 90 percent of south Texas schools were segregated by 1930. In agricultural areas, many Mexican Americans lived in company towns like Taft Ranch with separate institutions. Mexican Americans were discriminated against in jury selection and in voting and in many places were shut out of public accommodations like swimming pools, theaters, and restaurants or segregated into the colored section together with African Americans. For example, Manuel C. Gonzales, lawyer for the leading Mexican American advocacy group in the 1940s, the League of United Latin American Citizens (LULAC), compiled a "list of segregatory incidents" from 1939 to 1942. These incidents included a real estate covenant in Corpus Christi, Texas, with a clause requiring that "'[n]o lot or any part thereof shall be sold to any *Mexican*, Ethiopian, Malayan or Mongolian or any person having an appreciable admixture of *Mexican*, Ethiopian, Malayan or Mongolian blood'"; refusal of service to Mexicans at the Hitchcock Grill, in Galveston, Texas; "imprisonment of Mexicans with persons belonging to the colored race" in Dallas, Texas; "exclusion of all persons of 'Mexican Indian descent' from serving on grand juries" in Galveston, Texas; and taking "Mexican school children . . . to eat in the dining room for Negro school children" in Kennedy, Texas.

In California a similar situation prevailed. In 1945 Manuel Ruiz, secretary of the Coordinating Council for Latin American Youth, reported to the Los Angeles authorities that a police officer in Watts had been "shouting that he was going to 'kill any son of a bitch Mexican.'" He complained to the Office of War Information that local newspapers "stirr[ed] up feelings against juvenile delinquency of Mexican extraction." Ruiz monitored and protested police brutality against Latin American victims as well as judicial discrimination against Latin American defendants.

Texans who supported segregation of Texas Mexicans reported in a 1950 survey that they viewed Mexicans as a different race. According to the *American-Statesman*, "Most of those who approve segregation make no attempt to cover up their prejudice against Latin-Americans. They say Latin-Americans are 'a different race,' 'socially inferior,' 'not clean,' 'we don't believe in mixing races.'" One-third of all Texans favored separate schools explicitly because of the fear of race mixing. Nearly half cited other reasons relating to culture or social performance for preferring separation, including language differences and not "act[ing] like whites."

The Good Neighbor Commission (a state agency) also collected letters expressing virulent racism aimed at Texas Mexicans. One Texan wrote to Governor Shivers in 1953 that most "all white AMERICAN GOD FEARING CITIZENS . . . are strongly in favor of a continuation of racial discrimination in order to protect the sanctity of our homes, safeguard our children . . . keep Texas and the U.S. HOLY, sacred and pure, and keep AMERICA AMERICAN." He backed up his argument for racism with a theory of polygenesis, that God created "the Negro, the Indian and THE WHITE MAN," just as he made "deer, antelope, goat and sheep," and ended with a warning that LULAC and the American GI Forum, founded by a Mexican American World War II veteran, "should be *carefully watched*."[12]

Most segregation of Mexican Americans was de facto rather than de jure, set in place by custom and local administration rather than state law. In Texas, school segregation was left up to the discretion of local officials, who insisted that all separation was for educational purposes. In California, section 8003 of the state school code provided that separate schools be established for "Indians under certain conditions and children of Chinese, Japanese or Mongolian parentage." The California state legislature proposed a bill to add the phrase "whether born in the United States or not" immediately after the words "Indian children" in that statute. As the *New York Times* noted, this addition "could only apply to Mexican children, for there are in California no other youngsters of Indian blood in sufficient numbers to be segregated, and not born in this country."[13]

Although this effort to enshrine segregation of Mexican Americans in a state statute failed, most California school districts simply interpreted the existing statute to include them already in the category "Indian." In 1945 Manuel Ruiz "declared that many school districts have used this section to segregate Latin American pupils 'on the ground that they may have some Indian blood.'"[14]

Both state and national government agencies explicitly counted Mexican Americans as a separate racial category. The first efforts to count Mexicans in the U.S. census, in 1930, listed individuals as "Mexicans (Mex)" if they or their parents were born in Mexico and if they were not "definitely White, Negro, Indian, Chinese or Japanese."[15] Thus, whereas the 1930 census counted 686,260 "people of other races" in Texas, it counted only 3,692 "white people born in Mexico." Because of the vigorous opposition to this racialization of "Mexican" by LULAC, as well as by the Mexican government, the census in 1940 categorized Mexicans as white unless "definitely Indian or some race other than white" (although they did begin asking for the "language spoken at home in earliest childhood"). In subsequent decades the census used a variety of methods to count people of Mexican origin in the five southwestern states, including lists of Spanish surnames and the categories "Spanish Mother Tongue," "Spanish Language," "Spanish Heritage," and "Spanish Origin." Beginning in 1980 the general term "Hispanic" appeared as an ethnicity category following the "race" question on the census form. Yet state officials continued to classify "Mexicans" or "Latin Americans" as a nonwhite race well after 1940. Thus, in Texas and California, Mexican Americans suffered many of the same Jim Crow practices as African Americans. They were excluded not only from many public accommodations, like swimming pools, theaters, and restaurants, but more importantly, from the key institutions of public life: schools and political offices. Like African Americans, they responded to racial injustice by organizing, petitioning, and litigating.

Mexican American Organizations and Politics

In the 1930s and 1940s, Mexican Americans formed organizations to battle Jim Crow. These groups often enlisted claims of whiteness in the battle for civil rights and urged fellow Mexicans toward cultural assimilation and "100% Americanism," drawing a connection between whiteness and citizenship that would have been familiar to most Americans. Yet at the same time, these organizations also emphasized racial pride and Mexican cultural heritage.

The most important organization advocating on behalf of Mexican Americans was LULAC. Formed in 1927 to unite a number of Mexican American fraternal organizations

in Texas, the organization aimed to promote both racial pride and Americanization. Among the "Objects and Aims of the United Latin American Citizens" were

> [t]o assume complete responsibility of educating our children in the knowledge of all their duties and rights, language and customs of this country as far as there is good in them. We declare for once and forever that we will main[tain] a respectful and sincere worship for our racial origin and be proud of it.
>
> . . . Secretly and openly, by all right means, we will aid the culture and orientation of Mexican-Americans and we will govern our life as a citizen to protect and defend their life and interests in so far as is necessary.

These aims included pride both in racial and cultural origins as well as in Americanization. Early LULAC leader Alonso Perales described the goals of LULAC to be the development among "the members of our race [of] the better, more pure and perfect type of true and loyal citizens of the United States of America," the attack on all discrimination based on "race, religion, or social position," and the emphasis of "the acquisition of the English language."[16] The application for membership asked the applicant, "Are you a native born American citizen? Are you a naturalized American Citizen? If so, when and where were you naturalized? Are you legally qualified to vote in this County and State?"

LULAC officials generally referred to "the Mexican Race . . . as a Race" and talked about the need for an organization to promote understanding "[w]here two races are brought together under one flag."[17] At the same time, LULAC used claims of whiteness to push for Mexican American civil rights: in 1941, 1943, and again in 1945, LULAC pushed unsuccessfully for a bill in the Texas legislature guaranteeing "equal . . . privileges" to "all persons of the Caucasian race."[18] While the bill failed, a toothless resolution declaring that "all persons of the Caucasian Race . . . are entitled to the full and equal accommodations, advantages, facilities, and privileges of all public places of business or amusement" did go through the Texas state legislature in 1941; LULAC leaders M. C. Gonzales, George Sánchez, Alonso Perales, and the Mexican government all lobbied for it.

One of the earliest actions of a LULAC chapter took place in 1936, when El Paso city officials began classifying Mexican Americans as "colored" rather than "white" in birth and death registries, which conveniently lowered the "white" infant mortality rate for the city. When the local LULAC chapter filed an injunction against the city, its local leader argued that Mexicans "as a race are red if they are Indians and white if they are not Indians." Alonso Perales wrote to

> congratulate him for his "virile stance" on the classification issue, [and he] explained that he never protested the fact that Mexicans had their own category in San Antonio because "we are very proud of our racial origins and we do not wish to give the impression that we are ashamed of being called Mexicans."[19]

"Nevertheless," he continued, "we have always resented the inference that we are not whites."

A few years after World War II, Hector Garcia, a physician and military veteran, founded another important Mexican American organization, the American GI Forum

(AGIF). Despite the fact that AGIF, like LULAC, worked to combat discrimination and segregation, in 1954 Garcia insisted that "we are not and have never been a civil rights organization," presumably to avoid any association with black groups. "Making any distinction between Latin Americans and whites, he wrote, was a 'slur,' an insult to all Latin Americans of Spanish descent."[20] AGIF also connected its whiteness claims to aggressively Americanist anti-immigrationism. In 1951 AGIF passed resolutions urging restriction of the "wetback tide," although by 1954, Operation Wetback had led to such egregious violations of Mexicans' civil rights that even AGIF and LULAC protested.

NOTES

1. Statement of Facts at 11, Ramirez v. State, 40 S.W.2d 138, 139 (Tex. Crim. App. 1931) (No. 13,789) (testimony of Cecil Walston, sheriff and tax collector, Menard County, Texas).

2. Sanchez v. State, 243 S.W.2d 700, 701 (Tex. Crim. App. 1951) (holding that the exclusion of Mexican Americans from a jury in a murder prosecution was not race discrimination).

3. Appellant's Brief at 17, Hernandez v. Texas, 251 S.W.2d 531 (Tex. Crim. App. 1952) (No. 24,816).

4. See Ian Haney López, White by Law (rev. ed. 2006), for a discussion of the naturalization cases concerning Asian immigrants' claims to whiteness.

5. Neil Foley, The White Scourge: Mexicans, Blacks, and Poor Whites in Texas Cotton Culture 19 (1997).

6. Neil Foley, *Straddling the Color Line: The Legal Construction of Hispanic Identity in Texas*, in Not Just Black and White: Historical and Contemporary Perspectives on Immigration, Race, and Ethnicity in the United States 344 (Nancy Foner & George M. Fredrickson eds., 2004).

7. Flores v. State, No. 727, slip op. at 1 (Tex. Crim. App. June 22, 1910).

8. Transcript of Testimony at 3–4, State v. Flores, No. 3020 (Dist. Ct. Tex. Dec. 5, 1909).

9. *Id*. at 11.

10. Defendant's Original Motion for a New Trial, Flores, No. 3020 (Dist. Ct. Tex. Nov. 24, 1909).

11. *Id*.

12. See, e.g., Letter from J. G. Riser, Sec'y-Treasurer, Nat'l Farm Loan Ass'n of Beeville, to Allan Shivers, Governor of Tex. (Aug. 24, 1953).

13. *Hegira of Mexicans Bothers California*, N.Y. Times, Apr. 19, 1931, at 6E.

14. Manuel Ruiz, *Untitled News Report from Los Angeles*, Associated Press, Apr. 30, 1945.

15. U.S. Dept of Commerce, Bureau of the Census, 200 Years of U.S. Census Taking: Population and Housing Questions, 1790–1990, at 60 (Heritage Quest 2000) (1989).

16. Alonso S. Perales, *The Unification of the Mexican-Americans*, La Prensa, Sept. 4, 1929.

17. *Latin-U.S. Group Form Service Body; Organization's Purpose Is to Gain Equal Rights for All Citizens Here*, Brownsville Herald, Sept. 22, 1929.

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20. *Id*. at 136.

18. Did the First Justice Harlan Have a Black Brother?

JAMES W. GORDON

On September 18, 1848, James Harlan, father of future Supreme Court Justice John Marshall Harlan, appeared in a Franklin County, Kentucky, court to free his mulatto slave, Robert Harlan. This appearance formalized Robert's free status and exposed a remarkable link between this talented mulatto and his prominent lawyer-politician sponsor.

This event would have little historical significance but for the fact that Robert Harlan was no ordinary slave. Born in 1816 and raised in James Harlan's household, blue-eyed, light-skinned Robert Harlan had been treated by James Harlan more as a member of the family than a slave. Robert was given an informal education and unusual opportunities to make money and to travel. While still a slave in the 1840s, he was permitted sufficient freedom to have his own businesses, first in Harrodsburg, Kentucky, and then later in Lexington, Kentucky. More remarkably still, he was permitted to hold himself out to the community as a free man of color at least as early as 1840, not only with James Harlan's knowledge but apparently with his consent. After making a fortune in California during the Gold Rush, Robert moved to Cincinnati in 1850 and invested his money in real estate and a photography business. In the years that followed, he became a member of the northern black elite and after 1870 established himself as one of the most important black Republican leaders in Ohio.

Although he was a humane master, James Harlan's treatment of Robert was paradoxical. James's tax records show that he bought and sold slaves throughout his life. The slave census of 1850 lists fourteen slaves in James Harlan's household, ranging in age from three months to seventy years. The census for 1860 lists twelve slaves ranging in age from one to fifty-three years. James neither routinely educated nor often emancipated his slaves, although his ambivalence about the South's "peculiar institution" was well enough known to become a political liability in Kentucky, a state firmly committed to the preservation of slavery.

What about Robert Harlan was so special as to lead to such exceptional treatment by James? In the view of two scholars, the peculiarity of James Harlan's relationship with

A version of this chapter previously appeared as James W. Gordon, *Did the First Justice Harlan Have a Black Brother?*, 15 W. New Eng. L. Rev. 159 (1993). Originally published in the *Western New England Law Review*.

Robert Harlan is easily explained. Robert Harlan, they assert, was James Harlan's son.[1] If true, this means that another of James's sons, the first Justice John Marshall Harlan, had a black half brother.

When James emancipated Robert, John Harlan was fifteen years old. Thereafter, James and Robert continued to have contacts. After James's death in 1863, John and Robert remained in touch. Robert was an anomalous feature of John's childhood in slaveholding Kentucky and remained a part of his perception of blacks as an adult.

John deeply loved and respected his father, James. He lived in his father's house until after his own marriage. James taught John law and politics. In both arenas, father and son were partners and seem to have confided freely in one another. James remained the most important influence in John's life until the older man died, when John was thirty years old.

James Harlan's ambivalent, but generally negative, feelings about slavery surely influenced John's views on the subject. But even more importantly, James's peculiar relationship with Robert during John's youth, and the ongoing contact between James, John, and Robert after Robert's emancipation, must have affected John's attitudes toward blacks. Robert was smart and ambitious but lived his life in the twilight between two worlds, one black, the other white. He was never completely at home in either. Robert's lifelong experience of the significance of the color line became, vicariously, a part of John's experience. Robert was also a continuing example of something John Harlan could not later, as a Supreme Court justice, bring himself to deny—the humanity of blacks and the profound unfairness of their treatment by a racist America.

Given his connection to Robert, Justice John Harlan's progressive views on race, views that he repeatedly articulated in his famous dissents as a justice of the U.S. Supreme Court, become more comprehensible. Indeed, it is reasonable to assume that we will never understand fully the sources of Justice Harlan's advanced views on race until we better understand his relationship with the black man who might have been his half brother. Justice Harlan argued repeatedly that the Civil War amendments had given black Americans the same civil rights as whites:

> [T]here cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant. The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination, in respect of civil rights, against [free men] and citizens because of their race, color, or previous condition of servitude.[2]

Harlan further denied that blacks constituted

> a class which may still be discriminated against, even in respect of rights of a character so necessary and supreme, that, deprived of their enjoyment in common with others, a [free man] is not only branded as one inferior and infected, but, in the competitions of life, is robbed of some of the most essential means of existence.[3]

In *Plessy v. Ferguson*, Harlan, standing alone against the rest of the Court, again dissented:

> In respect of civil rights, common to all citizens the Constitution of the United States does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. . . . I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved.[4]

Elsewhere in the same opinion, in words that have since become famous, Harlan wrote:

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.[5]

If Robert and John were brothers, a provocative dimension for contemplation is opened. The careers of these two talented, ambitious men offer us parallel examples of life on different sides of the color line in nineteenth-century America. They grew up in the same household and, if brothers, carried many of the same genes. Each was given every opportunity that his status and skin color permitted. Each succeeded to a remarkable extent, again, within the limits imposed on him by the society in which they both lived. Each man was shaped by his own perceptions of these limits and by their reality. In the end, John Harlan climbed as high as his society permitted *any man.* Robert Harlan climbed as high as his society permitted *any black man.* Although in the end Robert did not rise as high as John did, his achievements were, on reflection, equally impressive and worthy of exploration.

Was James Harlan Robert Harlan's Father?

Although by no means conclusive, Robert's size and physical resemblance to the "Big Red" branch of the Harlan family argues strongly against the paternity of a stranger to that clan. Robert Harlan was a big man. He stood over six feet tall and weighed more than two hundred pounds. He had blue-gray eyes, light skin, and black, straight hair. He was physically vigorous and healthy his whole life and traveled extensively. When Robert died in 1897, at age eighty, the average life expectancy for a black man was thirty-two years. That of white males was only forty-eight. Robert Harlan's son, Robert, Jr., also lived at least into his late seventies. Both men were long lived, and modern mortality studies indicate that heredity is an important factor in family longevity.

A number of portraits of Robert Harlan were published during his lifetime. The best of these appeared in 1886 in an Ohio newspaper.[6] In this detailed etching, captioned "Col. Robert Harlan, Member of the Ohio Legislature," Harlan's fine features stare out in a right full-face profile. His most prominent features are a rounded pate with a high, full forehead crowned by a receding hairline of short, straight hair that has reached the peak of his head. He has large ears with full earlobes and a firm, well-defined jawline. A large, full mustache sitting below a straight, slightly bulbous nose dominates the face and covers the mouth, preventing any view of the lips. The smooth skin of the face—it is remarkably wrinkle-free given his age—ends in a pointed chin. Heavy brows cover

narrow eyes that turn down at the outside, imparting almost a squinting expression. The entire face is lean and shows strength.

When I first saw this picture, I was struck by the similarity it bore to a famous picture of Justice John Marshall Harlan taken while he was a member of the Supreme Court. In that picture, John Harlan's rounded dome of a head with its crowning fringe of hair displays, it seems to me, a number of the same features. The shape of the head is similar. The large forehead is similar. The receding hairline, the short, straight hair (which had been red in his youth), and the large ears are there, as is the large earlobe and the strong jaw. The nose is the same, though fuller and more bulbous. The smooth skin, the heavy brows, the squinting eyes—they too were blue—and the pointed chin are all there. The wide mouth, with its narrow lips and distinctive scowl, made me long for the look behind Robert Harlan's mustache that I will never have. Although John Harlan's face is fuller—John was overweight in his later years—I thought, "They could be brothers." Of course, my perception might have been affected by my knowledge that Robert had grown up in James Harlan's household.

The only portrait of James Harlan, John's father, with which I am familiar is an oil painting by an unknown artist, in the collection of the Kentucky State Historical Society's museum at the Old Statehouse in Frankfort, Kentucky. That portrait shows a middle-aged man with a high forehead and thinning straight red hair, with the familiar Harlan nose and strong jawline. His eyes appear to be gray or hazel, although it is difficult to tell what color was intended by the artist. They look out from behind wire-rimmed antique glasses and heavy brows. The earlobe of the left ear, which is just visible below the long hair on the side of James' head, is large. The mouth is firmly set and surrounded by thin lips. The face is ruddy and thinner than John Harlan's—in this respect more resembling Robert's than John's—but the resemblance between father and son, between James and John, is pronounced.

In his powerful treatment of slavery, *Roll, Jordan, Roll*, Eugene Genovese concluded, "Those mulattoes who received special treatment usually were kin to their white folks."[7] While by no means conclusive, evidence of Robert's special treatment by James is important to any consideration of the relationship between these two men.

Sometimes little things escape notice. Robert Harlan lived under that name throughout his life (as far as public records can establish this fact), and as Paul McStallworth[8] indicated, it was no small thing for Robert to have been permitted to take the Harlan family name and use it while still a slave.

Although it was common for freed slaves to take the family name of their former masters after the Civil War, this practice was rarer in the antebellum South. Perhaps this was simply because the planter families frowned on it. Perhaps they did so for no more obscure reason than that use of the family name bestowed more humanity on slaves than most owners found comfortable. One could call many other chattels by name, a horse or a dog, for example, but few of these "things" had two names, one of which associated it directly with the master's family Perhaps it was this public association that was unacceptable, because it invited speculation and rumors that a family with self-respect and social position preferred to prevent. It was a rare thing indeed for a slave to be permitted to use the family name while still in bondage. Such permission came very close to an informal acknowledgment of familial connection. But allowing Robert Harlan to use

the Harlan family name was not the only unusual privilege that James Harlan extended to his slave Robert.

At least as early as 1840—eight years before his formal emancipation—Robert Harlan appears in the public records of Lexington, Kentucky, with the designation "free man of color" next to his name. Accounts of Robert's life state that James Harlan permitted Robert to set up in Harrodsburg as a barber in the 1830s, and as a grocer in Lexington in the 1840s. While in Harrodsburg, Robert might still have been living in James' household. However, James moved to Frankfort in 1840 to become secretary of state for Kentucky, and Robert established himself in Lexington that same year. Robert must have been living on his own in Lexington. The city tax records for Lexington support this hypothesis. The records listed heads of household and independent individuals only. Robert's household appears in the records for 1841–1848. Robert lived with a free woman of color throughout the 1840s, and she bore him five daughters between 1842 and 1848, when Robert disappeared from the Lexington records.

Robert's status as a nonslave is especially surprising since it was illegal under the laws of Kentucky for Robert to live as a free man, working for his own account in Harrodsburg and Lexington. It was a criminal offense for James Harlan to permit him to do so, and James could not have been ignorant of this fact.

The risks for James grew more immediate in 1847. Robert was living in Lexington and James in Frankfort, twenty miles away. James could no longer provide Robert with the informal protection that was probably possible when they both lived in Harrodsburg in the 1830s. Now too, James's visibility as a Whig leader in the state made both men more vulnerable to James's political enemies. This point must have been driven home to James when the court of appeals handed down its decision in *Parker v. Commonwealth*[9] in December 1847.

In *Parker*, the court sustained a verdict against a slaveholder under an indictment that was challenged as insufficient. The slaveholder was indicted for permitting her slave Clarissa "to go at large and hire herself by permission of the plaintiff in error, who was her owner."[10]

It is possible that the *Parker* decision influenced James to convert Robert's de facto emancipation into formal, de jure manumission, in September 1848. However, it must have been Robert's decision to leave the state—and James's protection—for the California gold fields that made legal emancipation absolutely necessary.

Robert remained in contact with John's brother James. James had practiced law with John in Louisville in the 1870s and served later as a judge in Louisville. However, James appears to have been an alcoholic and to have suffered a tragic decline. His correspondence with John about his circumstances and his need for money is agitated and moving. John apparently tried to assist James in ways that would not result in supplying his brother with liquor.

Some of James's letters refer to Robert Harlan. In May 1888, James wrote John:

> It is well settled beyond change that I cant [*sic*] stay here. I am afraid to do so. Bob Harlan has often [the word "promised" is struck through] offered to asst [*sic*] me but I do not wish to be driven to the necessity of appealing to him—My position is as despicable and contemptible as it can be and few have been so utterly abandoned by fate as I have.[11]

In another letter, James seems almost to threaten John with an appeal to Robert: "If you cant [*sic*] help me I can try others—Bob Harlan will let me have the money if he has it."[12] In July of the same year, James's fortunes took a turn for the better, and he wrote John a newsy letter from James's new home in the Indian (soon to be Oklahoma) Territory. In it he told John that "Bob Harlan has for two years been unusually kind to me, not however putting me under obligation."[13]

Surely James would not have turned to Robert for money unless he believed the older man had financial means. It is possible, of course, that James turned to Robert not as a family member but as a former family slave who owed the Harlan family a great debt of gratitude. However, from the content of James's surviving letters to John it appears that his appeals for financial help were directed primarily at family or very close friends of the family, like John's former law partner Augustus Willson. The fact that James maintained contact with Robert and looked to him for financial assistance is suggestive. The anguish James felt when driven to ask for Robert's assistance, and his assumption that such an appeal would discomfit John enough to wring money from the justice, offers support for the family connection hypothesis when added to the rest of the evidence.

Did Robert Harlan Help Shape John Marshall Harlan's Views on Race?

Most of the scholarly writings about the first Justice Harlan offer, at best, tentative explanations for his behavior on the Supreme Court. We need more studies of the details of his life and personal relationships if we are to understand better this complex and important justice. One of the most important enigmas about John Harlan that remains is the source of his progressive attitude concerning the legal rights of America's black citizens.

My own research has convinced me that one of the keys to understanding the sources of John Harlan's personal and judicial values is his relationship with his father, James. John Harlan loved and respected his father. Through James's relationship with Robert Harlan, and through John's own contacts with Robert, Robert was well situated to influence John's understanding of race. John's own contacts with Robert began in childhood and continued at least until the time of John's appointment to the Supreme Court. John's experiences with Robert were different in quality from those he had with other blacks because of Robert's special relationship with James Harlan. If the blood tie I have suggested existed, and if John knew of it, then Robert's effect on John would have been profound. Even if my hypothesis of a blood relationship is rejected, the duration and intensity of contacts between John, James, and Robert is certain to have had some impact on the future justice and should be explored as fully as the surviving sources permit.

At the very least, John's connection to Robert would have made empty abstractions about race impossible for John. Robert humanized, for John, all cases involving the rights of black Americans. John knew through personal experience what the legal disabilities imposed on blacks—the disabilities against which John Harlan raged in his Supreme Court opinions—meant in people's lives. At the very least, Robert put a face on the millions of human beings who were forced to live their lives in the shadow of the Supreme Court's racist opinions. Robert made John see the human beings behind the briefs. This must certainly have been true in a case like *Plessy v. Ferguson*, where the plaintiff was

seven-eighths white—like Robert. John's devotion to his religion offers another key to understanding his behavior—a topic I hope to explore in the future. Once John Harlan could see blacks as individual human beings, his religious convictions compelled him to extend to them the rights all human beings deserved. This alone might have set John Harlan apart from his fellow justices, for whom race was largely an abstract matter.

Through Robert, John would also have experienced, vicariously, the consequences of the color line. Robert was raised in the household of a humane slaveholder. He had money and great opportunity for a man of color in his time. Despite these advantages, Robert was denied all of the opportunities that were John's from birth. Through Robert, John could experience the pain of butting doors that would never open no matter how meritorious he might be as an individual. In reviewing the story of Robert's life, John must have been acutely aware of the significance of the color line. Robert's slightly brown skin had rendered his considerable talents largely irrelevant to a color-conscious, racist society. Indeed, this circumstance alone had robbed Robert of the Harlan birthright that helped John prosper throughout his life.

If Robert Harlan helped shape John Harlan's views about race in any of these ways, he made a lasting contribution to John's fame. Through John's words, Robert also left a mark on his country. He helped start America's eventual, painful reexamination of the assumptions underlying its racist consensus. In this way, Robert left his descendants and his country a wonderful legacy.

NOTES

1. This connection was made by Dr. Paul McStallworth in his brief biographical entry on "Robert James Harlan" in Dictionary of American Negro Biography 287–88 (Rayford W. Logan & Michael R. Winston eds., 1983). Dr. McStallworth's conclusion appears to rest primarily on a biographical article about Robert Harlan that was published in a Cincinnati newspaper thirty-seven years after Robert's death. See *Brief Biography of Colonel Robert Harlan*, Cincinnati Union, Dec. 13, 1934.

A recent biography on John Marshall Harlan refers to the blood relationship between John Harlan and Robert Harlan as an established fact and puts Robert into the Harlan family tree on the inside cover of the book—as either the son of John's father, James, or as the son of John's grandfather, James the elder. The textual discussion of Robert is brief, covering less than two pages. Loren P. Beth, John Marshall Harlan: The Last Whig Justice 12–13 (1992).

2. Civil Rights Cases, 109 U.S. 3, 62 (1883) (Harlan, J., dissenting).

3. *Id.* at 39–40.

4. Plessy v. Ferguson, 163 U.S. 537, 554–55 (1896) (Harlan, J., dissenting).

5. *Id.* at 559.

6. *Honorable Robert Harlan*, Cincinnati Gazette, May 1, 1886.

7. Eugene D. Genovese, Roll, Jordan, Roll 429 (Vintage Books 1976).

8. Dictionary of American Negro Biography, *supra* note 1, at 287.

9. Parker v. Commonwealth, 47 Ky. (8 B. Mon.) 30 (1847).

10. *Id.* at 30.

11. Letter from James Harlan to John Marshall Harlan (May 10, 1888) (available in John Marshall Harlan Papers, University of Louisville Law School).

12. Letter from James Harlan to John Marshall Harlan (May 14, 1888) (available in John Marshall Harlan Papers, University of Louisville Law School).

13. Letter from James Harlan to John Marshall Harlan (July 27, 1888) (available in John Marshall Harlan Papers, University of Louisville Law School).

From the Editors

Issues and Comments

On some level, all the authors in this part seem to agree that history—what happened—is a contested construct, subject to multiple interpretations and assignments of meaning. There is no standard account, no unquestionable view of what happened, why it did, or who did what to whom. Do colonial conquerors, as Robert Williams suggests, always devise and circulate devastating stories to demonize the subjugated population and thus rationalize their own plundering of native riches and lands—and do we continue to do this even today?

Mary Dudziak argues that in *Brown* whites did not so much do a favor for blacks as for each other. Is this a tenable hypothesis? Was liberal McCarthyism in fact a reaction to concern over the incoming flood of black students in the wake of *Brown v. Board of Education*, as Richard Delgado posits, and if so were the subsequent careers of the four displaced professors eminently predictable?

Are Latinos white or nonwhite? Ariela Gross suggests that it depends on who is asking and why. For further discussion of this issue, see the chapters by George Martinez in Part X and Ian Haney López in Parts X, XI, and XVII.

If the first Justice Harlan indeed had a black brother, does this help explain his attitudes and positions on race? If so, what does this say about the possibility of racial harmony in our time?

For further reading, consult the essay by Maivân Clech Lâm on the Hawaiian land question and a clutch of new books, all listed in the Suggested Readings that follow.

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PART IV

CRITICAL UNDERSTANDINGS OF THE SOCIAL SCIENCE UNDERPINNINGS OF RACE AND RACISM

CRITICAL RACE THEORY writers have been applying the insights of social science to understand how race and racism work in our society and legal system. Richard Delgado's classic "Words That Wound" addresses the question of what the law can do about racial insults and name-calling, marshaling social science evidence that shows the harm of racist epithets. Judge and law professor Peggy Davis employs cognitive psychology and the notion of microaggressions to explain why persons of color continue to believe the legal system biased.

Gregory Parks and Jeffrey Rachlinski show how implicit bias, so deeply engrained in most Americans that they are not even aware of it, can influence elections of minority candidates. Jerry Kang demonstrates how local news, with its emphasis on crime and disasters, exacerbates implicit bias and makes viewers fearful of black people.

Devon Carbado and Mitu Gulati show how workers of color end up doing a great deal of extra work reassuring colleagues that they are normal and just like them.

Ian Haney López puts forward the view that race and races do not exist—that they have little or no biological reality and are constructs that society invents for its own, usually questionable, purposes. We all have the choice whether to acquiesce in the construction others assign to us; if we agree to be black or Latino, for example, we do so as a matter of our own agency.

Angela Onwuachi-Willig and her coauthors conclude with a chapter showing that affirmative action does not stigmatize its beneficiaries; rather, stigma preceded the establishment of these programs and does not increase at campuses that recruit minorities aggressively.

The social science literature on race includes Derrick Bell and others exploring the reasons why interracial sex and marriages remain subject to strong taboos. It also includes efforts to understand forces that influence the judiciary in controversial cases and why alternative dispute resolution may not be the promised godsend for disempowered disputants. In addition to the selections in this part, the subject of hate speech has attracted such prominent commentators as Mari Matsuda, Charles Lawrence, and Catharine MacKinnon.

19. Words That Wound

A Tort Action for Racial Insults, Epithets, and Name-Calling

RICHARD DELGADO

Psychological, Sociological, and Political Effects of Racial Insults

American society remains deeply afflicted by racism. Long before slavery became the mainstay of the plantation society of the antebellum South, Anglo-Saxon attitudes of racial superiority left their stamp on the developing culture of colonial America.[1] Today, over a century after the abolition of slavery, many citizens suffer from discriminatory attitudes and practices, infecting our economic system, our cultural and political institutions, and the daily interactions of individuals. The idea that color is a badge of inferiority and a justification for the denial of opportunity and equal treatment is deeply ingrained.

The racial insult remains one of the most pervasive channels through which discriminatory attitudes are imparted. Such language injures the dignity and self-regard of the person to whom it is addressed, communicating the message that distinctions of race are distinctions of merit, dignity, status, and personhood. Not only does the listener learn and internalize the messages contained in racial insults; these messages color our society's institutions and are transmitted to succeeding generations.

The Harms of Racism

The psychological harms caused by racial stigmatization are often much more severe than those created by other stereotyping actions. Unlike many characteristics on which stigmatization may be based, membership in a racial minority can be considered neither self-induced, like alcoholism or prostitution, nor alterable. Race-based stigmatization is, therefore, "one of the most fruitful causes of human misery. Poverty can be eliminated—but skin color cannot."[2] The plight of members of racial minorities may be compared with that of persons with physical disfigurements; the point has been made that

A version of this chapter previously appeared as Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133 (1982). Originally published in the *Harvard Civil Rights–Civil Liberties Law Review*.

> [a] rebuff due to one's color puts [the victim] in very much the situation of the very ugly person or one suffering from a loathsome disease. The suffering . . . may be aggravated by a consciousness of incurability and even blameworthiness, a self-reproaching which tends to leave the individual still more aware of his loneliness and unwantedness.[3]

The psychological impact of this type of verbal abuse has been described in various ways. Kenneth Clark has observed, "Human beings . . . whose daily experience tells them that almost nowhere in society are they respected and granted the ordinary dignity and courtesy accorded to others will, as a matter of course, begin to doubt their own worth."[4] Minorities may come to believe the frequent accusations that they are lazy, ignorant, dirty, and superstitious.[5] "The accumulation of negative images . . . present[s] them with one massive and destructive choice: either to hate one's self, as culture so systematically demand[s], or to have no self at all, to be nothing."[6]

The psychological responses to such stigmatization consist of feelings of humiliation, isolation, and self-hatred. Consequently, it is neither unusual nor abnormal for stigmatized individuals to feel ambivalent about their self-worth and identity.[7] This ambivalence arises from the stigmatized individual's awareness that others perceive him or her as falling short of societal standards, standards that the individual has adopted. Stigmatized individuals thus often are hypersensitive and anticipate pain at the prospect of contact with "normals."[8]

It is no surprise, then, that racial stigmatization injures its victims' relationships with others. Racial tags deny minority individuals the possibility of neutral behavior in cross-racial contacts,[9] thereby impairing the victims' capacity to form close interracial relationships. Moreover, the psychological responses of self-hatred and self-doubt unquestionably affect even the victims' relationships with members of their own group.[10]

The psychological effects of racism may also result in mental illness and psychosomatic disease.[11] The affected person may react by seeking escape through alcohol, drugs, or other kinds of antisocial behavior. The rates of narcotic use and admission to public psychiatric hospitals are much higher in minority communities than in society as a whole.[12]

The achievement of high socioeconomic status does not diminish the psychological harms caused by prejudice. The effort to achieve success in business and managerial careers exacts a psychological toll even among exceptionally ambitious and upwardly mobile members of minority groups. Furthermore, those who succeed "do not enjoy the full benefits of their professional status within their organizations, because of inconsistent treatment by others resulting in continual psychological stress, strain, and frustration."[13] As a result, the incidence of severe psychological impairment caused by the environmental stress of prejudice and discrimination is not lower among minority group members of high socioeconomic status.[14]

One of the most troubling effects of racial stigmatization is that it may affect parenting practices among minority group members, thereby perpetuating a tradition of failure. A study[15] of minority mothers found that many denied the real significance of color in their lives yet were morbidly sensitive to matters of race. Some, as a defense against aggression, identified excessively with whites, accepting whiteness as superior. Most had negative expectations concerning life's chances. Such self-conscious, hypersensitive

parents, preoccupied with the ambiguity of their own social position, are unlikely to raise confident, achievement-oriented, and emotionally stable children.

In addition to these long-term psychological harms of racial labeling, the stresses of racial abuse may have physical consequences. There is evidence that high blood pressure is associated with inhibited, constrained, or restricted anger, not with genetic factors,[16] and that insults produce elevation in blood pressure.[17] American blacks have higher blood pressure levels and higher morbidity and mortality rates from hypertension, hypertensive disease, and stroke than do white counterparts.[18] Further, there exists a strong correlation between degree of darkness of skin for blacks and level of stress felt, a correlation that may be caused by the greater discrimination experienced by dark-skinned blacks.[19]

In addition to such emotional and physical consequences, racial stigmatization may damage a victim's pecuniary interests. The psychological injuries severely handicap the victim's pursuit of a career. The person who is timid, withdrawn, bitter, hypertense, or psychotic will almost certainly fare poorly in employment settings. An experiment in which blacks and whites of similar aptitudes and capacities were put into a competitive situation found that the blacks exhibited defeatism, half-hearted competitiveness, and "high expectancies of failure."[20] For many minority group members, the equalization of such quantifiable variables as salary and entry level would be an insufficient antidote to defeatist attitudes because the psychological price of attempting to compete is unaffordable; they are "programmed for failure."[21] Additionally, career options for the victims of racism are closed off by institutional racism—the subtle and unconscious racism in schools, hiring decisions, and the other practices that determine the distribution of social benefits and responsibilities.

Unlike most of the actions for which tort law provides redress to the victim, racial labeling and racial insults directly harm the perpetrator. Bigotry harms the individuals who harbor it by reinforcing rigid thinking, thereby dulling their moral and social senses[22] and possibly leading to a "mildly . . . paranoid" mentality.[23] There is little evidence that racial slurs serve as a "safety valve" for anxiety that would otherwise be expressed in violence.[24]

Racism and racial stigmatization harm not only the victim and the perpetrator of individual racist acts but also society as a whole. Racism is a breach of the ideal of egalitarianism, that "all men are created equal" and each person is an equal moral agent, an ideal that is a cornerstone of the American moral and legal system. A society in which some members regularly are subjected to degradation because of their race hardly exemplifies this ideal. The failure of the legal system to redress the harms of racism, and of racial insults, conveys to all the lesson that egalitarianism is not a fundamental principle; the law, through inaction, implicitly teaches that respect for individuals is of little importance. Moreover, unredressed breaches of the egalitarian ideal may demoralize all those who prefer to live in a truly equal society, making them unwilling participants in the perpetuation of racism and racial inequality.

To the extent that racism contributes to a class system, society has a paramount interest in controlling or suppressing it. Racism injures the career prospects, social mobility, and interracial contacts of minority group members. This, in turn, impedes assimilation into the economic, social, and political mainstream of society and ensures that the victims of racism are seen and see themselves as outsiders. Indeed, racism can be seen

as a force used by the majority to preserve an economically advantageous position for themselves. But when individuals cannot or choose not to contribute their talents to a social system because they are demoralized or angry or when they are actively prevented by racist institutions from fully contributing their talents, society as a whole loses.

Finally, and perhaps most disturbingly, racism and racial labeling have an even greater impact on children than on adults. The effects of racial labeling are discernible early in life; at a young age, minority children exhibit self-hatred because of their color, and majority children learn to associate dark skin with undesirability and ugliness.[25] A few examples readily reveal the psychological damage of racial stigmatization on children. When presented with otherwise identical dolls, a black child preferred the light-skinned one as a friend; she said that the dark-skinned one looked dirty or "not nice."[26] Another child hated her skin color so intensely that she "vigorously lathered her arms and face with soap in an effort to wash away the dirt."[27] She told the experimenter, "This morning I scrubbed and scrubbed and it came almost white."[28] When asked about making a little girl out of clay, a black child said that the group should use the white clay rather than the brown "because it will make a better girl."[29] When asked to describe dolls that had the physical characteristics of black people, young children chose adjectives such as "rough, funny, stupid, silly, smelly, stinky, dirty."[30] Three-fourths of a group of four-year-old black children favored white play companions;[31] over half felt themselves inferior to whites.[32] Some engaged in denial or falsification.[33]

The Harms of Racial Insults

Immediate mental or emotional distress is the most obvious direct harm caused by a racial insult. Without question, mere words, whether racial or otherwise, can cause mental, emotional, or even physical[34] harm to their target, especially if delivered in front of others[35] or by a person in a position of authority.[36] Racial insults, relying as they do on the unalterable fact of the victim's race and on the history of slavery and race discrimination in this country, have an even greater potential for harm than other insults.

Although the emotional damage caused is variable and depends on many factors, only one of which is the outrageousness of the insult, a racial insult is always a dignitary affront, a direct violation of the victim's right to be treated respectfully. Our moral and legal systems recognize the principle that individuals are entitled to treatment that does not denigrate their humanity through disrespect for their privacy or moral worth. This ideal has a high place in our traditions, finding expression in such principles as universal suffrage, the prohibition against cruel and unusual punishment, the protection of the Fourth Amendment against unreasonable searches, and the abolition of slavery. A racial insult is a serious transgression of this principle because it derogates by race, a characteristic central to one's self-image.

The wrong of this dignitary affront consists of the expression of a judgment that the victim of the racial slur is entitled to less than that to which all other citizens are entitled. Verbal tags provide a convenient means of categorization so that individuals may be treated as members of a class and assumed to share all the negative attitudes imputed to the class.[37] Racial insults also serve to keep the victim compliant. Such dignitary affronts are certainly no less harmful than others recognized by the law. Clearly, a society whose public law recognizes harm in the stigma of separate but equal schooling[38] and

the potential offensiveness of the required display of a state motto on automobile license plates[39] and whose private law sees actionable conduct in an unwanted kiss[40] or the forcible removal of a person's hat[41] should also recognize the dignitary harm inflicted by a racial insult.

The need for legal redress for victims also is underscored by the fact that racial insults are intentional acts. The intentionality of racial insults is obvious: What other purpose could the insult serve? There can be little doubt that the dignitary affront of racial insults, except perhaps those that are overheard, is intentional and therefore most reprehensible. Most people today know that certain words are offensive and only calculated to wound.[42] No other use remains for such words as "nigger," "wop," "spick," or "kike."

In addition to the harms of immediate emotional distress and infringement of dignity, racial insults inflict psychological harm on the victim. Racial slurs may cause long-term emotional pain because they draw on and intensify the effects of the stigmatization, labeling, and disrespectful treatment that the victim has previously undergone. Social scientists who have studied the effects of racism have found that speech that communicates low regard for an individual because of race "tends to create in the victim those very traits of 'inferiority' that it ascribes to him."[43] Moreover, "even in the absence of more objective forms of discrimination—poor schools, menial jobs, and substandard housing—traditional stereotypes about the low ability and apathy of Negroes and other minorities can operate as 'self-fulfilling prophecies.'"[44] These stereotypes, portraying members of a minority group as stupid, lazy, dirty, or untrustworthy, are often communicated either explicitly or implicitly through racial insults.

Because they constantly hear racist messages, minority children, not surprisingly, come to question their competence, intelligence, and worth. Much of the blame for the formation of these attitudes lies squarely on value-laden words, epithets, and racial names.[45] These are the materials out of which each child "grows his own set of thoughts and feelings about race."[46] If the majority "defines them and their parents as no good, inadequate, dirty, incompetent, and stupid," the child will find it difficult not to accept those judgments.[47]

Victims of racial invective have few means of coping with the harms caused by the insults. Physical attacks are of course forbidden. More speech frequently is useless because it may provoke only further abuse or because the insulter is in a position of authority over the victim. Complaints to civil rights organizations also are meaningless unless they are followed by action to punish the offender. Adoption of a "they're well meaning but ignorant" attitude is another impotent response in light of the insidious psychological harms of racial slurs. When victimized by racist language, victims must be able to threaten and institute legal action, thereby relieving the sense of helplessness that leads to psychological harm and communicating to the perpetrator and to society that such abuse will not be tolerated, either by its victims or by the courts.

Minority children possess even fewer means for coping with racial insults than do adults. "A child who finds himself rejected and attacked . . . is not likely to develop dignity and poise. . . . On the contrary he develops defenses. Like a dwarf in a world of menacing giants, he cannot fight on equal terms."[48] The child who is the victim of belittlement can react with only two unsuccessful strategies, hostility or passivity. Aggressive reactions can lead to consequences that reinforce the harm caused by the insults; children who behave aggressively in school are marked by their teachers as troublemakers,

adding to the children's alienation and sense of rejection.[49] Seemingly passive reactions have no better results; children who are passive toward their insulters turn the aggressive response on themselves;[50] robbed of confidence and motivation, these children withdraw into moroseness, fantasy, and fear.[51]

It is, of course, impossible to predict the degree of deterrence a cause of action in tort would create. However, as Professor van den Berghe has written, "for most people living in racist societies racial prejudice is merely a special kind of convenient rationalization for rewarding behavior."[52] In other words, in racist societies "most members of the dominant group will exhibit both prejudice and discrimination"[53] but only in conforming to social norms. Thus, "[W]hen social pressures and rewards for racism are absent, racial bigotry is more likely to be restricted to people for whom prejudice fulfills a psychological 'need.' In such a tolerant milieu prejudiced persons may even refrain from discriminating behavior to escape social disapproval."[54] Increasing the cost of racial insults thus would certainly decrease their frequency. Laws will never prevent violations altogether, but they will deter "whoever is deterrable."[55]

Because most citizens comply with legal rules, and this compliance in turn "reinforce[s] their own sentiments toward conformity,"[56] a tort action for racial insults would discourage such harmful activity through the teaching function of the law.[57] The establishment of a legal norm "creates a public conscience and a standard for expected behavior that check overt signs of prejudice."[58] Legislation aims first at controlling only the acts that express undesired attitudes. But "when expression changes, thoughts too in the long run are likely to fall into line."[59] "Laws . . . restrain the middle range of mortals who need them as a mentor in molding their habits."[60] Thus, "If we create institutional arrangements in which exploitative behaviors are no longer reinforced, we will then succeed in changing attitudes [that underlie these behaviors]."[61] Because racial attitudes of white Americans "typically follow rather than precede actual institutional [or legal] alteration,"[62] a tort for racial slurs is a promising vehicle for the eradication of racism.

NOTES

1. See generally A. Higginbotham, In the Matter of Color (1978).

2. P. Mason, Race Relations 2 (1970).

3. O. Cox, Caste, Class and Race 383 (1948).

4. K. Clark, Dark Ghetto 63–64 (1965).

5. See G. Allport, The Nature of Prejudice 152 (1954).

6. J. Kovel, White Racism: A Psychohistory 195 (1970).

7. See E. Goffman, Stigma 7 (1963). See also J. Griffin, Black like Me (1960) (white journalist dyed skin, assumed black identity, traveled through South, was treated as a black; began to assume physical demeanor and psychological set of black itinerant).

8. See Goffman, *supra* note 7, at 17, 131.

9. See S. Hayakawa, Symbol, Status, and Personality 76–78 (1966).

10. See, e.g., Allport, *supra* note 5, at 9, 148–49; M. Goodman, Race Awareness in Young Children 46–47, 55–58, 60 (rev. ed. 1964). See also Cecilia Cota Robles de Suarez, *Skin Color as a Factor of Racial Identification and Preference of Young Chicano Children*, Chi. J. Soc. Sci. & Arts, Spring 1971, at 107; Harold Stevenson & Edward Stewart, *A Developmental Study of Racial Awareness in Young Children*, 29 Child Dev. 399 (1958).

11. See, e.g., Ernest Harburg et al., *Socio-Ecological Stress, Suppressed Hostility, Skin Color, and Black-White Male Blood Pressure: Detroit*, 35 Psychosomatic Med. 276 (1973) [hereinafter Harburg]

(suppressed hostility and darker skin "interact for high stress males and relate to high blood pressure"); Ari Kiev, *Psychiatric Disorders in Minority Groups*, in Psychology and Race 416, 420–24 (P. Watson ed., 1973).

12. See Clark, *supra* note 4, at 82–84, 90. See generally W. Grier & P. Cobbs, Black Rage 161 (1968) (paranoid symptoms are significantly more frequent among mentally ill blacks than among mentally ill whites); Special Populations Sub-Task Panel on Mental Health of Hispanic Americans, Report to the President's Commission on Mental Health 2, 10–11, 40 (1978).

13. J. Martin & C. Franklin, Minority Group Relations 3 (1979).

14. See Joint Commission on Mental Health of Children, Social Change and the Mental Health of Children 99–100 (1973).

15. Kiev, *supra* note 11, at 416, 420–21.

16. See Harburg, *supra* note 11, at 292.

17. See William D. Gentry, *Effects of Frustration, Attack, and Prior Aggressive Training on Overt Aggression and Vascular Processes*, 16 J. Personality & Soc. Psychol. 718 (1970).

18. See Harburg, *supra* note 11, at 294. See generally L.A. Times, Jan. 14, 1981, §I-A, at 4, col. 1 (discussing report of Children's Defense Fund) (black children more likely to be sick and without regular source of health care than white children; black children three times as likely as white children to be labeled mentally retarded and twice as likely to drop out of school before the twelfth grade).

19. See Harburg, *supra* note 11, at 285–90.

20. Martin & Franklin, *supra* note 13, at 43. See Allport, *supra* note 5, at 159.

21. Martin & Franklin, *supra* note 13, at 4.

22. See Allport, *supra* note 5, at 170–86, 371–84, 407–08.

23. G. Allport, *The Bigot in Our Midst*, 40 Commonweal 582 (1944), reprinted in Anatomy of Racial Intolerance 161, 164 (G. deHuszar ed., 1946).

24. See Allport, *supra* note 5, at 62, 252, 460–61, 467–72 (rejecting view of racist conduct as catharsis and arguing that racist attitudes themselves can be curtailed by law). But see R. Williams, The Reduction of Intergroup Tensions 41 (1947); L. Berkovitz, *The Case for Bottling Up Rage*, Psychology Today, July 1973, at 24; L. Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1053 (1936) ("[I]t would be unfortunate if the law closed all safety valves through which irascible tempers might legally blow off steam").

25. See Goodman, *supra* note 10, at 36–60. See also Allport, *supra* note 5, at 289–301.

26. Goodman, *supra* note 10, at 55.

27. *Id.* at 56.

28. *Id.* at 58.

29. *Id.*

30. *Id.*

31. See *id.* at 83.

32. See *id.* at 86.

33. See *id.* at 60–73.

34. E.g., Wilkinson v. Downton, [1897] 2 Q.B. 57 (defendant falsely told plaintiff her husband had had both legs broken in an accident; plaintiff suffered permanent physical harm).

35. E.g., Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967).

36. E.g., Alcorn v. Anbro Eng'g, Inc., 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970); Contreras v. Crown Zellerbach, Inc., 88 Wash. 2d 735, 565 P.2d 1173 (1977) (en banc).

37. See F. Wertham, A Sign for Cain 89 (1966) (racial prejudice depersonalizes the victim, thereby rationalizing violence and inhumane treatment).

38. See generally Brown v. Bd. of Educ., 347 U.S. 483 (1954). *Brown* turned, clearly, on the stigmatizing effect—the indignity or affront of separate schools—because by hypothesis the schools were "equal." See *id.* at 492.

39. Wooley v. Maynard, 430 U.S. 705 (1977) (considerations of privacy and autonomy held to prevent New Hampshire from punishing citizens for putting tape over state motto "Live Free or Die" on license plates).

40. See W. Prosser, Handbook of the Law of Torts, §10, at 36 & n.85 (4th ed. 1971).

41. See *id.* §10, at 36 & n.78.

42. See Allport, *supra* note 5, at 177 (When a speaker uses terms like "nigger," "spick," or "wop," "we can be almost certain that the speaker *intends* not only to characterize the person's membership, but also to disparage and reject him"). See generally Hayakawa, *supra* note 9, at 25 (racial and religious classifications serve no nondiscriminatory, predictive ends).

43. M. Deutsch et al., Social Class, Race, and Psychological Development 175 (1968).

44. *Id.*

45. See Allport, *supra* note 5, at vi; Goodman, *supra* note 10, at 73, 127–31, 135–36, 159–60, 163–64, 211, 232, 238–39; deHuszar, preface to Anatomy of Racial Intolerance, *supra* note 23, at 3.

46. Goodman, *supra* note 10, at 246.

47. K. Keniston, All Our Children 33 (1977).

48. Allport, *supra* note 5, at 139.

49. See generally Howard James, Children in Trouble 278 (1970); Jonathan Kozol, Death at an Early Age (1967); Vredeval, *Embarrassment and Ridicule*, Nat'l Educ. Ass'n. J., Sept. 1963, at 17. Black teenagers have a one in ten chance of getting into trouble with the law and are five times more likely to be murdered than white teenagers. See L.A. Times, *supra* note 18. Black children are suspended from schools at twice the rate of white children. See *id.*

50. See M. McDonald, Not by the Color of Their Skin 131 (1970).

51. See generally Clark, *supra* note 4, at 65 (sense of inferiority is the most serious race-related injury to a black child); M. Deutsch, The Disadvantaged Child 106 (1968) ("[B]lack children tend to be more passive, more fearful and more diseuphoric than white").

Deutsch has produced evidence to show that personality traits of defeatism and self-rejection in minority children are to a significant extent independent of income level. In a study comparing aptitude scores and self-image ratings among groups of low-income white children and similar black children, it was found that the latter had lower scores on aptitude tests and more negative self-images. See Deutsch, *supra* at 106. Another study found that although IQ levels increased with education and prestige ratings of occupations of the parents of both white and black children, the gains were considerably less for black children. See *id.* at 295. These studies seem to show that although poverty has a negative effect on a child's self-image and academic performance, the racial factor is even more significant. See also Kacser, *Background Paper*, in Subcomm. on Executive Reorganization and Government Research of the Senate Comm. on Government Operations, Government Research on the Problems of Children and Youth: Background Papers Prepared for the 1970–71 White House Conference on Children and Youth, 92d Cong., 1st Sess. 1, 15 (1971) (children who suffer from discrimination become convinced they are inferior and unworthy of help or affection and respond by aggression, neurotic repression, withdrawal, and fantasy).

52. P. van den Berghe, Race and Racism 21 (2d ed. 1978).

53. *Id.* at 20.

54. *Id.*

55. Allport, *supra* note 5, at 472.

56. Williams, *supra* note 24, at 73.

57. See Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (teaching role of the law).

58. Allport, *supra* note 5, at 470.

59. *Id.*

60. *Id.* at 439. See also G. Allport, *Prejudice: A Problem in Psychological and Social Causation*, 4, Supp. Ser. No. 4, J. Soc. Issues (1950) (examination of prejudice as a mode of mental functioning).

61. H. Triandis, *The Impact of Social Change on Attitudes*, in Attitudes, Conflict and Social Changes 132 (1972) (quoted in P. Katz, preface to Toward the Elimination of Racism 8 (P. Katz ed., 1976)).

62. Gunnar Myrdal, An American Dilemma 20 (1962) (fallacy of theory that law cannot change custom).

20. Law as Microaggression

PEGGY C. DAVIS

In January 1988, the chief judge of the highest court of New York commissioned sixteen citizens to consider whether minorities in that state believe the court system to be biased. The answer was immediately apparent. With striking regularity minority people in New York, and elsewhere in the United States, report conviction that the law will work to their disadvantage. Every relevant opinion poll of which the commission is aware finds that minorities are more likely than other Americans to doubt the fairness of the court system.

Having quickly discovered evidence of a widespread minority perception of bias within the courts, the commission was left to consider its causes. The causes are not easily established. Those who perceive the courts as biased admit that incidents of alleged bias are usually ambiguous, that systematic evidence of bias is difficult to compile, and that evidence of bias in some aspects of the justice system is balanced by evidence that the system acts to correct or to punish bias in other sectors of the society.

The Lens Through Which Blacks Are Perceived

The work of Professor Charles Lawrence has sensitized legal scholars to basic psychological facts about race and perception. In urging that antidiscrimination laws be liberated from existing standards of intentionality, Lawrence argues that, as a matter of history, culture, and psychology, American racism is pervasive and largely unconscious:

> Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism.[1]

A version of this chapter originally appeared as Peggy Cooper Davis, *Law as Microagression*, 98 Yale L.J. 1559 (1989). Originally published in the *Yale Law Journal*.

The claim of pervasive, unconscious racism is easily devalued. The charge has come to be seen as egregious defamation and to carry an aura of irresponsibility. Nonetheless, the claim is well founded. It must be examined and understood, rather than resisted. I examine it here in the context of a small incident. I analyze the incident, reported below, first from the point of view of a white participant and as an instance of stereotyping. Then I analyze it from the point of view of a black participant and as an instance of the "incessant, often gratuitous and subtle offenses" defined by black mental health professionals as "microaggressions."[2]

The scene is a courthouse in Bronx, New York. A white assistant city attorney takes the court elevator up to the ninth floor. At the fifth floor, the doors open. A black woman poised to enter asks, "Going down?" "Up," says the city attorney. And then, as the doors close, "You see? They can't even tell up from down. I'm sorry, but it's true."

The black woman's words are subject to a variety of interpretations. She might have thought it efficient, appropriate, or congenial to ask the direction of the elevator rather than to search for the indicator. The indicator might have been broken. Or the woman might have been incapable of competent elevator travel. The city attorney is led, by cognitive habit and by personal and cultural history, to seize on the pejorative interpretation.

The city attorney lives in a society in which blacks are commonly regarded as incompetent. The traditional stereotype of blacks includes inferior mentality, primitive morality, emotional instability, laziness, boisterousness, closeness to anthropoid ancestors, occupational instability, superstition, carefree attitude, and ignorance.[3] Common culture reinforces the belief in black incompetence in that the black is "less often depicted as a thinking being."[4] If, for example, the city attorney watches television, she has observed that whites, but not blacks, are likely to exert authority or display superior knowledge; that whites, but not blacks, dispense goods and favors; and that blacks are disproportionately likely to be dependent and subservient.[5]

Cognitive psychologists tell us that the city attorney shares with all human beings a need to "categorize in order to make sense of experience. Too many events occur daily for us to deal successfully with each one on an individual basis; we must categorize in order to cope."[6] In a world in which sidewalk grates routinely collapsed under the weight of an average person, we would walk around sidewalk grates. We would not stop to inspect them and distinguish secure ones from loose ones: It is more efficient to act on the basis of a stereotyping heuristic. In a world in which blacks are commonly thought to be incompetent (or dangerous or musical or highly sexed), it is more efficient for the city attorney to rely on the generalization than to make individuating judgments.

It is likely that the city attorney assimilated negative stereotypes about blacks before she reached the age of judgment. She will, therefore, have accepted them as truth rather than opinion. Having assimilated the stereotypes, the city attorney will have developed a pattern of interpreting and remembering ambiguous events in ways that confirm, rather than unsettle, her stereotyped beliefs. If she sees or hears of two people on a subway, one white, one black, and one holding a knife, she is predisposed to form an impression that the black person held the knife, regardless of the truth of the matter. She will remember examples of black incompetence and may fail to remember examples of the opposite.[7]

Psychoanalysts tell us that the stereotype serves the city attorney as a mental repository for traits and impulses that she senses within herself and dislikes or fears. According

to this view, people manage normal developmental conflicts involving impulse control by projecting forbidden impulses onto an out-group. This defense mechanism allows the city attorney to distance herself psychologically from threatening traits and thoughts. In this respect, the pejorative out-group stereotype serves to reduce her level of stress and anxiety.

Historians tell us of the rootedness of the city attorney's views. During the early seventeenth century, the circumstances of blacks living in what was to become the United States were consistent with principles of open, although not equal, opportunity. African Americans lived both as indentured servants and as free people.[8] This early potential for egalitarianism was destroyed by the creation of a color-caste system. Colonial legislatures enacted slavery laws that transformed black servitude from a temporary status, under which both blacks and whites labored, to a lifelong status that was hereditary and racially defined. Slavery required a system of beliefs that would rationalize white domination and laws and customs that would assure control of the slave population.

The beliefs that served to rationalize white domination are documented in an 1858 treatise. In many respects, they echo the beliefs identified one hundred years later as constitutive of the twentieth-century black stereotype:

> [T]he negro, . . . whether in a state of bondage or in his native wilds, exhibits such a weakness of intellect that . . . "when he has the fortune to live in subjection to a wise director, he is, without doubt, fixed in such a state of life as is most agreeable to his genius and capacity."
>
> . . . So debased is their [moral] condition generally, that their humanity has been even doubted. . . . [T]he negro race is habitually indolent and indisposed to exertion. . . .
>
> In connection with this indolent disposition, may be mentioned the want of thrift and foresight of the negro race.
>
> The negro is not malicious. His disposition is to forgive injuries, and to forget the past. His gratitude is sometimes enduring, and his fidelity often remarkable. His passions and affections are seldom very strong, and are never very lasting. The dance will allay his most poignant grief, and a few days blot out the memory of his most bitter bereavement.
>
> The negro is naturally mendacious, and as a concomitant, thievish. . . .
>
> . . . Lust is his strongest passion; and hence, rape is an offence of too frequent occurrence.[9]

The laws and customs that assured control of the slave population reinforced the image of blacks as incompetent and in need of white governance. The master was afforded ownership, the right to command labor, and the virtually absolute right of discipline. Social controls extending beyond the master-slave relationship excluded the slave—and in some respects free blacks—from independent, self-defining activity. The slave could not obtain education, marry, maintain custody of offspring against the wishes of the master, or engage in commerce. Rights of assembly and movement were closely controlled. Social relationships between whites and blacks were regulated on the basis of caste hierarchy: Breaches of the social order, such as "insolence" of a slave toward a white person, were criminally punishable.

This history is part of the cultural heritage of the city attorney. The system of legal segregation, which maintained caste distinctions after abolition, is part of her life experience. This "new system continued to place all Negroes in inferior positions and all whites in superior positions."[10] The city attorney is among the

> two-thirds of the current population [that] lived during a time when it was legal and customary in some parts of this country to require that blacks sit in the back of a bus, give up their seats to whites, use different rest rooms and drinking fountains, and eat at different restaurants.[11]

The civil rights movement and post-1954 desegregation efforts are also part of the city attorney's cultural heritage. As an educated woman in the 1980s, she understands racial prejudice to be socially and morally unacceptable. Psychological research that targets her contemporaries reveals an expressed commitment to egalitarian ideals along with lingering negative beliefs and aversive feelings about blacks. "Prejudiced thinking and discrimination still exist, but the contemporary forms are more subtle, more indirect, and less overtly negative than are more traditional forms."[12]

Recent research also suggests that the city attorney can be expected to conceal her antiblack feelings except in private, homoracial settings. Many of her white contemporaries will suppress such feelings from their conscious thoughts. White Americans of the city attorney's generation do not wish to appear prejudiced. "[T]he contemporary form[] of prejudice is expressed [at least in testing situations] in ways that protect and perpetuate a nonprejudiced, nondiscriminating self-image."[13] Americans of the city attorney's generation live under the combined influence of egalitarian ideology and "cultural forces and cognitive processes that . . . promote prejudice and racism."[14] Antiblack attitudes persist in a climate of denial.

The denial and the persistence are related. It is difficult to change an attitude that is unacknowledged. Thus, "like a virus that mutates into new forms, old-fashioned prejudice seems to have evolved into a new type that is, at least temporarily, resistant to traditional . . . remedies."[15]

The View from the Other Side of the Lens: Microaggression

Return to the fifth floor and the moment the elevator door opened. The black woman sees two white passengers. She inquires and perceives the response to her inquiry. She sees and hears, or thinks she sees and hears, condescension. It is in the tone and body language that surround the word "up." Perhaps the tone is flat, the head turns slowly in the direction of the second passenger, and the eyes roll upward in apparent exasperation. Perhaps the head remains lowered, and the word is uttered as the eyes are raised to a stare that suggests mock disbelief. The woman does not hear the words spoken behind the closed elevator doors. Yet she feels that she has been branded incompetent, even for elevator travel. This feeling produces anger, frustration, and a need to be hypervigilant against subsequent, similar brandings.

The elevator encounter is a microaggression. "These are subtle, stunning, often automatic, and non-verbal exchanges which are 'put downs' of blacks by offenders."[16]

Psychiatrists who have studied black populations view them as "incessant and cumulative" assaults on black self-esteem.[17]

> Microaggressions simultaneously sustain[] defensive-deferential thinking and erode[] self confidence in Blacks. . . . [B]y monopolizing . . . perception and action through regularly irregular disruptions, they contribute[] to relative paralysis of action, planning and self-esteem. They seem to be the principal foundation for the verification of Black inferiority for both whites and Blacks.[18]

The management of these assaults is a preoccupying activity, simultaneously necessary to and disruptive of black adaptation.

> [The black person's] self-esteem suffers . . . because he is constantly receiving an unpleasant image of himself from the behavior of others to him. This is the subjective impact of social discrimination. . . . It seems to be an ever-present and unrelieved irritant. Its influence is not alone due to the fact that it is painful in its intensity, but also because the individual, in order to maintain internal balance and to protect himself from being overwhelmed by it, must initiate restitutive maneuvers . . .—all quite automatic and unconscious. In addition to maintaining an internal balance, the individual must continue to maintain a social facade and some kind of adaptation to the offending stimuli so that he can preserve some social effectiveness. All of this requires a constant preoccupation, notwithstanding . . . that these adaptational processes . . . take place on a low order of awareness.[19]

Vigilance and psychic energy are required not only to marshal adaptational techniques but also to distinguish microaggressions from differently motivated actions and to determine "which of many daily microaggressions one must undercut."[20]

The Legal System Perceived by Victims of Microaggression

We do not know what business the black elevator traveler has in the courthouse. Whether she is a judge, a litigant, a court officer, or a vagrant, it is likely that her view of the legal system is affected by her status as a regular target of microaggression. If she has a role in the system, she will be concerned about how she is heard and regarded. When a court decides matters of fact, she will wonder whether the judgment has been particularized or based on generalizations from immutable irrelevancies. When a court decides matters of law, she will wonder whether it considers and speaks to a community in which she is included. She will know that not every legal outcome is the product of bias. Sometimes the person on the sidewalk who will not yield turns out to be blind, or stopping to speak, or also black. Sometimes contrary evidence is so powerful that stereotypes are overwhelmed; a black person may perform in such an obviously competent manner that she or he is *perceived* as competent. Sometimes contrary evidence is so weak that the influence of stereotypes is harmless; a black person who asks a seemingly stupid question may *be* stupid. At other times, the concerns of the black elevator traveler

seem justified. The two situations described below are the sorts that seem to justify her concerns. The first involves matters of fact and the experiences of three black jurors. The second involves matters of law and the perspectives from which blacks regard legal pronouncements.

Jurors Under the Influence of Microaggression

Robert Nickey has three times assumed the role of juror in the legal system. On the last occasion, he sat in judgment of a young man of privilege accused of murdering a female companion. Mr. Nickey was one of three black jurors hearing the case of *New York v. Chambers.* Mr. Nickey has worked all his adult life as a mortician; he considered himself well qualified to evaluate the evidence in a trial dominated by forensic testimony. When the deliberations began, he felt that his views were unheeded by white jurors. At hearings convened by New York's Judicial Commission on Minorities, Mr. Nickey testified that a particular moment in the deliberations confirmed in his mind a growing sense that racial difference lay at the heart of juror disagreement:

> MR. NICKEY: [The second black juror] asked the remaining jurors, he said, if this man was black, would any of you all have any difficult[y] convicting him of murder with intent.
> MR. CHAIRMAN: He asked that in the jury room?
> MR. NICKEY: He asked that in the jury room, and I'm here to tell you there was a hush[ed] sound in that jury room. Nobody spoke for five minutes. And right then we were convinced there was some prejudice because the young man was white, young, a lot of money was behind him.

Mr. Nickey interpreted this moment in the jury room in light of a life history of microaggression. He had encountered whites who started or stiffened as he approached on a dark street or subway car but remained relaxed upon the approach of whites whose appearance and demeanor were no more threatening. He had encountered whites who did not give way if he approached on a busy street but yielded to a similarly situated white. He had often sensed that whites heard his ambiguous or perfectly sensible words and formed the thought that he "didn't know up from down." Robert Chambers, the defendant, did not fit the white jurors' stereotype of an intentional killer. From Mr. Nickey's perspective, their inability to conceive of Chambers as an intentional killer and inability to credit the views of black jurors combined to produce intransigence and deadlock. He concluded that "beyond reasonable doubt" meant one thing for white defendants and another for blacks:

> So I'm saying there is two kinds of justice[] here in the State of New York. One is for the rich and in my opinion, the rich, he gets off. He gets like what they call a hand slap. You know, a little time or no time at all.
>
> But if you are a minority and you don't have any money, you go to jail, it's as simple as that. You go to jail and you do your time.
>
> And I always felt and was taught that justice was blind to race, color, or creed. But that is not so here in New York.

A second black juror referred to the same moment in the jury room as the basis of a "strong belief of racial prejudice" that led him to seek to be relieved from further service. The third black juror, a woman, concluded that "racial prejudice, sexual harassment, sexism, chauvinistic and elitist attitudes . . . permeated the jury's deliberation process."

These jurors experienced microaggression on two levels. In the context of the deliberations, a message of inferiority and subordination was delivered as their views were disregarded. The stereotyped thinking of white jurors caused both a different evaluation of the evidence and an inability to credit the competing views and perspectives of the black jurors. As a result, the black jurors were rendered ineffective in the deliberative process. The theory of microaggression instructs that the black jurors' perception of being disregarded and marginalized in the deliberative process produced stress in direct proportion to the restriction that marginalization imposed on their ability to function as fact finders.[21]

At a more general level, a social message of inferiority and subordination was delivered. The black jurors were struck not only by their own isolation and ineffectiveness in the fact-finding process but also by the racialist character of the process. They took from the deliberations a belief that legal claims are consigned to a system unable in important respects to particularize factual judgments and prone to deliver judgment in accordance with racial stereotypes. The belief that particular jurors were, as a general matter, inappropriately empathetic or indifferent to the plight of the defendant might have been disquieting, but the belief that they were empathetic or indifferent *in racially determined ways* was an affront. It said to the black jurors that they, as black people, could not expect impartial consideration were they before the court as defendants or complainants. It increased their subjective need to be hypervigilant against manifestations of arbitrary prejudice and contributed to "the ongoing, cumulative racial stress[,] . . . anger, energy depletion, and uneasiness that result from the time spent preoccupied by color-related aspects of one's [life and work]."[22]

Law as Microaggression

Mr. Nickey lacks scientific evidence of bias in the court system. He has as a basis for his assertions only his sense of the cognitive dissonance between black and white jurors in a particular case, educated by experiences of American racism and awareness of American history and culture. His beliefs about decision making in the legal system are, however, consistent with the results of a research effort that has been described as "far and away the most complete and thorough analysis of sentencing that [has] ever been done." The study addressed the combined effects of the race of the victim and the race of the defendant on a sentencer's decision of whether to impose the penalty of death.

This research, conducted by Professor David Baldus, established that when a black person has been accused of murdering a white person, the likelihood that the killer will be sentenced to death is far greater than when homicide victims and perpetrators fall into any other racial pattern. The assertions offered earlier will, if credited, render this fact unsurprising: "If caste values and attitudes mean anything at all, they mean that offenses by or against Negroes will be defined not so much in terms of their intrinsic seriousness as in terms of their importance in the eyes of the dominant group."[23] It is a fact that certainly would not surprise Mr. Nickey.

The Supreme Court considered whether the Baldus research, which contained statistical evidence of an extreme manifestation of this racial pattern of capital sentencing in Georgia, supported a claim that Georgia death sentencing procedures violate equal protection guarantees or prohibitions against cruel and unusual punishment.[24] The Court found the evidence inadequate to demonstrate "a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process."[25] With arguments that wither (if they do not die) in the light of Professor Lawrence's explication of automatic and unconscious racism,[26] the Court found McCleskey's equal protection claim wanting by reason of his failure to prove the decision makers in his case guilty of intentional discrimination or the state of Georgia guilty of creating its system of capital punishment with a consciously discriminatory purpose.[27] With respect to the claim of cruel and unusual punishment, the Court also found that too little had been proven to warrant correction of the Georgia death sentencing scheme.[28]

When the Court announces law, as it did in *McCleskey*, it "constructs a response to the question 'What kind of community should we . . . establish with each other?'"[29] The law is perceived as just to the extent that it hears and respects the claims of each affected class. James Boyd White explains the point by example:

> In evaluating the law that regulates the relations between police officials and citizens . . . the important question to be asked is not whether it is "pro-police" or "pro-suspect" in result, nor even how it will work as a system of incentives and deterrents, but what room it makes for the officer and the citizen each to say what reasonably can be said, from his or her point of view, about the transaction—the street frisk, the airport search, the barroom arrest—that they share. . . . [T]he central concern is with voices: whether the voice of the judge leaves room for the voices of the parties.[30]

The relevant voices are not just those of the immediate parties but those of all persons whose lives, status, and rights are affected by the announced law. The rules governing street frisks will be better rules to the extent that the rule maker looks beyond the situations of the prosecutor and the frisked person to consider the positions of, inter alia, the police officer, the citizen who might be frisked, the citizen who might be victimized, and the community that shares the ambiguous or neutral characteristics that aroused suspicion and provoked the frisk.

Having in mind these questions of "voice," consider the reaction of James Nickey upon announcement of the *McCleskey* decision. Mr. Nickey will bring a question to the text: When this matter of constitutional law was debated, was there room in the argument for my voice? The accumulated effects of microaggressions give cause for skepticism. If there is a cultural pattern of reacting instinctively to blacks as inferior and subject to control, it is unlikely that blacks will have figured in legal discourse as part of the "we" that comes to mind as courts consider how "we" will govern ourselves and relate to one another. Just as the apparently incompetent elevator traveler will not be a credible witness, the being for whom one does not think of yielding on the sidewalk will not be thought of as an equal partner when the requirements of justice are calculated.

The *McCleskey* decision strikes the black reader of law as microaggression—stunning, automatic acts of disregard that stem from unconscious attitudes of white

superiority and constitute a verification of black inferiority. The Court was capable of this microaggression because cognitive habit, history, and culture left it unable to hear the range of relevant voices and grapple with what reasonably might be said in the voice of discrimination's victims.

NOTES

1. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 322 (1987) (also Chapter 31, this volume).

2. C. Pierce & W. Profit, Homoracial Behavior in the U.S.A. 2–3 (1986) (unpublished manuscript).

3. G. Allport, The Nature of Prejudice 196–98 (1954). The stereotype also includes overassertiveness, religious fanaticism, fondness for gambling, gaudy and flashy dress, violence, a high birth rate, and susceptibility to bribery. *Id.*

More recent opinion studies indicate a reduction in self-reported negative associations with blacks. J. Dovidio & S. Gaertner, Prejudice, Discrimination, and Racism 3–6 (1986). The relationship between self-reported beliefs and actual beliefs is, however, problematic in this context.

4. C. Pierce, *Psychiatric Problems of the Black Minority*, in American Handbook of Psychiatry 512, 514 (S. Arieti ed., 1974).

> For instance, although he is the district attorney in a [television] program, the black solves a case with his fists; an underling, who is a white police lieutenant, uses his brains to solve the same problem. That is, while the district attorney is being beat up, the lieutenant is deploying squad cars, securing laboratory assistance, and reasoning out his next move. Gratuitously . . . the show depicts the lieutenant speaking with a force and an arrogance that would not be tolerated in a real life situation between a district attorney and his subordinate.

Id. See also C. Pierce et al., *An Experiment in Racism: TV Commercials*, in Television and Education 62 (C. Pierce ed., 1978).

5. Pierce et al., *supra* note 4, at 82; see also Dovidio & Gaertner, *supra* note 3, at 8–9, 64–65.

6. Lawrence, *supra* note 1, at 337.

7. See G. Allport & L. Postman, The Psychology of Rumor 12–13, 99–115 (1947); see also S. Fiske & S. Neuberg, Alternatives to Stereotyping: Informational and Motivational Conditions for Individuating Processes 11, 12–13 (1986) (unpublished manuscript) ("Once perceiver has accessed a social category, it is difficult for the perceiver to respond accurately to the targets' individuating characteristics").

8. See H. Burns, *Black People and the Tyranny of American Law*, 407 Annals 156, 157–58 (1973) and authorities cited therein.

9. T. Cobb, An Inquiry into the Law of Negro Slavery 34–40 (1858) (footnotes omitted).

10. A. Davis et al., Deep South 4 (1941).

11. Dovidio & Gaertner, *supra* note 3, at 1.

12. *Id.* at 84.

13. *Id.* The authors show, for example, that antiblack feelings may be masked to the extent that they are displayed only when there is a nonracial factor that can be used to rationalize them. White research subjects led to believe that a person was in distress responded in nearly similar ways to black and to white victims (with a somewhat greater response in the case of black victims) if there was no apparent justification for a failure to respond. If the subjects knew of the availability of another who might respond, they "helped black victims much less frequently than they helped white victims (38 percent vs. 75 percent) . . . [and] showed lower levels of arousal with black than with white victims (Means +2.40 vs. [+]10.84 [heart]beats per minute). These subjects thus showed much less evidence of personal concern, in terms of both physiological response and helping behavior, for black victims than for white victims." *Id.* at 77–78.

14. *Id.* at 85.

15. *Id.* at 85–86.

16. Pierce et al., *supra* note 4, at 66.

17. *Id.* at 515.

18. C. Pierce, Unity in Diversity: Thirty-Three Years of Stress 17 (1986) (unpublished manuscript).

19. A. Kardiner & L. Ovesey, The Mark of Oppression 302–03 (1951).

20. Pierce, *supra* note 18, at 18; see also Dudley, *Blacks in Policy-Making Positions*, in Black Families in Crisis 22 (A. Coner-Edwards & J. Spurlock eds., 1988) (describing psychic work associated with distinguishing racially influenced from other behaviors and fashioning response).

21. See C. Pierce, *Stress in the Workplace*, in Black Families in Crisis, *supra* note 20, at 31 ("[A] Black worker is stressed in direct proportion to the inhibition to control space, time, energy, and movement secondary to overt or covert racial barriers").

22. *Id.* at 31.

23. Johnson, *The Negro and Crime*, 217 Annals 93, 98 (Sept. 1941).

24. McCleskey v. Kemp, 481 U.S. 279 (1987).

25. *Id.* at 313.

26. See S. Johnson, *Unconscious Racism and the Criminal Law*, 73 Cornell L. Rev. 1016 (1988).

27. *McCleskey*, 481 U.S. at 279–82.

28. *Id.* at 312–13 ("[A]t most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. . . . '[T]here can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death."' Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious") (citation omitted). This disinclination to find a relationship between racial disparity and attitudes about race will remain a feature of the Court's jurisprudence as long as the mechanisms of contemporary racialism remain unacknowledged. For a recent example of this phenomenon, see *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706, 723–27 (1989) (discounting evidence of racial disparity among recipients of city contracts and members of contractors' associations as justifications for time-limited minority set-aside program).

29. J. White, Heracles' Bow: Essay on the Rhetoric and Poetics of the Law 34 (1985).

30. *Id.* at 47–48.

21. Implicit Bias, Election 2008, and the Myth of a Postracial America

GREGORY S. PARKS AND JEFFREY J. RACHLINSKI

The election of Barack Obama as the forty-fourth president of the United States signals that the traditional modes of thinking about race in America require rethinking. Commentators and pundits have begun to suggest that the election of a black man to the nation's highest office means that the United States has entered a postracial era in which civil rights laws are becoming unnecessary. Although President Obama's election means that explicit, open antiblack racism has largely faded, an analysis of the campaign's rhetoric and themes suggests that unconscious racism is alive and well. Rather than suggest a retreat from traditional civil rights protections, the 2008 election calls for enhancing and maintaining efforts to ensure that civil rights laws address less virulent, but persistent, forms of racism.

Contemporary racism tends to be subtle—even unconscious. Civil rights laws and jurisprudence are designed to combat overt discrimination but function poorly as remedies for subtle, unconscious racism. Unfortunately, uncovering convincing evidence that unconscious racism influences society at large has proven difficult, thereby reducing the impetus for reform. The 2008 election, however, provides evidence for widespread unconscious racism, as well as a case study in how it functions.

The election shows that voting rights and employment discrimination laws must combat unconscious bias if they are to accomplish their stated goals. The principles of open access to the polls and workplaces free from discrimination are likely to remain enshrined in American law for some time to come. The election of a black president, however, might suggest that racial gerrymandering has become unnecessary and that efforts to use Title VII to combat anything other than overtly racist practices in the workplace are unnecessary. The 2008 election shows nothing of the sort. Rather, it shows that invigorated versions of these mechanisms are essential to combating the implicit racism that continues to haunt elections and the workplace.

We use the 2008 election as a case study, relying on a combination of qualitative and quantitative methods. We assess polling numbers, news accounts, and campaign

A version of this chapter previously appeared as Gregory S. Parks and Jeffrey J. Rachlinski, *Implicit Bias, Election '08, and the Myth of a Post-Racial America*, 37 Fla. St. U. L. Rev. 659 (2010). Originally published in the *Florida State University Law Review*.

rhetoric in light of contemporary psychological research on how modern racism functions. We then assess what this means for the Voting Rights Act of 1965 and Title VII of the Civil Rights Act.

The 2008 Election and Race at the Ballot Box

Does a country where voters elect black people to high public offices such as police chief, governor, and president really need the protections of the Voting Rights Act? We doubt that anyone would argue seriously that President Obama's success suggests that efforts to provide equal or widespread access to the polls are unnecessary. Elections remain marked by unfortunate, sporadic instances of fraud and voter disenfranchisement that continue to demand attention at the state and federal levels.[1] But the Voting Rights Act goes beyond efforts to ensure access to the polls to all eligible voters. The act facilitates, and even demands, a degree of gerrymandering designed to ensure that minority groups, especially black Americans, will find electoral success through the creation of districts that are disproportionately composed of minorities. The wisdom of this kind of racial gerrymandering remains the source of heated debate. Although it allows minority politicians to succeed, it arguably also dilutes the influence of minority voters overall by concentrating their interests into a few districts. The success of black politicians like President Obama and Massachusetts governor Deval Patrick arguably provides evidence that white voters will vote for minority candidates, undermining the foundational assumptions of racial gerrymandering.

President Obama's and Governor Patrick's electoral victories, however, convey a misleading impression. As we shall see, the success of black politicians has been tied closely to the presence of black voters. The 2008 electoral cycle was not exceptional. Voting patterns in the United States remain highly racially stratified. Furthermore, as we discuss below, modern campaign rhetoric promotes this stratification. Few black politicians would enjoy any measure of success without racial gerrymandering. In short, President Obama is nearly unique, so that it would be inappropriate to found changes in election law on his success.

Black Political Success and Black Voters

The success of black politicians has always depended on the franchise and political engagement of black voters. Just after the Civil War, Congress's passage of the Fifteenth Amendment, the Enforcement Acts, and the Force Acts first set black political power in motion. South Carolina offered an early example of what this large and newly motivated black population could accomplish. In 1870 black politicians attained three congressional seats, four of the state's eight executive offices, and a seat on the state supreme court. Throughout the South, black politicians took advantage of the political climate of Reconstruction to achieve high office, including three positions in the U.S. Senate. By 1875 Congress had eight black members.[2]

Suffrage proved to be an ephemeral right for black Americans, however. The election of 1876 saw the number of black members of Congress drop into the single digits. It fell to zero by 1902 and stayed there until 1928. The number of black congressional members did not reach double digits again until 1969,[3] four years after the passage of the Voting Rights Act.

With the advent of the act, black political participation grew. Unlike previous civil rights legislation, the Voting Rights Act gave the attorney general and the courts broad powers "to ensure the administration of a discrimination-free electoral process."[4] The act also established "mechanisms or 'special provisions' to monitor certain states and counties, and it created a triggering mechanism to bring most of the South under federal monitoring and the special provisions of enforcement."[5] These efforts worked hand in hand with voter registration campaigns and racial gerrymandering, especially in the South, to produce districts with disproportionately large black populations. Beginning in the 1970s, the number of black politicians in former Confederate states elected to state and federal legislatures grew from less than fifty to more than one hundred and reached almost two hundred by the late 1980s. The success of black politicians has thus always been tied to the legal protection of black voters.

An examination of the 2008 election reveals that the presidential race was a striking anomaly that has not changed the tight relationship between black political engagement and the success of black politicians. The same election that produced the nation's first black president continued the tradition of overwhelmingly racial voting patterns in the national legislature. The demographics of the House of Representatives, for example, are the product of racial gerrymandering and overwhelmingly racially stratified voting. The 2008 election sent thirty-nine black representatives to the 111th Congress. Blacks make up, on average, 48.4 percent of the population in these 39 congressional districts. In contrast, the 396 other districts have populations that are on average 8.7 percent black. Among the 313 districts with very small black populations, not one has a black representative.

The demography of congressional districts is no accident. Explicit racial gerrymandering is largely responsible for the creation of thirty-nine congressional districts with large black populations. Because the demographics of the districts vary enormously, even if voters select representatives from the population in the district without regard to race, some districts would be more likely than others to have black representatives. For example, the First Congressional District of Illinois (currently represented by former Black Panther Bobby Rush) is 65.1 percent black. Hence, if race played no role in the availability of candidates or the election process, the district would have a 65.1 percent chance of having a black representative. At the other end of the scale, only 0.25 percent of Wisconsin's Seventh Congressional District (currently represented by Dave Obey) is black, and hence it would have only a 0.25 percent chance of having a black representative if race played no role.

The ability of black candidates to get elected to the House of Representatives thus depends on having a large percentage of black voters in a congressional district. The statistics even reveal a distinct tipping point. Black candidates represent most districts with a black population greater than one-third; nonblack candidates represent nearly all districts with black populations less than one-third. A one-third tipping point is consistent with the following simple pattern: black voters nearly unanimously support black candidates, half of nonblack voters vote nearly unanimously against black candidates, and the remaining half of the nonblack voters divide on political issues. That highly racially stratified voting pattern would produce, nearly precisely, the racial composition of the House in exactly the same election that produced the nation's first black president.

Other factors are also apt to be at work, of course. Incumbency matters, as does party membership. Black voters are easily the Democratic Party's most reliable contingent, making race impossible to disentangle completely from party. Favoritism for black candidates might thereby combine with black voter clustering in the Democratic Party to explain the success of black politicians in districts with large numbers of black voters. The extraordinary lack of success of black politicians in districts where white voters are more prevalent, however, signals that white voters—even Democrats—disfavor black candidates.

The U.S. Senate provides the clearest test of the efficacy of racial gerrymandering. Unlike congressional districts, the states are not gerrymandered by race. Black politicians seeking to serve in the Senate generally face an electorate that has few black voters. Only Mississippi has a population that is more than one-third black (37.2 percent). Several other Southern states have sizable black populations, but the black population in all those states falls below the one-third cutoff that seems critical to black political success. Black politicians do not fare well in senatorial elections. At the time of writing, the only sitting black senator was Roland Burris, who was appointed to serve out President Obama's term in Illinois. Furthermore, Barack Obama was only the third black politician elected to the Senate in America's history (although two others have been appointed to serve). Without the intervention of the Voting Rights Act and racial gerrymandering, the House would presumably be little different.

Despite the legal efforts aimed at ensuring black political participation, law alone cannot change human behavior. *Brown v. Board of Education* overturned *Plessy v. Ferguson*'s "separate but equal" doctrine as it related to public education, but the change in law that the decision announced did little to alter the underlying attitudes that produced segregation. Indeed, widespread segregation in schools remains the norm, even fifty years later. Likewise, despite the ratification of the Fifteenth Amendment, the enactment of the Voting Rights Act, and the subsequent rise in the number of black elected officials, racism has persisted in the American political process. Recent history, too, suggests that political candidates' race has long predicted whether voters would elect them to office. Merely protecting access to the polls is not enough to ensure black political success. Even in 2008 the active intervention of racial gerrymandering remains an essential measure to overcoming racial voting patterns.

Racial Messages in Modern Political Campaigns

Why do racial voting patterns persist in an electorate that largely denounces the influence of race at the polls? While many factors contribute to the persistence of these patterns, political leaders must accept some of the blame. Overt racism is no longer a strategy that national leaders employ. Subtle messages that fan lingering racial animosity, however, still commonly animate modern campaign strategies. Voters' perceptions about race influence how they cast their ballots, while white politicians also have long used veiled racism as a way to swing voters or to get white voters out to the polls.

Richard Nixon's 1968 campaign provided perhaps the first blueprint for a modern political campaign in the United States. Included in the Nixon campaign's pioneering efforts in the art of spin was the use of racial messages that quietly harnessed the racial mood among white voters. The campaign promised law and order, which many saw as

code for cracking down on black militants. The campaign solicited supporters to show up at Nixon rallies to shout racial epithets so candidate Nixon could disparage the explicit expression of racism. This tactic sent a double message to white voters. To those who disdained explicit racism, Nixon could be seen as espousing a reasonably progressive message that racism was morally wrong. To those who harbored racist sentiment, the presence of the supporter at the campaign was evidence that like-minded voters supported Nixon.

Many Republicans since Nixon maintained a drumbeat of covert racial messages in campaigns. When Ronald Reagan spoke of supposed welfare queens who game the system, voters knew what he meant. The imagery melded the Republicans' focus on lower taxes and smaller government with whites' racial animosity. The message to whites was implicit but clear: your taxes are high because Lyndon Johnson's programs are funneling your money to undeserving black women. These seemingly race-neutral campaign themes—welfare and crime—carry demonstrably racially loaded undertones.

So successful were these tactics that by 1985, the Democratic Party openly sponsored research to discern why so many working-class white voters had abandoned their traditional support for the party. After conducting significant research on the subject, pollster Stanley Greenberg attributed the defection to dissatisfaction with the Democratic Party's increasing association with black voters. White defectors expressed a profound distaste for black voters and issues. For these voters, blacks constituted an explanation for "almost everything that ha[d] gone wrong in their lives." Not being black relegated them to lower-middle-class status. Not living near blacks made their neighborhoods decent places to live. It is no surprise that such voters repudiated the Democratic Party and developed such hardened racial attitudes. Just as whites moved to the suburbs to flee increasing integration in urban public schools, so too did many abandon the increasingly integrated Democratic Party. In effect, latent racism combined with the tone of political campaigns to create and maintain subtle racially charged voting patterns.

As overt racism became increasingly taboo, white politicians continued to appeal to white voters' concerns through subtle overtures. In 1988 a group that supported George H. W. Bush's presidential campaign ran a highly controversial ad that fanned white fears about young black male violence. The ads featured a sinister image of Willie Horton, a black escapee from Massachusetts who had fled to Maryland and broken into a white couple's home. There, Horton stabbed the husband and raped the wife. In addition to emphasizing Horton's crimes, the ads "attacked Democratic presidential candidate Michael Dukakis (then governor of Massachusetts) for the weekend release program under which Horton had fled the state."[6] Republican political operatives knew that the Horton ad would use continuing racism as a way to win white support.

When Jesse Helms, a white senator from North Carolina, faced a black challenger, Harvey Gantt, in 1990, few were surprised that race played a role in Helms's ultimate victory. In the race Helms raised several issues tied to race, including his allegation that Gantt favored quotas that would benefit blacks. "One of Helms' advertisements showed the hands of a white person crumpling a rejection letter. 'You needed that job,' the announcer says. 'And you were the best-qualified. But they had to give it to a minority because of a racial quota. Is that really fair?'" The ad was broadcast just a few days shy of the election and boosted Helms to victory in an election that had been a dead heat.[7]

Politicians have even found ways to fan racial animosity in elections between white candidates. During the 2000 presidential primaries, Karl Rove masterminded a much-needed victory for George W. Bush during his South Carolina primary with a campaign that featured a quiet racial attack. Rove strategically used "whispered innuendos," one of them being "that John McCain fathered a black child out of wedlock." People in some areas of South Carolina received phone calls in which self-proclaimed pollsters would ask, "Would you be more likely or less likely to vote for John McCain for president if you knew he had fathered an illegitimate black child?" This was likely a reference to Bridget, a darker-skinned child whom the McCains had adopted as a baby from an orphanage in Bangladesh.

Before the 2008 campaign, the most recent attempt at subtle racial appeals occurred during the 2006 U.S. Senate race in Tennessee: "[I]n a tight race between Bob Corker [a white] and Rep. Harold Ford, an African American, the Republican National Committee played the race card." A television ad, funded by the Republican National Convention, insinuated an intimate relationship between Ford and a white woman. The ad's hardest-hitting jab came from the mouth of a scantily clad white woman, who says she met Harold "at the Playboy party," casting a flirtatious look into the camera. Then, as the ad draws to an end, the woman says, "Harold, call me."

The continued racial overtones of political campaigns have likely helped maintain racially stratified voting patterns. Race-baiting splits white and black voters. The contrast of occasional explicit racism exhibited by a fringe candidate or supporter also makes the subtler message seem measured and acceptable. The political dynamic creates an equilibrium wherein one candidate or another at intervals tries to attract white voters with racial messages that make subtle racism acceptable and widespread in political life.

Racial Messages in the 2008 Presidential Campaign

Does the election of Barack Obama change the equilibrium? The 2008 campaign lacked messages as blunt as those in the past, but it was not free from racial imagery. An analysis of the words, images, and symbols of the campaigns reveals that several racial themes emerged, some of which followed the script of racially coded messages laid down by past campaigns.

Too Black

In the growing body of research on the nature of racial bias in American in the twenty-first century, the main finding is that a large number of white Americans associate black Americans with a range of negative concepts. The research also shows, however, that these negative associations target black Americans who appear the most stereotypically black. For example, priming police officers with violent imagery causes them to make mistakes in a lineup that favor picking out suspects who are rated as more "stereotypically Black." Similarly, juries are more likely to sentence black defendants who look more "stereotypically Black" to death in capital cases than those who look less so. The Clinton campaign, in fact, took the obvious tack that this research suggests by airing a television advertisement that darkened the tone of Senator Obama's skin, a none-too-subtle effort to make Senator Obama appear (to white Americans) more menacing.[8]

Candidate Obama's opponents also found that events could help them move some voters to conclude that Senator Obama seemed too black politically. Minister Louis Farrakhan, during the Nation of Islam's Savior's Day gathering in 2008, publicly praised Senator Obama, forcing Senator Obama to publicly "reject and denounce" Minister Farrakhan's support.

The association with Reverend Jeremiah Wright did real damage to candidate Obama's campaign. He was forced to respond to excerpts of Wright's sermons in a widely publicized speech on race in Philadelphia. This speech drew praise from many quarters but did little to assuage concerns among many white voters. For many white Americans, this association might have made him too black to be president. None of the associations that some white candidates in both parties have had with radical or controversial clergy have hurt their political standing to the extent that Obama's association with Reverend Wright did. Reverend Wright is simply too black for white Americans.

The McCain campaign chose not to resurrect the Reverend Wright controversy in the fall campaign. Instead, they tried to tie Senator Obama to former Weather Underground leader Bill Ayers. The effort intended to blend two messages—terrorism and danger.

Primate Imagery

One of the ugliest aspects of the 2008 presidential campaign included several incidents where voters likened the Obamas to various types of primates. In February 2008 one commenter on the *Huffington Post* indicated that Ms. Obama was reminiscent of Zira—one of the characters from *Planet of the Apes*. Three months later, a white Georgia bar and grill owner began selling T-shirts at his establishment featuring Curious George, a cartoon monkey, with the slogan "Obama in '08." Then in June, a Utah company began making a sock monkey (doll) of Senator Obama.

These efforts arise from the latent associations many white Americans harbor between blacks and apes. In one study of this relationship, individuals were subliminally shown images of black faces, white faces, or neutral images. Then they were shown fuzzy images of animals (apes and nonapes) that gradually became clearer. Individuals were instructed to indicate the point at which they could identify the image. Individuals more easily identified ape images when primed (subliminally shown images) with black male faces than when not so primed. The results suggest that although the black-primate association is common, it may operate outside of "explicit cultural knowledge of the association."[9]

Slurs

The 2008 presidential campaign also featured patently racially derogatory terms and quasi-derogatory terms to describe candidate Obama when viewed through a racial lens. Accordingly, white politicians' use of implicit antiblack bias predicts the use of racial slurs.

Early in the campaign, Hillary Clinton's surrogate, Andrew Cuomo, used the phrase "shuck and jive" to describe how candidates evade questions from the press. Though he did not mention Obama by name, many believed he was referring to him. Additionally,

Republican congressman Tom Davis, in discussing how Senator Obama would have difficulty handling the immigration debate, described this issue as a "tar baby." Representative Davis's statement might not have been racially tinged, although he has a history of making similar statements.

Fringe groups also used demeaning racial slurs during the campaign. Near the end of the presidential campaign, the Chaffey Community Republican Women, Federated, sent out a newsletter that depicted Barack Obama on a ten-dollar "food stamp." The stamp also featured a bucket of KFC fried chicken, a piece of watermelon, spare ribs, and a pitcher of Kool-Aid. The group's president, Diane Fedele, said she had no idea why anyone would take offense from the image, stating, "It was just food to me. It didn't mean anything else."

Foreign, Arab, and Muslim

Candidate Obama constantly faced allegations that that he was unpatriotic, un-American, and even a foreigner. These allegations started with charges that he does not pledge allegiance to the American flag. Such critiques stemmed from his not placing his hand over his heart during the singing of the national anthem at an Iowa fair. In addition, critics latched onto his failure to wear an American flag pin on his lapel.

Candidate Obama's very name, of course, made him vulnerable to insinuations of foreign loyalties or status, but his race also played a role in this vulnerability. Many white Americans continue to associate racial minorities with disloyalty. As recently as twenty years ago, a poll indicated that 51 percent of nonblack Americans believed that black Americans are less patriotic than other racial groups. Such attitudes remain pervasive at the unconscious level. In one recent study, researchers found that college students more easily paired American symbols with white rather than with black faces. In another study, white and Asian Americans associated whites with the "American" concept to a greater extent than blacks. Furthermore, when whites and Asians are primed (subliminally shown images) with the American flag, their attitudes toward black Americans become more negative. When white and Asian Americans are primed with images of the American flag, their attitudes toward Democrats were not altered, but their attitudes toward blacks generally, and Senator Obama specifically, became more negative.

In addition to equating Obama's race with a lack of being authentically American, critics have attempted to allude to his middle name, Hussein, as another indicator that he is not authentically American. The latent sense that Barack Obama is not quite American has not entirely dissipated with his election. The Birthers, radical conservatives who seek to prove Barack Obama is ineligible to hold the office of president, began appearing at town hall meetings of members of both parties during 2009, demanding an investigation into President Obama's citizenship. Health care protests during 2009 also focused on a theme of "taking back America." Rhetoric demanding that politicians "take back our country" is not unique to President Obama—President Bush attracted similar calls. Past demands to "take back America," however, have not been accompanied by the emotional anger that characterized anti-Obama rallies. Just as black American Olympic athletes, decked out in red, white, and blue uniforms, seem less American to some than their white counterparts, apparently so too does a black American president.

An assessment of the 2008 election thus reveals that race continues to play an enormous, albeit subtle, role. Racially stratified voting is pervasive. The same election that produced a black president also witnessed the election of thirty-nine black representatives, almost all of whom come from districts that are more than one-third black. Absent racial gerrymandering, the House would likely look like the Senate, which now lacks even one elected black member. Furthermore, the 2008 election continued a modern tradition of racial subtext that promotes racially stratified voting. The presidential election itself included several explicitly racist intrusions by fringe groups and subtextual references by candidate Obama's chief opponents. A full analysis of the 2008 election thus shows that it cannot support the end of racial gerrymandering. Limiting the Voting Rights Act to the protection of access to the polls so as to ensure equal access would effectively end the careers of many minority politicians. Many white voters happily voted for Barack Obama. An assessment of the national legislature, however, suggests that, like most presidential candidates, he is an extraordinary outlier rather than the tip of a larger iceberg of postracial elections.

The 2008 Election and the Role of Unconscious Bias

Research on "implicit bias" demonstrates that race influences unconscious cognitive and emotional reactions, wholly outside conscious, rational awareness. Psychologists term these unconscious, emotional influences "implicit biases"—attitudes or thoughts that people hold but might not explicitly endorse. These attitudes commonly conflict with expressly held values or beliefs.

Many who embrace the egalitarian norm that skin color should not affect their judgment of a job or political candidate also unwittingly harbor negative associations with minorities. Individuals might not even be aware that they hold these attitudes. Even so, these implicit cognitions influence how people evaluate others. The implicit cognitive processes might heavily influence the final choice of a voter who does not otherwise clearly embrace one candidate over another.

Over the last ten years, psychologists have identified ways to measure these implicit cognitions. These measures have proven to be particularly useful for studying bias against blacks. The Implicit Association Test (IAT) has rapidly become the most widely used measure of implicit racial bias. It does so with a simple computer task that asks participants to sort stimuli into one of four categories. The four categories are also paired together, so that the difficulty of the sorting process produces a measure of how closely the person taking the IAT associates the categories. For example, one of the most common IAT tests asks participants to sort positive words, negative words, black faces, and white faces. The task pairs white faces with positive words and black faces with negative words and measures how long it takes participants to sort randomly presented stimuli. Then it alters the pairings to be white faces with negative words and black faces with positive words and again measures the time it takes participants to sort the four types of stimuli. The difference in average reaction times in the two different pairings provides a measure of the participant's association between the two categories (white with good and black with bad versus white with bad and black with good).

IAT studies reveal that a majority of Americans more closely associate black faces with weapons and white faces with harmless objects than the opposite pairing. Additionally,

participants identified weapons faster when primed with black faces than white faces. The proper interpretation of these results has been a matter of some debate, but most scholars conclude that the IAT can measure invidious implicit biases. Furthermore, the bias begins at an early age. Andrew Scott Baron and Mahzarin Banaji assessed white American six-year-olds, ten-year-olds, and adults using a child-oriented version of the IAT. Even the youngest group showed implicit prowhite, antiblack bias, with self-reported attitudes revealing biases in the same direction. The ten-year-olds and adults showed the same magnitude of implicit race bias, but self-reported racial attitudes became substantially less biased in older children and vanished entirely in adults, who self-reported equally favorable attitudes toward whites and blacks. It seems that people learn bias early but only later learn to cover the bias by publicly embracing more egalitarian norms.

Even people who openly embrace egalitarian norms often harbor very negative associations concerning blacks. Even participants who are told that the IAT measures undesirable racist attitudes and who explicitly self-report egalitarian attitudes find it difficult to control their biased responses. These findings suggest that the explicit and implicit studies measure somewhat different cognitive systems. The explicit measures show that most adults have learned the importance of egalitarian norms or at least the importance of embracing such norms publicly. These explicit norms, however, reflect only the slower deductive processes.

Implicit racial bias is not a mere abstraction. It is linked to the deepest recesses of the mind—particularly the amygdala. Neurological research shows that whites react to black faces with amygdala activation, even when shown black faces subliminally. This activation does not occur in whites processing white faces. Furthermore, the degree of activation after exposure to black faces correlates with IAT scores. In short, whites who show evidence of a high degree of implicit bias react to black faces, whether they know it or not, with some measure of fear and anxiety.

The unconscious bias that the IAT measures also seems to affect cognitive processes. In one study, subliminally priming participants with the word "white" made it easier for them to recognize positive words like "smart" than when they were primed with the word "black." Other studies show even more marked effects when researchers use black and white faces as priming materials. Similarly, whites subliminally primed with black male faces reacted to a staged computer mishap with much greater hostility than those primed with white male faces. Other work shows that subliminally priming people with words commonly associated with blacks could lead individuals to interpret ambiguous behavior as more aggressive.

Other striking demonstrations of the influence of unconscious racial bias on behavior show that these biases can be life threatening. One study placed participants in a video-game-style police simulation in which they had to assess whether a target was holding a gun or a harmless object (wallet, soda can, or cell phone). Participants had to decide as quickly as possible whether to shoot the target. Both black and white participants were more likely to mistake a black target as armed when he was unarmed; conversely, they were more likely to mistake a white target as unarmed when he was armed. In the area of health care, Green and his colleagues found that the diagnoses of internal medicine and emergency medicine physicians were associated with their unconscious bias. In that study, those physicians who harbored implicit negative associations with black patients diagnosed black patients differently than they did white patients.

Implicit Bias and the Obama Campaign

A close analysis of the 2008 campaign documents the influence of unconscious bias on voters' decisions. We recognize that this conclusion seems ironic. After all, candidate Obama landed the job for which he was applying and has no claim under Title VII. But unlike most job applicants, candidate Obama had armies of people working to help him obtain the position. More importantly, he had a professional staff of well-funded campaign managers to help him navigate the landscape of implicit bias in the electorate. To the extent his candidacy lays out a blueprint for successfully navigating implicit racial bias, it reveals the existence and influence of this bias.

It is reasonably clear that implicit bias can influence voters. Voting is not based solely on the deductive, deliberative system of reasoning; intuition and emotion play significant roles. In one study involving a choice of candidates, the emotional responses to candidates accurately predicted voter preferences for more than 90 percent of the decided voters and 80 percent of the undecided voters. Spin doctors seem to know this. Most political advertisements aim either to inspire voter enthusiasm, thereby motivating their political engagement and loyalty, or to induce fear, thereby stimulating vigilance against the risks some candidate supposedly poses. Other research shows that political advertisements that provoke anxiety stimulate attention toward the campaign and discourage reliance on habitual cues for voting; in short, they can induce crossover voting.

Likability also affects voting. In one study, disengaged voters who watched entertainment-oriented talk show interviews of Al Gore and George W. Bush were more likely to vote against their party loyalties when they found the crossover candidate likable. Accordingly, politicians prime (that is, use subtle, if not subliminal, messages) exposed and attentive voters to base their voting decisions on particular issues and images. Moreover, candidates have an incentive to use arguments that evoke emotions such as fear, anxiety, and anger. Such emotional appeals allow politicians to galvanize their base and attract uncommitted voters' support. The use of emotionally evocative appeals reinforces the media's desire for excitement and drama in their reporting. It is no surprise that such appeals influence voting patterns, inasmuch as people's implicit attitudes affect how they vote. Emotion is clearly not a panacea for candidates. Politically astute voters were not influenced by the extent to which they found the candidates likable. As with most decisions, both passion and reason influence voting. All candidates must win the hearts and minds of the voters—and the hearts are probably more important.

Walking the Racial Tightrope

Candidate Obama faced the daunting task of winning hearts and minds that all candidates face. He also faced complex racial challenges, particularly early on in the campaign, that other candidates did not. As noted earlier, white voters seemed to wonder whether candidate Obama was too black. At the same time, many leaders in the black community openly wondered whether he was black enough.

In addition, at least some black voters did not believe he had a realistic chance of winning the November election, doubting whether the country was ready for a black president. Some blacks believed that when push came to shove, "they" ("they" being anyone, maybe the Republican smear machine, the FBI, or the CIA) would not let Obama

win. Other blacks, including Senator Obama's wife, feared that he would be placed in harm's way. Some went so far as to fear that Obama would be assassinated and that not voting for him was a way to protect him.

White voter support for Obama was complicated from the start. Unlike previous black candidates, Obama enjoyed real success among white voters. He won in Iowa and came close to winning in New Hampshire, even though both states have only tiny black populations. Even in South Carolina, the heart of the old South, Obama attracted large percentages of white votes. Furthermore, Obama achieved his unprecedented ability to raise money from the grass roots with considerable support from white donors.

Views on the sources and meaning of Obama's success among whites were mixed in the early stages of his campaign. Some argued that polls showing that Americans would support a black president reflected a new reality and that white voters now look beyond race. Yet lurking beneath Obama's success in early primaries was evidence that support among many whites was weaker than it seemed. Whites sometimes give pollsters responses they perceive to be politically correct but act on different impulses in the voting booth.

Even white voters who would ultimately vote for Obama were not necessarily engaged in a race-neutral focus on his qualities as a candidate, relative to Senator Clinton. Psychologists have long found that many white Americans are well aware of their own prejudices and those of the society in which they live and find facing these biases an unpleasant experience. They react by engaging in actions designed to quell the uncomfortable sense that they and their peers are biased. A white voter who supports Obama does not necessarily want a black man to be president but might only want to be able to congratulate himself or herself for backing a black person. As Bruce Llewellyn, Colin Powell's cousin, told *New Yorker* magazine, "[W]hites love the idea that, '[g]ee, we weren't prejudiced.'"[10]

Obama had been careful to avoid using America's racial legacy against white voters. In doing so, according to Shelby Steele, Obama granted whites the benefit of the doubt that they are decent Americans who are not racists. In return for this gift, many whites openly embraced Obama and gave him a fair chance to make his case for his candidacy. Obama's race "can implicitly encourage [white voters] to feel that a vote for Obama is a vote for tolerance, for a future free of the constricting prejudices of the past."[11] If a black man can attain this nation's highest office—largely with the support of white voters—maybe our nation finally judges people "on the basis of the content of his character rather than the color of his skin." Whites would like to believe that the nation is breaking free of racial prejudice, and Barack Obama's successful presidential campaign allows them to do that. In essence, Obama cast himself as a bridge over the troubled waters of race relations to a postracial America. At least a certain segment of white voters supported him because of that.

After a long campaign that featured some measure of racial subtext and a racially stratified pattern of voting in the Democratic primary, how is it that the November presidential election looked free from the influence of race? In the words of James Carville, "It's the economy, stupid!" Obama did well among voters who worried about the economy. Obama won twenty-seven states among voters who were worried about the national economy at the time of the general election. Similarly, McCain won twenty-eight states among voters who were not worried about the national economy, versus four for Obama (the rest lack data or were too close to call).

Candidate Obama also surely benefited from the nature of how implicit bias and prejudice function in general. By the time of the fall campaign, Barack Obama was a genuine celebrity. He had enjoyed largely positive press coverage for many months, which likely meant that most voters had developed associations that were unique to him. Bias tends to operate by filling in the blanks: when whites see a black man in a dark alley pulling an ambiguous object out of his pocket, their minds tend to fill the gap with a gun rather than a harmless wallet. Upon meeting a black job candidate for the first time, someone who harbors negative associations with blacks will rely on those associations to evaluate the potential employee. By late August 2008, however, Barack Obama was no longer just a black man—he was Barack Obama. The constant media exposure would have ensured that many voters developed their own associations for just him alone.

Senator Obama also benefited from an unexpected political subtext. Every high school civics class in America teaches that as the financial markets plummeted during the Great Depression, a Republican president clung to the principle that the government should not intervene. Whether true or not, most Americans believe that the interventions of Franklin Roosevelt were essential to keeping the nation from outright revolution and complete collapse. The script of a Democrat moving the government to rescue the economy from the dangers of Republican-sponsored free market excess is well known. To his credit, candidate Obama excelled at taking advantage of the script, while his opponent seemed hesitant. As one commentator put it, "[A] drowning man doesn't care what color the person is who throws him a life preserver." To many, Senator Obama seemed to offer that life vest.

It is important to note that implicit bias has its limits. White job applicants do not always get hired in preference to black applicants. The November results remind us somewhat of the 1970s movie *Blazing Saddles*, in which a desperately racist, but also just plain desperate white town in the Old West finds itself with no choice but to hire a black sheriff to defend itself. A National Public Radio interview illustrates the point. The interviewer asked a Republican diner owner whom he supported in the upcoming election. The owner indicated that he would vote Democratic in 2008, out of concern for the economy and the direction of the nation. When asked which candidate he would support in the primary, the owner said, "I think I'm going to vote for that black boy." The latent racism is inherent in the statement, of course, but so too is the willingness to overcome the racism to hire someone who appeared, to that voter, to be able to address the nation's problems.

Research conducted after the election suggests that President Obama's success might be a misleading indicator of racial progress. Some voters who harbor antiegalitarian racial views nevertheless cast their ballots for Obama largely to support the claim that the United States is now a postracial country. His election might even facilitate backsliding on racial progress. One study demonstrates that individuals become more willing to describe a job as better suited for whites than for blacks after expressing support for President Obama as a presidential candidate. This result suggests that showing "support for Obama grants people moral credentials" where an individual's track record of egalitarian racial views provides them with an ethical certification that later facilitates racially biased decisions. It is akin to hiring or promoting a token black employee so as to avoid implementing a more widespread, systematic effort to rid a workplace of bias. Addressing implicit bias at an individual level requires active cognitive and social effort.

Belief that bias is a thing of the past might lead those with the desire to avoid acting on their implicit biases to let down their guard and might give license to those inclined to discriminate to carry on.

In the long run, President Obama's electoral success is good news for American race relations, of course. Current models of prejudice and stereotype reduction support the view that the 2008 election will reduce the effect of implicit biases overall. This work reveals that people can help avoid the influence of implicit biases if they (1) are aware of their bias; (2) are motivated to "change their responses because of personal values, feelings of guilt, compunction, or self-insight"; and (3) possess cognitive resources needed to develop and practice correction. The outcome of the 2008 election facilitates all of these factors. Exposure to high-esteemed black Americans reduces implicit bias, and the nation will now have at least four years of daily exposure to a black man occupying the highest office. The Obama administration has also appointed other minorities to prominent positions, creating even more role models that are vastly contrary to stereotypes.

The United States has moved far from its brutal racial history, but it is still a work in racial progress. It is not that President Obama's election ends the debate on race, because his campaign highlighted myriad ways a modern conception of racial prejudice can and must be understood. His election will provide a new way to think about race in American life. It represents an auspicious beginning to new modes of thinking about the role of law in helping this society reach its racial egalitarian ideals. But it is still only the beginning of a new era.

NOTES

1. See Heather K. Gerken, The Democracy Index 11–26 (2009).

2. *Black Americans in Congress*, http://baic.house.gov/historical-data/representatives-senators-by-congress.html? congress=44 (last visited July 30, 2010).

3. See *CRS Report for Congress: African American Members of the United States Congress: 1870–2008* (2008), available at http://www.senate.gov/reference/resources/pdf/RL30378.pdf.

4. David Michael Hudson, Along Racial Lines: Consequences of the 1965 Voting Rights Act 55 (1998).

5. *Id.*

6. Frederick Slocum & Yeuh-Ting Lee, *Racism, Racial Stereotypes, and American Politics*, in The Psychology of Prejudice and Discrimination 72–73 (Jean Lau Chin ed., 2004).

7. Slocum & Lee, *supra* note 6, at 72.

8. Bill Sanderson, *Shady TV Ad Darkens 'O': Clinton Sparks Huetube Ruckus*, N.Y. Post, Mar. 5, 2008, at 8.

9. Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. Personality & Soc. Psychol. 292, 301 (2008).

10. Dick Polman, *Barack Obama's Race Seems to Be a Second-Tier Issue in '08 Election*, Augusta Chron., Jan. 24, 2007, at A05.

11. David Greenberg, *Playing the Tolerance Card: How Obama Is like JFK*, Slate, Apr. 20, 2007, http://www.slate.com/id/2164662.

22. Trojan Horses of Race

JERRY KANG

Recent social cognition research has provided stunning evidence of implicit bias against various social categories. In particular, it reveals that most of us have implicit biases against racial minorities notwithstanding sincere self-reports to the contrary. These implicit biases have real-world consequence—in how we interpret actions, perform on examinations, interact with others, and even shoot a gun. As we shall see, much implicit bias comes from vicarious experiences with racial others mediated through electronic communications. This, in turn, raises a timely question of broadcast policy sparked by the controversial 2003 Media Ownership Order of the Federal Communications Commission (FCC). In it the FCC repeatedly justified relaxing ownership rules by explaining how it would increase, of all things, local news. But local news is replete with violent crime stories prominently featuring racial minorities. Consumption of these images, the social cognition research suggests, exacerbates our implicit biases. In other words, as we consume local news, we download a sort of Trojan Horse virus that increases our implicit bias. Unwittingly, the FCC linked the public interest to racism. Potential responses, such as recoding the public interest and examining potential firewalls and disinfectants for these viruses, require consideration in light of psychological, political, and constitutional constraints.

Consider the following studies with an open mind.

Computer Crash: Social cognitionist John Bargh asked participants to count whether an even or odd number of circles appeared on a computer screen.[1] After the 130th iteration, the computer was programmed to crash, and the participants were told to start over. A hidden video camera recorded their reactions. Third-party observers then evaluated those recordings to measure participants' frustration and hostility. What neither participants nor observers knew was that for half the participants, a young black male face was flashed subliminally before each counting iteration; for the other half, the face was white. As rated by the observers, those who had been shown the black faces responded with greater hostility to the computer crash.

A version of this chapter previously appeared as Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489 (2005). Originally published in the *Harvard Law Review*.

Mug Shot: Political scientists Frank Gilliam and Shanto Iyengar created variations of a local newscast: a control version with no crime story, a crime story with no mug shot, a crime story with a black-suspect mug shot, and a crime story with a white-suspect mug shot.[2] The black and white suspects were represented by the same morphed photograph, with the only difference being skin hue—thus controlling for facial expression and features. The suspect appeared for only five seconds in a ten-minute newscast; nonetheless, the suspect's race produced statistically significant differences in a criminal law survey completed after the viewing. Having seen the black suspect, white participants showed 6 percent more support for punitive remedies than did the control group, which saw no crime story. When participants were instead exposed to the white suspect, their support for punitive remedies increased by only 1 percent, which was not statistically significant.

Mathematics Test: Social psychologist Margaret Shih asked Asian American women at Harvard University to take a hard mathematics test.[3] Before taking the examination, each participant answered a questionnaire designed to prime subtly different social identities: female (with questions relating, for example, to coed dormitory policy) or Asian (with questions relating, for example, to language spoken at home). A control group answered questions related to neutral topics, such as telecommunications usage. As measured by an exit survey, these questions had no conscious impact on self-reports of test difficulty, self-confidence in mathematics ability, the number of questions attempted, or how well participants thought they did. Yet something happened implicitly. The group that had its Asian identity triggered performed best in accuracy (54 percent); the group that had no identity triggered came in second (49 percent); and the one that had its female identity triggered ranked last (43 percent). "Being" Asian boosted, while "being" female depressed, math performance. Of course, these students were both.

Shooter Bias: Social cognitionist Joshua Correll created a video game that placed photographs of a white or black individual holding either a gun or other object (wallet, soda can, or cell phone) into diverse photographic backgrounds.[4] Participants were instructed to decide as quickly as possible whether to shoot the target. Severe time pressure designed into the game forced errors. Consistent with earlier findings, participants were more likely to mistake a black target as armed when he was unarmed (false alarms); conversely, they were more likely to mistake a white target as unarmed when he was armed (misses). Even more striking is that black participants showed amounts of shooter bias similar to those of whites.

What is going on here? Quite simply, a revolution. These studies are the tip of the iceberg of recent social cognition research elaborating what I call "racial mechanics"—the ways in which race alters intrapersonal, interpersonal, and intergroup interactions. The results are stunning, reproducible, and valid by traditional scientific metrics. They seriously challenge current understandings of our "rational" selves and our interrelations.

Crucial findings from the field of social cognition with emphasis on the recent "implicit bias" literature demonstrate that most of us have implicit biases in the form of negative beliefs (stereotypes) and attitudes (prejudice) against racial minorities. These implicit biases, however, are not well reflected in explicit self-reported measures. This

dissociation arises not solely because we try to sound more politically correct than we are. Even when we are honest, we simply lack introspective insight. Finally, and most importantly, these implicit biases have real-world consequences—not only in the extraordinary case of shooting a gun but also in the more mundane, everyday realm of social interactions.

Applying social cognition to communications law is unorthodox, but purposefully so. Race talk in legal literature seems at a dead end. No new philosophical argument or constitutional theory seems to persuade those sitting on one side of the fence to jump to the other. One way to break current deadlocks is to turn to new bodies of knowledge uncovered by social science, specifically the remarkable findings of social cognition. Not only do they provide a more precise, particularized, and empirically grounded picture of how race functions in our minds, and thus in our societies; they also rattle us out of a complacency that set in with the demise of de jure discrimination. Further calls for equality are often derogated as whining by those who cannot compete in a modern meritocracy. Social cognition discoveries dispute that resentful characterization and make us reexamine our individual and collective responsibilities for persistent racial inequality. For better and worse, law has turned sharply in favor of quantified and empirical analyses. Social cognition allows those who study race to take that same turn, to fight fire with fire, and to profit from a body of science that supports, particularizes, and checks what we intuit as the truth of our lived experiences.

Racial Mechanics

A *schema* is a "cognitive structure that represents knowledge about a concept or type of stimulus, including its attributes and the relations among those attributes."[5] These knowledge structures can be modeled as prototypes or exemplars for a class of objects, providing rules that map objects into the class, as well as general information about members of the class. For instance, when we see something that has four legs, a horizontal plane, and a back, we immediately classify that object into the category "chair." We then understand how to use the object, for example, by sitting on it. This schematic thinking operates automatically, nearly instantaneously.

We employ schemas out of necessity. Our senses are constantly bombarded by environmental stimuli, which must be processed and then encoded into memories (short- and long-term) in some internal representation. On the basis of that representation of reality, we must respond. But we drown in information. Perforce we simplify the data stream at every stage of information processing through the use of schemas.

Different schema types abound for different types of entities, such as objects, other people, the self, roles, and events. This most basic process operates not only on inanimate objects, such as chairs or bananas, but also on human beings. When we encounter a person, we classify that person into numerous social categories, such as gender, (dis) ability, age, race, and role. My focus is on race.

Through law and culture, society provides us (the perceivers) with a set of racial categories into which we map an individual human being (the target) according to prevailing rules of racial mapping. Once a person is assigned to a racial category, implicit and explicit racial meanings associated with that category are triggered. These activated racial meanings then influence our interpersonal interaction. All three elements—racial

categories, racial mapping rules, and racial meanings—constitute components of the racial schema.

I include in the term "racial meanings" both cognitive and affective components. The cognitive component includes thoughts or beliefs about the category, such as generalizations about members' intelligence or criminality. The affective component reflects emotions, feelings, and evaluations that range on the scales of positive–negative, good–bad, approach–avoid. Social psychologists often call cognitive beliefs about social groups "stereotypes" and (negative) affective feelings about such groups "prejudice." The racial meanings triggered upon schema activation include both thoughts and feelings, rational and emotional, that can independently and jointly drive the perceiver's reactions.

For example, critical race scholars repeat the mantra that "race is a social construction." My social cognitive account provides a particularized understanding of that general claim: all three components—racial categories, mapping rules, and racial meanings—are contingent, constructed, and contestable. Not one of these elements is biologically inevitable.

This framing also helps translate the critical race theme that "race (almost always) matters." In interpersonal encounters, multiple schemas may be activated. For example, when one first meets a young Asian male law professor, multiple schemas could come into play, including age, race, gender, and role (profession). Which schemas actively influence the interaction depend on numerous variables, such as primacy (what gets activated first), salience (which schema cues catch attention), accessibility (which schemas can be retrieved in memory easily, perhaps because of recent priming), and individuating information. As the computer crash study demonstrated, the visual information can be so fleeting as to be subliminal, yet it can still activate the racial schema. We may not be color blind even when we cannot see.

Once activated, the racial meanings embedded within the racial schema influence interaction. The apocryphal quotation attributed to Nietzsche that "there is no immaculate perception" nicely captures how schemas guide what we see, encode into memory, and subsequently recall.

Schemas thus automatically, efficiently, and adaptively parse the raw data pushed to our senses. To take an extreme example, the hate criminal will map an African American into the racial category "black" (or some other term) by visual inspection, at which point both emotional hatred and the cognitive beliefs that fuel that hatred (for example, scapegoating) can catalyze racial violence. No fancy psychological model is necessary to make sense of such vulgar acts. The payoff of this social cognitive model comes in parsing subtler cases. For instance, what if we don't even see the black man?

The computer crash experiment reveals that we do not have to consciously see the black male face for it to influence our behavior. The researchers in that study concluded that the black face automatically activated schema-consistent behavior through the principle of "ideomotor action."[6] Prior research by Patricia Devine had revealed that subliminal priming with words stereotypically associated with African Americans could lead participants to interpret ambiguous behavior as more aggressive.[7] But scientists wondered whether the result stemmed partly from using words with negative affect, such as "lazy." The computer crash study answered this question by demonstrating that the mere image of a black face—and a subliminal one at that—could activate a black racial schema.

Further research has demonstrated the connection between subliminal priming (through words or pictures) and subsequent tasks, such as evaluations, interpretations, and speed tasks. These findings indicate that schemas operate not only as part of a conscious, rational deliberation that, for example, draws on racial meanings to provide base rates for Bayesian calculations (what social cognitionists might call a controlled process). Rather, they also operate automatically—without conscious intention and outside our awareness (an automatic process). Here we see translation of yet another critical race studies theme, that the "power of race is invisible."

In summary, we think through schemas generally, and through racial schemas specifically, which operate automatically when primed, sometimes even by subliminal stimuli. The existence of such automatic processes disturbs us because it questions our self-understanding as entirely rational, freely choosing, self-legislating actors. We are obviously not robots that mechanically respond to stimuli in precisely programmed ways. We do respond to individuating information when we are motivated and able to do so. Nevertheless, we ignore the best scientific evidence if we deny that our behavior is produced by complex superpositions of mental processes that range from the controlled, calculated, and rational to the automatic, unintended, and unnoticed. Finally, we must recognize that these biases are not random errors; rather, they have a tilt. After all, the participants in the computer crash experiment got more hostile, not more friendly, after being flashed black faces. Why?

Implicit Bias

How have social cognitionists measured the bias in racial meanings if it is so opaque? One method has been to use sequential priming procedures that take advantage of the automaticity of schemas. Such procedures begin by priming a participant with a particular stimulus, such as a word or a face, that activates a particular racial schema. Then, the racial meanings associated with that schema should alter performance on some subsequent linguistic, interpretive, or physical task. If the prime and the task are schema consistent, one expects a faster response; by contrast, if they are inconsistent, one expects a slower response.

The first such study was by Samuel Gaertner and John McLaughlin, who primed participants subliminally with the word "white" or "black" and then immediately replaced the word with a string of letters that were sometimes words and sometimes gibberish.[8] Participants had to identify as quickly as possible whether the string of letters was indeed a word. The words chosen were associated with stereotypes of either whites or blacks. Participants were faster at recognizing a positive word such as "smart" if they had just been primed with the word "white" instead of "black." The time differential in task execution was deemed a measure of implicit bias.

A flurry of studies adopted and varied this reaction-time paradigm by priming participants with some social category, subliminally or consciously (supraliminally), and then measuring whether their ability to execute some task was facilitated or hindered. The Implicit Association Test (IAT) has become the state-of-the-art measurement tool. The IAT examines how tightly any two concepts are associated with each other. In a typical experiment, two racial categories are compared, say, black and white. Next, two sets of stimuli (words or images) that correspond to the racial meanings (stereotypes or

attitudes) associated with those categories are selected. For example, words such as "violent" and "lazy" are chosen for blacks and "smart" and "kind" for whites.

Participants are shown a black or white face and told to hit as fast as possible a key on the left or right side of the keyboard. They are also shown words stereotypically associated with blacks or whites and again told to hit a key on the left or right side of the keyboard. In half the runs, the black face and black-associated word are assigned to the same side of the keyboard (schema-consistent arrangement). In the other half, they are assigned opposite sides (schema-inconsistent arrangement). The same goes for the white-face–white-associated stimulus combination.

Tasks in the schema-consistent arrangement should be easier, and so it is for most of us. How much easier—as measured by the time differential between the two arrangements—provides a measure of implicit bias. The obvious confounds—such as overall speed of participant's reactions, right- or left-handedness, and familiarity with test stimuli—have been examined and shown not to undermine the IAT's validity.

The Results: Pervasive Implicit Bias

Using the IAT and similar tools, social cognitionists have documented implicit bias against numerous social categories. According to Nilanjana Dasgupta, the first wave of research demonstrated that socially dominant groups have implicit bias against subordinate groups (white over nonwhite, for example). By her count "almost a hundred studies have documented people's tendency to automatically associate positive characteristics with their ingroups more easily than outgroups (i.e. ingroup favoritism) as well as their tendency to associate negative characteristics with outgroups more easily than ingroups (i.e. outgroup derogation)." These studies address not only automatic attitudes (prejudice) but also automatic beliefs (stereotypes). In the United States, bias has been found against blacks, Latinos, Jews, Asians, non-Americans, women, gays, and the elderly. Researchers have also found implicit bias against out-groups in other countries.

Behavioral Consequences

By now, even patient readers demand a payoff: Do racial schemas alter behavior? More particularly, does implicit bias represent anything besides millisecond latencies in stylized laboratory experiments? What is the evidence, for instance, that the IAT predicts any real-world behavior, much less anything that is legally actionable?

Research addressing behavioral consequences has been called the second wave of implicit bias research. Persuasive evidence now shows that implicit bias against a social category, as measured by instruments such as the IAT, predicts disparate behavior toward individuals mapped to that category. This occurs notwithstanding contrary explicit commitments in favor of racial equality. In other words, even if our sincere self-reports of bias score zero, we would still engage in disparate treatment of individuals on the basis of race, consistent with our racial schemas. Controlled, deliberative, rational processes are not the only forces guiding our behavior. That we are not even aware of, much less intending, such race-contingent behavior does not magically erase the harm.

Interpreting

Even before the rise of reaction-time measurements, social psychologists demonstrated convincingly that schemas influence interpretation. We have already discussed how activated schemas influence which stimuli we give attention to, how we encode representations of those stimuli, and how easily we retrieve information thus stored. To a first approximation, we see what we expect to see. Like well-accepted theories that guide our interpretation of data, schemas incline us to interpret data consistent with our biases.

Emily or Lakisha? A recent experiment provides powerful evidence that our racial schemas, triggered simply by names, can alter how we interpret résumés. Behavioral economists Marianne Bertrand and Sendhil Mullainathan responded to over 1,300 help-wanted ads in Boston and Chicago with fictitious résumés that were crafted to be comparably qualified. The sole difference was that half of the résumés were randomly assigned African American–signaling names (for example, Lakisha Washington), while the other half were assigned "white" names (for example, Emily Walsh). The white résumés received 50 percent more callbacks.

Biased interpretation can have substantial real-world consequences. Consider a teacher whose schema inclines her to set lower expectations for some students, creating a self-fulfilling prophecy. Or a grade school teacher who must decide who started the fight during recess. Or a jury that must decide a similar question, including the reasonableness of force and self-defense. Or students who must evaluate an out-group teacher, especially if she has been critical of their performance. The foregoing research shows the behavioral consequences of implicit bias.

Of course, schemas do not blind us entirely to individual qualities signaled by the object of interest. Students in my class, for instance, do not treat me the same as a busboy in a Korean restaurant who speaks limited English simply because we are both mapped to the category Asian. Even if race is a central schema, it is simple enough to activate the subtype of "model minority" versus "FOB" (fresh off the boat). Moreover, my students have much higher motivation to be accurate since I am in a position of power over them. And motivation for accuracy can prevent the use of heuristics or other cognitive shortcuts when adequate cognitive resources are available. Similarly, in a nighttime encounter, a black man dressed as a police officer is not treated the same as one in a jogging suit: role schemas often dominate the field. Nonetheless, in some situations, especially in stranger-to-stranger interactions, little additional individuating information besides what we look like and how we dress is available. In such circumstances, ambiguous actions produce schema-consistent interpretations. As Susan Fiske succinctly notes, "People are hardly equal opportunity perceivers."[9]

Performing

Differential assessments may not be caused entirely by subjective interpretations. Rather, racial meanings transmitted through the culture, coupled with implicit cognitive processes, may alter how we actually perform on objectively measured tests. Evidence comes from the remarkable stereotype-threat literature launched by psychologist Claude Steele. In a seminal experiment, Claude Steele and Joshua Aronson gave a difficult verbal test to white and black Stanford undergraduate students. One group was informed that the test was ability diagnostic—testing how smart they were. Another comparable group,

given the same test, was told that the test was ability nondiagnostic—simply a laboratory problem-solving task. In the latter condition, the black students performed comparably to equally skilled white students. But in the former condition, black students greatly underperformed equally skilled white students.

The apparent explanation for this odd result is that somehow the stereotype that blacks are intellectually inferior got activated in the former group. According to Steele, this stereotype threat might have raised the group's fear that by doing poorly they would reinforce a negative stereotype of the group they belong to. Thus, doing poorly had a double consequence: not only individual failure but also confirmation of the negative stereotype. This anxiety somehow disrupted their performance. In the stereotype-threat model, this threat does not operate by way of explicit internalization of negative self-concept; in other words, these black students would not self-report that they are intellectually inferior to their white peers because they are black. The precise mechanism of performance disruption has not yet been specified. Nonetheless, the general empirical findings of stereotype threat have been duplicated across various social categories, including women, Latinos, and poor white students.

What is amazing is that test scores can be not only depressed but also boosted. That was the finding of the mathematics test study described earlier. By unconsciously activating a particular identity, performance on difficult tests by the very same category of people could be boosted upward (Asian) or depressed downward (woman), notwithstanding that the participants were already two standard deviations above the mean in SAT mathematics scores.

Interacting: Nonverbal Leakage

Recent research demonstrates that implicit bias, as measured by reaction-time studies, also predicts behavior in stranger-to-stranger social interactions, such as interviews and face-to-face meetings. In classic experiments by Carl Word, Mark Zanna, and Joel Cooper, white interviewers were trained to display less friendly nonverbal behavior—the sort that has now been correlated with higher implicit bias against racial minorities.[10] When such behavior was performed in front of naive white interviewees, those interviewees gave objectively worse interviews, as measured by third parties blind to the purpose of the experiment. In addition, the perceiver's (interviewer's) unfriendly nonverbal behavior can instigate retaliatory responses from the target (interviewee), causing a positive feedback loop. This creates a vicious circle that reinforces the racial schema. Worse, the perceiver's decision not to hire the target based on that social interaction is understood as legitimately on the interviewee's merits.

Trojan Horses

Let us now consider a concrete application of the racial mechanics model—this recent FCC decision about the local news. To understand my choice of topic, we must start with a fundamental question: "Where do racial meanings come from?" Racial meanings that accrete in our schemas can, on the one hand, come from direct experiences with individuals mapped into those categories. On the other hand, the racial meanings can arise from what I call vicarious experiences, which are stories of or simulated engagements with racial others provided through various forms of the media or narrated by parents

and our peers. Given persistent racial segregation, we should not underestimate the significance of vicarious experiences. Even if direct experience with racial minorities more powerfully shapes our schemas, vicarious experiences may well dominate in terms of sheer quantity and frequency.

The next question becomes "Why are racial meanings biased against racial minorities?" One hypothesis is that people encounter skewed data sets—or as the computer scientists say, "Garbage in, garbage out." If these principally vicarious experiences, transmitted through electronic media, are somehow skewed, then the racial meanings associated with certain racial categories should also be skewed. This analysis invites further study of culture and mass media policy, topics that social cognitionists have largely avoided. The touchstone for governmental management of broadcast is the public interest standard. That standard has recently been explicated in an unusual way. At least in the context of ownership policy, the public interest has been functionally equated with the local news. But what is on the local news?

Violent Crime and Punishment

Crime occupies a heavy share of broadcast news programming. This is true for national news. It is also true for local news, which is "the most widely used source of information about crime."[11] An annual study of local news programming consistently finds that local newscasts spend about a quarter of their time on crime stories.

Political scientists Frank Gilliam and Shanto Iyengar examined local news of a Los Angeles network affiliate for thirteen months, randomly selecting a thirty-minute newscast, two days per week. The absolute number of minutes dedicated to crime stories was high. On average, there were three crime stories per day, accounting for 25 percent of the total minutes aired. In 51 percent of the newscasts, crime was the lead story. For comparison, the researchers obtained actual crime statistics during the corresponding time period. Although the ratio of violent crime arrests compared to all crime arrests in Los Angeles was 30 percent, violent crime news stories accounted for 78 percent of crime stories broadcast. Although the ratio of murder arrests compared to all arrests in Los Angeles was 2 percent, murder news stories accounted for 27 percent of all crime stories broadcast.

These figures do not in themselves demonstrate disproportionality, because any such claim must provide a normative account of newsworthiness. We should not presume that a one-to-one correspondence is proportional. For example, even if murders happen quite infrequently compared to tax evasion, under what theory of newsworthiness should broadcasters have to provide thousands of minutes covering tax evasion for a single minute of murder? Still, the disparities suggest a lurid fascination with violent crime. They are also consistent with findings that the time allocated to crime stories does not correlate with changes in crime rates. These findings should not surprise us, given the strong financial incentives to focus on sensationalistic stories such as violent crimes. Financial success of broadcast stations requires high ratings, to sell more advertisements at higher rates. In turn, this strategy requires stations' pulling in more viewers any way they can.

Violent crime news stories frequently center on racial minorities, especially African Americans. One reason is that racial minorities are arrested for violent crimes more

frequently on a per capita basis than whites. Given our social cognition review, we can predict what watching local news might do to us. If subliminal flashes of black male faces can raise our frustration, as shown by the computer crash study, would it be surprising that consciously received messages couched in violent visual context have impact, too? Even ephemeral exposure to race can alter our opinions about crime and punishment. The mug shot study, also conducted by Gilliam and Iyengar, is one of the more sophisticated in a line of newscast experiments finding similar results.

For example, using a similar experimental design, Gilliam had earlier found that exposure to a black perpetrator mug shot produced statistically significant increases in two variables, defined as "concern for violent crime" and "causal attributions for rising crime." Another study has concluded that "judgments of the suspect's guilt are significantly affected by the visual image of the race of the suspect, respondents' stereotypes of blacks, and the interaction between these two variables." A political scientist has even demonstrated how exposure to crime stories, depending on the race of the suspect, can alter self-reports of which presidential candidate participants will vote for.

In the mug shot study, Gilliam and Iyengar also used survey data to corroborate their experimental findings. In a large survey conducted at approximately the same time and location as the experiments, participants answered questions about their political opinions and media consumption habits. Three statistically significant correlations emerged: Greater viewing of local news led to greater support for punitive remedies, more old-fashioned racism, and more "new racism." Such results, confirmed in various contexts, should give us all pause. On the basis of this evidence alone, one could challenge the FCC's unmindful adoration of local news as furthering the public interest—at least as local news is currently constituted. But far more might be at stake.

Trojan Horse Viruses

I now make explicit what I have so far left implicit: local news programs, dense with images of racial minorities committing violent crimes in one's own community, can be analogized to Trojan Horse viruses. A type of computer virus, a Trojan Horse installs itself on a computer without the user's awareness. That small program then runs in the background, without the user's knowledge, and silently waits to take action—whether by corrupting files, e-mailing pornographic spam, or launching a denial-of-service attack—which the user, if conscious of it, would disavow.

Typically, a Trojan Horse comes attached secretly to a program or information we actively seek. For instance, we might download a new program for a trial run and embedded inside is a Trojan Horse that installs itself without our knowledge. Or we might browse some website in search of information, and a small javascript bug is embedded in the page we view. Here is the translation to the news context: We turn on the television in search of local news and with that information comes a Trojan Horse that alters our racial schemas. The images we see are more powerful than mere words. As local news, they speak of threats nearby, not in some abstract, distant land. The stories are not fiction but a brutal reality. They come from the most popular and trusted source.

Two clarifications are warranted. First, in the computer world, Trojan Horse viruses are written by programmers and unleashed into the wild to do the authors' bidding. That is not my account of race and racism. For example, I do not believe that broadcast

licensees or local news producers are purposefully designing visceral images of minority-perpetrated crimes to implant viruses in the audience's brains that harm racial minorities. One could plausibly accuse political advertisers of doing precisely this, when they launch Willie Horton–like ads or their more sophisticated equivalents. But no such case can be made against local news producers generally, who are merely trying, on a charitable view, to provide satisfactory news while maintaining top ratings in increasingly competitive media environments.

Second, viruses are executable code, programs that take inputs and generate outputs. Isn't news, or any other media input, something different—just data? Yes, but that distinction may not be tenable if our minds function partly like neural networks, which they seem to do. As suggested earlier, my racial schemas model can be seen as a higher-level metaphor for a lower-level description that models the brain as a neural network, a massively distributed mesh of nodes with varied strengths in linkages among them. Neural nets are not programmed by writing a linear, flowchart-like order of instructions for execution. Rather, they are trained through exposure to countless cases. Through some learning rule, such as back propagation, those connections that produce a correct answer are subtly strengthened and those that produce a wrong answer are subtly weakened. After sufficient number of exposures, the neural network is deemed trained, and its knowledge or programming is reflected in the relative strengths of the links among the various nodes. When the brain is modeled this way, much of the data-program distinction dissolves: A part of us is in fact programmed by what we see.

How do we know violent crime stories can, like Trojan Horses, exacerbate implicit bias? The mug shot study and other work by political scientists using the newscast paradigm are suggestive. Further evidence comes from studies that demonstrate media primings of racial schemas. For example, we now know that exposure to violent rap music can increase implicit bias against African Americans and that playing the video game Doom can increase one's implicit self-concept of aggressiveness—all the while having no statistically significant impact on one's explicit, self-reported views. Still further evidence comes indirectly from research that examines the malleability of implicit bias—that is, how it can be exacerbated or mitigated by the information environments we inhabit.

Positive Role Models

Consider, for example, how exposure to positive exemplars of subordinated categories can decrease implicit bias. Nilanjana Dasgupta and Anthony Greenwald found that implicit attitudes could be changed without conscious effort simply by exposing people to particular types of content. Participants were first given a questionnaire on general knowledge. For the problack condition group, the researchers used names and images of positive black exemplars, such as Martin Luther King, Jr., and negative white exemplars, such as Jeffrey Dahmer. For the prowhite condition group, the valences of the images were reversed (Louis Farrakhan and John F. Kennedy, for example). Finally, for a control group, the questionnaire required correct identification of insects and flowers. After finishing the questionnaire, participants took an IAT and then completed a survey of racial bias.

The type of questionnaire had no impact on participants' explicit bias as measured by the self-reports. In contrast, the researchers found that the questionnaires had a

surprisingly significant effect on implicit bias as measured by the IAT: those participants who had experienced the problack condition reduced their implicit bias by more than half. These results persisted for over twenty-four hours.

The authors explained the results in terms of exemplar accessibility. When we evaluate social groups, we do so by calling on particular exemplars of that group retrieved from memory. Thus, recent priming through visual images (such as the pictures presented in the general-knowledge questionnaire) can alter the accessibility of one exemplar over another (Martin Luther King, Jr., over Louis Farrakhan, Michael Jordan over Mike Tyson). The control group, which answered a questionnaire about flowers and insects, produced results that were indistinguishable from the prowhite condition, which suggests that the default exemplar or racial meaning for whites is favorable.

These studies suggest that the images consumed matter. Specifically, consuming positive images can decrease individuals' implicit bias. Conversely, consuming negative images can exacerbate implicit bias.

To summarize, local news provides data that we use consciously in a rational analysis to produce informed opinions on, say, criminal punishment. But these newscasts also activate and strengthen linkages among certain racial categories, violent crime, and the fear and loathing such crime evokes. In this sense, the local news functions precisely like a Trojan Horse virus. We invite it into our homes, into our dens, and in through the gates of our minds and accept it at face value as an accurate representation of newsworthy events. But something lurks within those newscasts that programs our racial schemas in ways we cannot notice but can, through scientific measurements, detect. And the viruses they harbor deliver a payload with consequences, affecting how we vote for three-strikes laws, how awkwardly we interact with folks, and even how quickly we pull the trigger.

NOTES

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6. Bargh et al., *supra* note 1, at 231, 232.

7. See Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. Personality & Soc. Psychol. 5 (1989).

8. Samuel L. Gaertner & John P. McLaughlin, *Racial Stereotypes: Associations and Ascriptions of Positive and Negative Characteristics*, 46 Soc. Psychol. Q. 23, 23 (1983).

9. Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination* in 2 The Handbook of Social Psychology 369 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

10. See Carl O. Word et al., *The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction*, 10 J. Experimental Soc. Psychol. 109 (1974).

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23. Working Identity

DEVON W. CARBADO AND MITU GULATI

Working within an organization necessarily entails negotiating and performing identity. We can most easily illustrate what we mean by "negotiation" and "performance" with examples. Take a hypothetical organization that values effort and awards promotions to those who demonstrate it. Assume also that the work is such that individual effort is difficult to monitor. In response to this difficulty, the employer sets up an incentive scheme—by, for example, offering attractive promotions to those employees who demonstrate that they are exerting the highest levels of effort—to induce employees to work with a minimal amount of monitoring. Under these conditions, individual employees seeking promotion have an incentive to engage in acts that signal to the employer that they are the ones exerting high amounts of effort.

For example, an employee engaged in casual conversation at the workplace might mention how tired she is as a result of having had to work all through the previous two nights. Or an employee might cultivate a harried and tired look to suggest that she is very busy. Or the employee might leave her jacket in the office and her lights on when she leaves the office early so as to suggest that she was at work later than she was. And when she does work late, she might send an e-mail or phone message to her supervisor before leaving, the subtext of which might be "I was working until 1:00 A.M." The list of effort-suggestive actions, or signaling strategies, goes on. The point is that, in settings in which individual identity characteristics are difficult to observe, employees have an incentive to work their identities in ways that suggest to the employer what otherwise might not be readily apparent.

The basic concepts of signaling and identity performance are familiar to most. Those incentives and pressures to signal and work one's identity shape the workplace behavior and experiences of outsider groups, such as women and minorities. Because members of these groups are often likely to perceive themselves as subject to negative stereotypes, they are also likely to feel the need to do significant amounts of extra identity work to counter those stereotypes. Depending on the setting, that extra work may not only result in significant opportunity costs but also entail a high level of risk.

A version of this chapter previously appeared as Devon W. Carbado and Mitu Gulati, *Working Identity*, 85 Cornell L. Rev. 1259 (2000). Originally published in the *Cornell Law Review*.

Our purpose is to flesh out the kinds of work outsiders often feel pressured to do because of negative assumptions about their identities. We argue that both the nature of the work and the pressure to do it, the working identity phenomenon, is a form of employment discrimination. Heretofore, antidiscrimination law has not identified, let alone addressed, this problem. Absent from that body of law is the notion that outsiders do not passively accept workplace discrimination and stereotyping but employ a variety of strategies to counteract them. These strategies function as coping mechanisms. We categorize them to illustrate the specific ways they burden outsider employees.

To fully appreciate workplace discrimination, then, one has to examine and raise questions about not only the employer's conduct (whether it is legitimate for employers to behave in ways that adversely affect outsider employees) but the employee's conduct as well (whether it is legitimate for employees to be pressured to behave in particular ways to avoid discrimination). Current antidiscrimination regimes focus almost entirely on the employer, neglecting the costs borne by victims who do identity work to prevent employment discrimination and preempt stereotyping. Further, if antidiscrimination law ignores identity work, it will not be able to address racial conduct discrimination. Racial conduct discrimination derives not simply from an employee's being, for example, phenotypically Asian American (i.e., her racial status) but also from how she performs her Asian American identity in the workplace (i.e., her racial conduct).

Everyone Works Identity

To take the illustration in the first paragraph a step further, suppose that the firm values not only effort but also more amorphous qualities such as collegiality, team work, and trust. Assume that each of these characteristics, too, is hard to observe. Employees seeking success within this environment have an incentive to adopt strategies to signal that they are hardworking, collegial, team oriented, and trustworthy. To signal collegiality, the employee might go out drinking with her colleagues, attend the firm's social events, or participate on sports teams with others at work.

Of course, the foregoing actions may not be enough or even necessary to demonstrate collegiality. Nor are institutional incentives necessary for employees to be collegial. The point is that, when employers value attributes that are hard to observe, individual employees have an incentive to take actions that suggest that they have those attributes.

The question becomes: What actions will the employee take? That is, if the employee is interested in signaling to the employer that he exhibits a certain characteristic, how will he do so? The answer turns on a negotiation and, more specifically, on how the employee chooses to negotiate his identity at work. Consider a shy and reserved employee who enjoys his job. He is happiest when he goes to work and performs his duties with little or no non-job-related interactions with his coworkers. Moreover, he does not enjoy, and thus would rather not attend, official or unofficial after-work social events. He is aware, however, that his organization values and encourages collegiality. Indeed, he believes that, because many of the people considered for promotion have the same credentials and overall work product, collegiality is an important criterion for promotion.

If the employee is interested in advancement, he will probably make a decision about how to remain happy at work while maximizing his opportunities for advancement. He

is likely to engage in a negotiation. The negotiation is between the employee's sense of self and his sense of the institutional values (here, collegiality). The employee may decide that, in the end, he cannot compromise his sense of identity, that he needs to be happy at work, and that engaging in office small talk or attending after-work events interferes with that happiness. He may not explore other ways of maximizing his opportunities for advancement.

Alternatively, the employee may decide to compromise his sense of identity. That is, he may decide that, while he would rather not socialize with his colleagues, he should nonetheless do so to improve his chances of promotion. Whatever the employee decides, he will take a series of actions to reflect his decision. In this sense, employees engage in a continual process of negotiating and performing identity. The choice of how to perform identity is a negotiation to the extent that it reflects a conflict resolution. The employee seeking advancement has an incentive to resolve the conflict between his sense of his identity and his sense of the identity he needs to project to signal to his employer that he exhibits the characteristics the employer values.

He may decide, like Sammy Davis, Jr., that "I've gotta be me." Or like Polonius in *Hamlet*, his existential mantra might be "To thine own self be true." In this case, the employee's performance will reflect this negotiation—he will not engage in after-work socializing. On the other hand, the employee may decide to compromise and socialize after work. The extent of the employee's performance of socializing will depend on the degree to which he is willing or feels the need to compromise his identity.

Imagine a workplace that values effort, collegiality, team work, leadership abilities, and trust—for example, a large, elite corporate law firm. Informally, the firm has two tracks for its new employees, most of whom it hires straight out of law school or from judicial clerkships. One track is for the employees whom the firm plans to groom for partnership. For this track, the firm wants employees with interpersonal skills, leadership ability, the capacity to inspire trust, and a strong work ethic. The other track is for associates whom the firm expects to employ for between two and six years to work on teams led by partners and by those associates being groomed for partnership. For this second track, which involves much paperwork, the firm wants employees who will work hard, follow orders, and pay attention to detail.

Assume also that the insider group at this elite law firm consists of heterosexual, white males. The outsiders, therefore, include women, racial minorities, gays, and lesbians. Posit that insiders hold certain stereotypes about members of outsider groups. Thus, absent additional information about the individual, a male Korean American who recently graduated from Harvard Law School might be stereotyped as being good at math and science, unassertive, quiet, hardworking, uncreative, and impersonal. To get onto the partnership track at the firm, an employee must be perceived to have leadership abilities, personality, the ability to induce trust in others, and a good work ethic. Like the other employees, the Korean American employee has an incentive to create the impression that he possesses all the requisite qualities for the partnership track. However, because of stereotypes, the Korean American employee and the insider employee are differently situated, or have a different workplace standing, with respect to the institutional criteria that the firm values and the actions that they (think they) will need to take to demonstrate to the employer that they have the potential to be successful partners. In other words, while all the employees in our hypothetical law firm have an incentive to

demonstrate that they have the potential to become partners, the burden of proof, and thus the precise nature of the incentive, varies across identities.

Recall the assumption that Korean American Harvard Law School graduates are generally perceived as quiet, unassertive, good at math and science (detail-oriented work), and lacking in creativity and personality. Those assumptions work well for an employee on the nonpartnership track. But they conflict with the qualities that the firm requires in the employees it plans to groom for partnership. The stronger this conflict, the harder the employee will have to work to overcome the negative assumptions by employing stereotype-negating strategies.

Positive and negative stereotypes influence the relationship between institutional criteria and workplace standing. A negative relationship between a stereotype about an employee's identity and a certain institutional criterion diminishes that employee's workplace standing and advancement opportunities within that institution. A positive relationship increases workplace standing and advancement opportunities.

While we focus on the implications of negative stereotypes, depending on the stereotype and the nature of the workplace norms, an outsider employee may be able to exploit a positive stereotype about her identity. For example, take the assumption of strong stereotypes of Korean American Harvard Law graduates as hard workers. Given this preunderstanding, it might be pointless and inefficient for such an employee to engage in workplace strategies that signal to her employer what it (thinks) it already knows—that she is a hard worker. Further, if the employee is not interested in becoming a partner but wants to work at the law firm for a few years to pay off her debts, the stereotypes of hardworking, lacking in creativity, and detail-oriented can help her both get hired and avoid the partnership track.

Admittedly, the definitions of positive and negative stereotypes that we employ are narrow. They are linked to the question of whether particular identity-based stereotypes set against specific institutional norms advantage or disadvantage individual employees. The narrow definitions help illustrate the point that employees not only work at their work but also work at performing their identities. How hard they work at the latter task turns on whether a positive or negative relationship links a stereotype about their identity and workplace criteria and on the strength of that relationship. When the environment renders observation of an employee's true characteristics difficult and employees are competing for promotion to a fixed number of partnership-track slots, the stronger the negative or positive stereotypes are, the more or less an employee is likely to have to work to construct her identity so as to fit the firm's mold and gain a position on the partnership track.

The Incentive System in Law Firms and Faculties

Outsiders enter most institutions with some understanding of their structure, function, organization, and culture. Further, insiders within these institutions have various preunderstandings, or stereotypes, of outsiders. The outsiders are aware that social stereotypes of their identities are a part of their workplace culture. They know that their employers will likely examine their workplace performances and interactions through stereotypical prisms. The outsiders likely believe that, in the absence of other information, firms and law faculties will adopt certain default positions with respect to the outsider's

professional standing within the institution. With a law school faculty, for example, one default position might be that a female Asian American feminist professor candidate will not be an effective teacher, because of stereotypes either of Asian American women as lacking authority and being quiet and submissive or about feminists as not teaching law and rather focusing too much on politics and social policy.

The Up-or-Out Structure: The Carrot and the Stick

Both law firms and law faculties tend to have up-or-out structures. Novice employees go through a lengthy trial period, between four and ten years, at the end of which senior employees decide whether to award them permanent employment. The denial of a promotion also results in the employee being fired, hence the term "up or out."

The "up" is the carrot and the "out," the stick. In combination, the carrot and the stick induce employees to exert high amounts of effort without constant supervision, which could be expensive or counterproductive. Instead, setting up an incentive structure that puts the onus on the employees to determine whether they deserve promotion is more efficient. If they fail, they are fired or, at least, are not promoted. The structure, therefore, aims to give employees room to demonstrate their worthiness, suggesting that room exists to negotiate identity.

Tournament Theory: Employees' Eyes on the Prize

In the basic tournament models that economists first used to understand these up-or-out structures, promotion was thought to be a reward for hard work as an apprentice. In other words, the structure aimed to encourage apprentices to exert high levels of effort. However, the reality is that the apprenticeship period often tends to be relatively short compared to the number of years of permanent employment that follow. Therefore, the primary element in the promotion decision must be predictive. Granting someone a large salary and job security for practically a lifetime as a reward for a relatively short apprenticeship period does not make sense, especially when the organization needs those who are promoted to continue to work hard. Promotion, therefore, is likely to be based on a future prediction about an employee's continued productivity in spite of job security. The apprenticeship period gives the senior members of the organization an opportunity to collect information about the apprentice on which to base the predictive decision.

Promotion, however, is unlikely to be a function of future productivity alone. In both law firms and law faculties, the decision to promote is typically determined by a vote of the senior members. Future productivity is a criterion, because hiring the most productive employees enhances the quality of the institution. But senior members also have personal agendas. For example, senior employees are typically also concerned with their own security and advancement and will, therefore, want to hire juniors who further these agendas. Thus, a senior law faculty member might endorse junior faculty engaged in the type of work that enhances the value of the senior faculty members' work (for example, someone who does work that is derivative and cites the senior members' work). Or senior members worried about young Turks who might try to take over the institution and alter the cushy status quo might vote for less threatening and less intellectually

capable candidates; for example, a candidate who wants to abolish tenure is unlikely to garner a lot of support.

Similarly, senior partners in law firms are likely to support candidates who will ensure and enhance their status. Partners will promote candidates who improve both the firm's bottom line and partners' individual bottom lines. Senior members whose most productive years are over are unlikely to want a new partner who will lobby for the senior members to be either fired or forced to retire because of their diminished productivity. As a result, junior employees have to demonstrate future productivity in terms of the institution's bottom line, whether it be in terms of dollars or academic articles, and convince enough seniors that their (the juniors') promotions will also serve their (the seniors') interests. This self-promotion includes persuading senior members not just of their intellectual capabilities and ability to produce high-quality work but also of their commitment to continued hard work, even after becoming partner or obtaining tenure. In other words, junior employees must demonstrate that they have internalized a norm of hard work and action consistent with the individual interests of their senior colleagues.

During the apprenticeship period, the employee must demonstrate intellectual ability ("candlepower") and skills. Moreover, the junior employee must indicate that he is a good team player. Most people commonly believe that a law firm's or a law school's productivity is measured in terms of hours billed and clients acquired in the law firm setting and in terms of scholarship and teaching in the law school environment. But both institutions are also likely to have other tasks that are even more difficult to measure and reward: willingness to handle administrative tasks, enthusiastic participation in committee work, and recruiting. Each of the foregoing tasks is necessary for the organization to function effectively but difficult to measure and reward. These tasks typically are taken on by "good citizens." Firms and law faculties, therefore, will want to promote those who will be highly productive, will not threaten the status quo, and will sacrifice for the good of the institution.

The Incentive System and Workplace Discrimination

What does the discussion so far have to do with employment discrimination? Progress on the civil rights front over the past few decades has opened a large number of doors for minority and women employees. That progress, while dissipating certain strong forms of discrimination against out-groups, has not eliminated stereotypes. When doors to the workplace are open, one must still ask how these stereotypes influence the behavior of those who have been allowed through the door. We offer three reasons for why it is important to pursue this question.

First, if we are right that the difficulty of evaluating certain individual characteristics and workplace criteria creates incentives for employees to project a conforming workplace identity, it follows that outsiders subject to negative stereotypes have greater than normal incentives to put effort and thought into constructing that identity. On the flip side, outsiders subject to positive stereotypes have to put less effort into image construction. The language of bargaining power helps illustrate this point. Other things being equal, an employee would rather not compromise her sense of identity or engage in extra signaling and performative work. Her bargaining power to avoid this compromise or extra work is a function of negative stereotypes about her identity. The stronger these

stereotypes, the weaker her bargaining power. The weaker her bargaining power, the more she may have to compromise her identity and engage in the extra work.

Second, various costs enter the equation. Psychic costs arise from self-negating and self-denying strategic behavior. Consider the care taken by a lesbian employee who, for strategic reasons such as concerns about workplace harassment or discrimination, decides to remain in the closet. She may even perform a straight identity by, for example, prominently displaying a photograph of a male friend on her desk and describing her relationship with him in ways that suggest heterosexual intimacy. Even heterosexuals engage in strategic performances of their heterosexuality to avoid the suspicion of homosexuality. Her decision to remain closeted or to perform a heterosexual identity may for her be functionally self-negating and self-denying; it sends a message to her employer that she is not a lesbian.

Third, strategic behavior is also risky and can backfire. Consider an Asian American male assistant professor who wants to project a collegial image. Assume that the institution is one in which faculty meetings tend to be sites of tension and unpleasant political discussions, such as ones on affirmative action or diversity. Assume also that the institution values collegiality and views the tensions that arise over racial issues as disturbing collegiality. If the Asian American faculty member disagrees with his colleagues about a particular controversial issue, he risks being viewed as uncollegial. Given these conditions, the Asian American male faculty member might attempt to demonstrate his collegiality by refraining from disagreeing with his colleagues, which may or may not be enough to demonstrate collegiality. If no other stereotypes about Asian American men existed, the nonintervention or nonparticipation strategy might improve the Asian American male's overall faculty standing. But instead, given the multiplicity of stereotypes about Asian American men, this stereotype-repudiating strategy could end up confirming stereotypes about Asian American men being docile, timid, and lacking in political and intellectual courage.

Doing Identity Work

Performing identity consumes resources in the form of time and effort, which is one of the costs of discrimination. The stronger the prejudices and the harder it is to observe true characteristics, the harder an outsider will have to work on managing his identity.

Consider the case of a hypothetical black male law professor. Stereotypes about his identity may be at odds with stated or unstated criteria that (he thinks) the institution values. Assume that the professor, in his first year of teaching, has been assigned to teach criminal procedure. One of the first cases he is likely to teach is *Terry v. Ohio*,[1] which establishes the stop-and-frisk doctrine. If a police officer has reasonable suspicion that a person has engaged or is about to engage in criminal conduct, she may stop and detain the suspect for limited questioning. If at any time during the encounter the officer develops reasonable suspicion that the suspect is armed and dangerous, she may frisk, or pat down, the suspect. In teaching this case, our black male first-year law professor must at least think about two concerns: whether to employ the Socratic method and how to teach *Terry v. Ohio*.

The Socratic method may not be our hypothetical professor's preferred pedagogical approach. If he were not worried about issues of authority in the classroom—and

whether his identity diminishes his professorial standing—he might adopt a less traditional approach. For example, he might break students up into small group sessions, ask them to discuss the material, and then have them report back to the class. Given the background assumptions about his identity, however, such an approach would not necessarily signal creativity. Instead, it could signal unpreparedness, intellectual softness, and disorganization.

Moreover, employing the Socratic method effectively is difficult. But for racial assumptions about his identity, the professor might adopt a teaching approach that requires a different kind of (and some might argue less) intellectual work: lecturing. It takes a great deal of work to convey complicated doctrinal ideas through Socratic engagement. A professor must think carefully about the questions, anticipate the responses, and move the conversation in a coherent and accessible way. It might be easier and safer for this professor to teach the material to the students via a lecture. In this way, he remains in control of the conversation.

Further, the professor might also think that the Socratic method disproportionately benefits insider students. This suspicion might especially be true of classes with few students of color. However, employing a teaching method other than the Socratic method could result in an image of the professor as nontraditional, illegitimate, intellectually rigid, close-minded, uninterested in student ideas, and unable to think on his feet. The employment of the lecture format, in other words, could be interpreted as the employment of a script.

Teaching Terry v. Ohio

Terry v. Ohio (1968) involved black defendants. In teaching the case, one could ignore the racial dynamics of the encounter between the defendants and the police and the race-based way Chief Justice Earl Warren structured the opinion. Alternatively, one could focus on all these factors. During such a discussion, the black professor might even reveal his own encounters with the stop-and-frisk doctrine on the street.

Assume that student evaluations play an important role in the tenure and promotion process at this institution. Assume also that the student body is overwhelmingly white. If so, the professor might choose not to focus on—or even ignore—the racial aspects of the case. In light of the professor's fears about what sort of assumptions the students might make if he talks about race, the professor might make the pragmatic choice to avoid talking about race for fear of receiving negative evaluations.

Suppose, however, that the professor does choose to address the racial aspects of the case. He thinks that this is the right thing to do politically, intellectually, and pedagogically. His decision does not mean that his pragmatic concerns about tenure and promotion have disappeared. Instead, the professor is likely to attempt to negotiate his pragmatic concerns about teaching evaluations and tenure with his political, intellectual, and pedagogical concerns about race. He will have to find ways to meaningfully integrate politics, history, and race into a discussion of the narrow doctrinal questions presented by the *Terry* opinion while avoiding alienating students or creating the impression that he is partial and obsessed with race. This approach requires work, which is directly related to the background racial assumptions that people make about the

professor's identity. None of these concerns would apply, at least not in the same way, if this professor were a white male.

The Racial Work of Color Blindness

Under the currently popular color-blind norm, whites cannot intentionally discriminate against people of color on the basis of race. They cannot use racial slurs or otherwise engage in overt racial conduct that creates a hostile work environment for people of color. The color-blind idea does not, however, place an affirmative duty on whites to interact with people of color, or a negative duty to dissociate and disidentify themselves from other whites.

Consider, for example, a large law firm's daily lunch rituals. Given how hard law firm associates work and the limited time they have to interact with other lawyers in their firm outside of work assignments, eating lunch together becomes an important way for associates to develop and sustain relationships within the firm. If the firm subscribes to a color-blind workplace norm, it would not be problematic for the same group of white male associates in the law firm to lunch together every day. Such racial associations would not run afoul of a workplace norm of color blindness. Few white people in the law firm would interpret these white-male, daily lunch gatherings as a form of white racial bonding or as evidencing a tendency on the part of the white male associates to form racial cliques. On the contrary, these associations would likely be understood to reflect the collegiality of the individual members of the lunch group.

Now suppose that within this same firm some Latinas/os develop a practice of going to lunch with each other on the first Monday of every month. This practice may be interpreted as undermining the law firm's color-blind ideal if they went to lunch with each other every day. Even a monthly lunch gathering of Latina/o associates might be viewed as evincing racial cliquishness—sticking to their own kind, in short, uncollegial.

Why do racial associations on the part of whites carry a different social meaning than racial associations on the part of people of color? One answer might be that the white associates did not racially define their association as a white-only association; it just happened that their lunch gatherings were white and male. With respect to the Latinas/os, however, their monthly meetings were organized around their racial or ethnic identity.

Why does the social meaning of the group association turn on its racial composition? The answer relates to the one-directional way that the color-blind norm works. The color-blind norm does not require whites to avoid other whites or to associate with people of color. This norm does, however, require people of color to avoid other people of color (the negative racial duty) and to associate with whites (the affirmative racial duty). In fact, the color-blind norm operates as a color conscious burden. Color blindness, therefore, does not actually mean what it declares about itself. It regulates the workplace associations of people of color but not those of white people. A color-blind workplace norm requires people of color, but not white people, to think and be careful about their racial associations. White-with-white and white-with-people-of-color associations are perceived as color blind. People-of-color-with-people-of-color associations are not.

Identity performances can also become a denial of self. Identity negotiations often aim to make insiders feel comfortable and at ease with the outsider's difference. Beyond

a certain point, an outsider's efforts to make insiders feel comfortable can translate into a denial of the outsider's sense of self. This is not to suggest that people have true identities or essences. Identity is socially constructed. Rather, the point is that most people have experienced what might be referred to as compromising moments of identity performance—moments in which a person's performance of identity contradicts some political or social image that person has of herself.

Consider a summer-associate event at a law firm, such as an end-of-the-summer dinner. Five permanent associates are present: four white men and one white woman. The summer associate, Debra, is a black woman, and one of the white male associates informs her that the firm has decided to extend to her a permanent offer to join the firm upon graduation from law school. Debra is excited. But her excitement is cautious, for she realizes that if she accepts the offer, she will be one of only two black women and five black people in a firm of two hundred attorneys.

As the evening progresses, there are many celebratory toasts. This firm prides itself on getting summer associates to accept the firm's offers by the end of dinner. Susan, the white female associate, wants to know if Debra has seen the new *Star Wars* movie. She tells Debra that the firm has lots of tickets and continues, "It's a great movie. Quite entertaining. The effects and the characters are all amazing! Jar Jar Binks was, I thought, very funny." The other associates agree enthusiastically. And they go on at some length about how truly great this movie is.

Debra has, in fact, seen *Star Wars*. She does not think the movie was great. On the contrary, she found the movie to be racially problematic and several of the characters to be walking racial stereotypes. Debra does not express her true feelings about the movie, however. Instead, she escapes the conversation by saying, "Thanks, but I've seen the film already. At any rate, I'm not a huge fan of the *Star Wars* genre."

For Debra, her reaction was a compromising moment of identity performance. To respond otherwise might have risked the associates' deeming her racially sensitive, uncollegial, a potential troublemaker, a radical, a "Sapphire," or a "PC-er." Had Debra not been concerned about the (race-based) costs of offering her racial analysis of the film she might have volunteered her perspective. Those concerns, however, resulted in her performing her identity so as to make the white associates feel racially comfortable. Doing so carried with it a significant cost: the performance of an identity that is at odds with—indeed a negation of—the social and political image that Debra has of herself.

Consider, next, the case of an insider who tells jokes about a Chinese character. The insider puts on the stereotypical Chinese accent commonly heard in the movies and on television to describe what the Chinese character says. An outsider hearing this joke could laugh, stay silent, or point out that the insider is being racist.

If the outsider laughs, the insiders will probably think that he is a "good guy": someone who can take a joke, a team player who is not obsessed with race, or a racially neutral person. If, however, the outsider suggests that the caricature is racist and offensive, then (1) his outsider status will be accentuated, (2) his colleagues might conclude that he cannot take a joke and is obsessed with race, and (3) insiders will question whether he is a team player who can be trusted. Outsiders are regularly confronted with this sort of question. If the outsider's sense of herself is so unconstrained by occupational concerns about promotion that she would be inclined to challenge the race-based humor in our

hypothetical above, remaining silent can become not only a denial of that sense of self but also a legitimation of and acquiescence to the implicit racial terms under which the outsider is expected to work (here, toleration of racial humor).

Outsiders' working identities pose two additional types of risk, including that others will identify the performative element of an outsider's behavior as strategic and manipulative. First, suppose an outsider's colleague is attempting a humorous caricature of a fellow employee that the outsider thinks is racist. The outsider does not want to feed her white colleague's stereotype of outsiders as people who are obsessed with race. Therefore, the outsider employee joins the laughter. If insiders perceive that the laughter is halfhearted and fake, it may be worse for the outsider's prospects of success in the workplace than if the outsider had objected to the caricature or refused to laugh. In other words, if the outsider is perceived as acting strategically, her actions will be discounted and probably resented. Therefore, the outsider has to not only perform but perform well.

Second, when multiple interconnected stereotypes operate simultaneously, taking steps to negate one kind of stereotype may activate another. Consider, for example, one of the few female employees in an organization that values assertiveness. She recognizes that other women before her have failed in the organization in part because of a stereotype that women are unassertive. Therefore, she decides to be assertive in her interactions with others; for example, she asserts herself in meetings and in her dealings with colleagues and subordinates. The risk is that the woman's male colleagues will not see the assertiveness as positive but rather as a sign that she is bitchy and pushy.

Or imagine that in an organization that values both effort and intellectual ability, a male African American employee perceives that negative stereotypes about him circulate on both counts. He works longer hours than normal to negate the stereotype of a lazy African American man. But that strategy creates the risk that working late will be interpreted as an inability to get work done as quickly as the others.

Finally, consider a male South Asian employee who is worried about the perception of South Asian men as unusually sexist. To negate that stereotype, he takes up cooking. But instead of negating the stereotype of the sexist South Asian man, his decision to take up cooking triggers the colonial image of the servile South Asian man. As these examples show, outsiders are typically subject to not one but a number of interconnected stereotypes. And a strategy to repudiate one stereotype, like laziness, may easily confirm another, like intellectual incompetence.

Identity Performances and Antidiscrimination Law

Identity negotiations are problematic in at least three senses. First, they impose costs that are not captured by current antidiscrimination regimes (the capture problem). Second, if a person engages in certain strategic identity negotiations, she undermines her ability subsequently to bring a discrimination claim (the evidentiary problem). Third, antidiscrimination law reflects the problematic presumption that an employer who hires several outsiders and fails to promote some is not motivated by discriminatory reasons (the doctrinal problem). This assumption ignores the reality that employers respond not only to outsider identity status, such as blackness, but also to outsider conduct, such as whether the outsider is perceived to be a good as opposed to a bad black.

The Capture Problem

Antidiscrimination law is supposed to compensate for the costs and burdens of discrimination. But it fails to capture the costs of discrimination in at least two ways. First, the law does not take into account how a color-blind norm burdens people of color. It ignores the extra costs to people of color imposed by implicit workplace expectations that require people of color to associate with white people and disidentify themselves from other people of color to blend in. It is not that an easy doctrinal solution to this problem exists. The costs are difficult to quantify, and allocating blame to any one individual or entity is difficult. Nevertheless, that this issue has largely escaped legal consciousness is problematic.

The Evidentiary Problem

A second problem with the law as it relates to identity negotiation derives from the negative relationship between an outsider employing racial comfort strategies and her ability to establish an evidentiary basis for a discrimination claim. The more an outsider negotiates her identity to make insiders feel comfortable, the more difficult it is for her to bring a discrimination claim. Suppose, for example, that an African American associate perceives that others at his largely white and male law firm are wary of African Americans. Other employees seem ill at ease in their conversations with him and get especially nervous when talking about issues relating to race. To put his colleagues at ease, this associate begins to make jokes containing negative stereotypes of African Americans. The strategy works. Indeed, it opens the door for his colleagues to make similar jokes. If this employee ever brings a race-based discrimination suit, he will unlikely be able to point to these jokes as evidence of a hostile workplace. After all, he not only started the cycle of jokes but laughed at the jokes made by his coworkers. That his race-based jokes were a response to the racial dynamics of his workplace can easily be lost to sight.

The Doctrinal Problem

Antidiscrimination law examines whether intentional discrimination took place on the basis of the plaintiff's membership in a protected class. It is not intentional discrimination for an employer to dismiss or deny promotion to a minority employee if the reason was not the employee's race or gender but the employer's dislike of the individual. But how does one distinguish between a dismissal based on pure dislike and one based on dislike that was animated by race or gender prejudice?

The distinction is obvious if the employer publicly announces "I dislike blacks" or "I will never promote a woman," but few employers are likely to make such statements publicly. In most cases, plaintiffs have to rely on circumstantial evidence of intentional discrimination—evidence of how the other employers treated members of the alleged victim's group. Therefore, courts would probably treat evidence that a law firm has rejected dozens of qualified black associates for partnership but promoted the majority of qualified white associates, as a sign of racial animus.

An employer with a record of promoting black employees is likely to persuade a court that insufficient evidence of racial animus exists. The court assumes that, because the employer thinks that some blacks are good, the reason the employer thought the plaintiff was bad had nothing to do with the plaintiff's race. The court is likely to conclude that the reason for the termination was simply the employer's dislike of the individual, which does not produce an actionable discrimination case.

The flaw in the hypothetical court's analysis is in its narrow conception of what race is or, as some would say, in its "essentializing." If judges understand the protected categories instead as at least partially composed of performances, they might begin to appreciate the extent to which the subjects of those categories strategically perform their identities in ways that move them closer or farther away from the core understanding or stereotypical version of what those categories are perceived to be about. To make this concrete, if ten black employees are up for promotion and nine are promoted, a court should still not negate the possibility that the tenth was denied a promotion because of his race: The other nine might have been engaged in racially palatable identity performances.

Strictly speaking, the problem is in the application of the doctrine and not in the doctrine itself. Indeed, Title VII already reflects the notion that it is unlawful for an employer to use race-based stereotypes to disadvantage employees. However, courts for the most part have not evidenced an interest in or willingness to respond to cases like our hypothetical, wherein the discrimination may be a function of identity work.

Categorizing Performances: A Closer Look at Strategies

Employees interested in advancement within a particular institution are likely to have multiple performance strategies available to them.

Passing refers to the phenomenon of fooling insiders into believing that an outsider is one of them. Passing is a 100 percent comfort strategy because the outsider pretends to be an insider. For example, a light-skinned African American may pass for white, a homosexual may pass as a heterosexual, a Hindu may pass as a Muslim, a Jew may pass as a gentile, or a man may pass as a woman. But the 100 percent passing strategy applies to only a small subset of outsiders, because most outsiders cannot totally fool insiders. Our focus, therefore, is on partial-passing strategies, in which the outsider's status is known but he or she can take actions to modify the social meaning of or stereotypical assumptions about that status. One of those actions is what we call comforting.

Outsiders perform comforting acts to make insiders comfortable with their outsider status. Unlike the total passing context, it is clear that the person performing comforting acts is an outsider. But the outsider has some room to work her identity to make the insider feel at ease. For example, some may believe that Asian American scientists tend to be conflicted about their loyalty to the United States. Assume that promotion in a scientific laboratory involved in weapons research is a function of success on the most important projects. Junior scientists are picked for these projects not only on the basis of their scientific abilities but also for their trustworthiness and the ability to work in teams. Assume that the junior Asian American scientists at the laboratory are thought to be exceptional in terms of scientific ability—an assumption perhaps based on a stereotype—but they are not deemed trustworthy or known as team players.

What kinds of strategies might the junior Asian Americans take to comfort (appear less foreign and more American to) their seniors? They could emphasize that they attended American colleges, were members of fraternities, or played stereotypically American team sports like American football and baseball. They could avoid associating with Asian Americans and instead associate only with white mainstream Americans. They could alter their Asian names to more American-sounding names. They could announce that they have never visited Asia and do not speak Asian languages. They could

make fun of stereotypical Asian accents. They could profess to dislike spicy Asian foods and to prefer hamburgers.

All these actions may comfort insiders and assure them that the outsider is in fact an insider, one of the guys. According to Erving Goffman,[2] such actions allow the outsider to fit in. Depending on how successful the outsider is at partially passing, he may even become an honorary insider.

A 100 percent comfort or passing strategy does not force an insider to challenge stereotypes that he holds about outsiders, because the insider does not know he is interacting with an outsider. But partial passing strategies are also not very effective in forcing the employer to rethink his assumptions about outsiders. They provide a political opportunity for insiders to engage in outsider exceptionalism via the following kinds of statements: "We like you despite your being [gay, lesbian, Asian American, Latina/o, etc.]," or "We don't really think of you as [gay, lesbian, Asian American, Latina/o]." Such sentiments, in turn, allow insiders to say, for example, "How can you say that I'm being [racist, homophobic, sexist, etc.]?" Another common saying is "I am best friends with [name of the African American, lesbian, or heterosexual woman who is passing and making insiders comfortable]." An employee's use of partial comforting strategies provides employers with a way to avoid confronting their use of stereotypes. In the face of such strategies, employers might tell themselves that, while the stereotypes they hold about outsiders may not (for the moment) apply to the specific outsider employee, the stereotypes are nevertheless valid. The partially passing outsider employee thus becomes the exception to otherwise valid stereotyping rules.

Other Strategies: Discomfort, Selling Out, and Buying Back

Three other strategies deserve mention. First, some outsiders may adopt a *discomfort* strategy. The outsider may choose to emphasize his or her outsider status in a way that makes insiders uncomfortable. The outsider may, for example, consistently point out instances of unfairness against outsiders. Most people tend to think of such behavior as authentic or politically principled. Often it is. But sometimes such behavior is strategic in that the goal may be to satisfy an institutional need. If the institution can handle some dissent, the discomfort strategy may work to provide the institution with legitimacy by creating the image of a democratic institution, for example. Outsiders also might adopt the discomfort strategy as a way to set the ground work for a discrimination claim by identifying and calling attention to examples of discrimination within the institution.

Second, there is the *sell-out* strategy. An outsider can make arguments that work to the advantage of insiders so that insiders can then claim that their arguments are not purely self-interested or even racial. For example, a claim made by an insider in a predominantly white institution concluding that a particular (racial) episode was not racial does not carry as much weight as a similar claim made by an outsider. The argument might be employed, explicitly or implicitly, to legitimize the insider's perspective. The employee may be rewarded for selling out. Many believe that former president George H. W. Bush rewarded Clarence Thomas, a black man, for selling out by nominating him to the Supreme Court. In this sense, selling out might be thought of as a specific kind of comfort strategy.

Third, a *buy-back* strategy allows outsiders whose comfort strategies have resulted in costs to their community to make amends. These individuals may engage in both comfort and discomfort strategies. For example, the Asian American who emphasizes his technical skills to take advantage of the stereotype that Asian Americans are good at technical subjects may recognize the costs of his actions and support other outsider claims of institutional discrimination to buy back or make amends for the cost. A more cynical view is that an outsider who performs comfort strategies may engage in some visible discomfort strategies to retain status in the outsider community while simultaneously maintaining a certain amount of legitimacy within the insider institution.

Of course, these strategies are situationally driven. How an outsider performs these strategies will depend on the institution. Different institutions have specific norms, values, structures, and cultures that create incentives for employees to behave in particular ways.

As we have seen, workplace discrimination turns on more than the outward markers of outsider difference. It is also a function of the ways outsiders perform their workplace identities. By this, we do not mean that outsiders invite discrimination by performing their identities in certain ways; rather, they are disciplined for not performing their identities in ways that are palatable to their insider employers. The result is that outsiders, if they wish to survive in the workplace, often find themselves having to do extra work to make themselves palatable and their insider employers comfortable. This extra work is directly linked to color-blind and assimilationist workplace norms.

As things stand, the law does little to address this burden. In this sense, identity performances constitute a form of shadow work—largely unacknowledged and thus unregulated. The law has recognized the extra burdens of identity performance but only in narrow sets of circumstances such as pregnancy and marriage. Firing one black employee in favor of another because the latter performed his identity in a way that was more racially palatable appears to pass muster.

The hard question is: Are there solutions to this problem? We think so. The law does not offer much promise, though doctrinal changes might provide some help. More important, there are institutional changes employers can make to ameliorate the working identity phenomenon. Employers, especially in the high-level jobs that we describe, often bewail the lack of diversity in their institutions and insist that they are willing to make extra efforts to solve the problems of retaining and hiring qualified outsiders. If they could be persuaded that outsiders bear extra costs in working identity that are, in substantial part, a function of the existing institutional structures and workplace norms, perhaps they would be persuaded to modify those structures.

NOTES

1. 392 U.S. 1 (1968).
2. Erving Goffman, Stigma: Notes on the Management of Spoiled Identity 49 (1963).

24. The Social Construction of Race

IAN F. HANEY LÓPEZ

Under the jurisprudence of slavery as it stood in 1806, one's status followed the maternal line. A person born to a slave woman was a slave; one born to a free woman was free. In that year, three generations of enslaved women sued for freedom in Virginia on the ground that they descended from a free maternal ancestor. Yet on the all-important issue of their descent, their faces and bodies provided the only evidence they or the owner who resisted their claims could bring before the court.

> The appellees . . . asserted this right [to be free] as having been descended, in the maternal line, from a free Indian woman; but their genealogy was very imperfectly stated. . . . [T]he youngest . . . [had] the characteristic features, the complexion, the hair and eyes . . . the same with those of whites. . . . Hannah, [the mother] had long black hair, was of the right Indian copper colour, and was generally called an Indian by the neighbours.[1]

Because the Wrights, grandmother, mother, and daughter, could not prove they had a free maternal ancestor, and their owner, Hudgins, could not show their descent from a female slave, the side charged with the burden of proof would lose. Allocating that burden required the court to assign the plaintiffs a race. Under Virginia law, blacks were presumably slaves and thus bore the burden of proving a free ancestor; whites and Indians were presumably free, and thus the burden of proving their descent fell on those alleging slave status. To determine whether the Wrights were black and presumptively slaves or Indian and presumptively free, the court, in the person of Judge Tucker, devised a racial test:

> Nature has stampt upon the African and his descendants two characteristic marks, besides the difference of complexion, which often remain visible long after the characteristic distinction of colour either disappears or becomes doubt-

A version of this chapter previously appeared as Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 Harv. C.R.-C.L. L. Rev. 1 (1994). Originally published in the *Harvard Civil Rights–Civil Liberties Law Review*.

> ful; a flat nose and woolly head of hair. The latter of these disappears the last of all; and so strong an ingredient in the African constitution is this latter character, that it predominates uniformly where the party is in equal degree descended from parents of different complexions, whether white or Indians. . . . So pointed is this distinction between the natives of Africa and the aborigines of America, that a man might as easily mistake the glossy, jetty clothing of an American bear for the wool of a black sheep, as the hair of an American Indian for that of an African, or the descendant of an African. Upon these distinctions as connected with our laws, the burden of proof depends.[2]

The fate of the women rode on the complexion of their face, the texture of their hair, and the width of their nose. Each of these characteristics served to mark their race, and their race in the end determined whether they were free or enslaved. The court decided for freedom:

> [T]he witnesses concur in assigning to the hair of Hannah . . . the long, straight, black hair of the native aborigines of this country. . . .
>
> [Verdict] pronouncing the appellees absolutely free.[3]

After unknown lives lost in slavery, Judge Tucker freed three generations of women because Hannah's hair was long and straight.

The Confounding Problem of Race

I begin this chapter with *Hudgins v. Wright* in part to emphasize the power of race in our society. Human fate still rides upon ancestry and appearance. The characteristics of our hair, complexion, and facial features still influence whether we are figuratively free or enslaved. Race dominates our personal lives. It manifests itself in our speech, dance, neighbors, and friends—"our very ways of talking, walking, eating and dreaming are ineluctably shaped by notions of race."[4] Race determines our economic prospects. The race-conscious market screens and selects us for manual jobs and professional careers, redlines financing for real estate, greenlines our access to insurance, and even raises the price of that car we need to buy.[5] Race permeates our politics. It alters electoral boundaries; shapes the disbursement of local, state, and federal funds; fuels the creation and collapse of political alliances; and twists the conduct of law enforcement.[6] In short, race mediates every aspect of our lives.

Hudgins v. Wright also enables me to emphasize the role of law in reifying racial identities. By embalming in the form of legal presumptions and evidentiary burdens the prejudices society attached to vestiges of African ancestry, *Hudgins* demonstrates that the law serves not only to reflect but to solidify social prejudice, making law a prime instrument in the construction and reinforcement of racial subordination. Judges and legislators, in their role as arbiters and violent creators of the social order, continue to concentrate and magnify the power of race. Race suffuses all bodies of law—not only obvious ones like civil rights, immigration law, and federal Indian law but also property law,[7] contracts law,[8] criminal law,[9] federal courts,[10] family law,[11] and even "the purest of corporate law questions within the most unquestionably Anglo scholarly paradigm."[12]

I assert that no body of law exists untainted by the powerful astringent of race in our society.

In largest part, however, I begin with *Hudgins v. Wright* because the case provides an empirical definition of race. *Hudgins* tells us one is black if one has a single African antecedent, or if one has a "flat nose" or a "woolly head of hair." I begin here because in the last two centuries our conception of race has not progressed much beyond the primitive view advanced by Judge Tucker.

Despite the pervasive influence of race in our lives and in U.S. law, a review of opinions and articles by judges and legal academics reveals a startling fact: Few seem to know what race is and is not. Today most judges and scholars accept the common wisdom concerning race, without pausing to examine the fallacies and fictions on which ideas of race depend. In U.S. society, "a kind of 'racial etiquette' exists, a set of interpretive codes and racial meanings which operate in the interactions of daily life. . . . Race becomes 'common sense'—a way of comprehending, explaining and acting in the world."[13] This social etiquette of common ignorance is readily apparent in the legal discourse of race. Rehnquist Court justices took this approach, speaking disingenuously of the peril posed by racial remediation to "a society where race is irrelevant," while nevertheless failing to offer an account of race that would bear the weight of their cynical assertions.[14] Arguably, critical race theorists, those legal scholars whose work seems most closely bound by their emphasis on the centrality of race, follow the same approach when they powerfully decry the permanence of racism and persuasively argue for race consciousness yet do so without explicitly suggesting what race might be.[15] Race may be America's single most confounding problem, but the confounding problem of race is that few people seem to know what race is.

In this chapter, I define a "race" as a vast group of people loosely bound by historically contingent, socially significant elements of their morphology and/or ancestry. I argue that race must be understood as a sui generis social phenomenon in which contested systems of meaning serve as the connections between physical features, faces, and personal characteristics. In other words, social meanings connect our faces to our souls. Race is neither an essence nor an illusion but rather an ongoing, contradictory, self-reinforcing, plastic process subject to the macro forces of social and political struggle and the micro effects of daily decisions. As used here, the referents of terms like "black" and "white" are social groups, not genetically distinct branches of humankind.

Note that whites exist as a race under this definition. It is not only people of color who find their identities mediated by race or who are implicated in the building and maintenance of racial constructs. White identity is just as much a racial fabrication, and whites are equally, or even more highly, implicated in preserving the racially constructed status quo. I therefore explicitly encourage whites to critically attend to racial constructs. Whites belong among those most deeply dedicated to fathoming the intricacies of race.

In this context, let me situate the theory I advance in terms of the epistemological significance of my own race and biography. I write as a Latino. The arguments I present no doubt reflect the less pronounced role physical features and ancestry play for my community as opposed to blacks, the group most often considered in the elaboration of racial theories. Perhaps more importantly, I write from a perspective influenced by a unique biography. My older brother, Garth, and I are the only children of a fourth-generation Irish father, Terrence Eugene Haney, and a Salvadoran immigrant mother,

Maria Daisy López de Haney. Sharing a similar morphology, Garth and I both have light but not white skin, dark brown hair, and dark brown eyes. We were raised in Hawaii, far from either my father's roots in Spokane, Washington, or my mother's family in San Salvador, El Salvador. Interestingly, Garth and I conceive of ourselves in different racial terms. For the most part, he considers his race transparent, something of a nonissue in the way whites do, and he relates most easily with the Anglo side of the family. I, on the other hand, consider myself Latino and am in greatest contact with my maternal family. Perhaps presciently, my parents gave Garth my paternal grandfather's name, Mark, for a middle name, thus christening him Garth Mark Haney. They gave me my maternal father's name, Fidencio. Affiliating with the Latino side of the family, in my first year of graduate school I followed Latino custom by appending my mother's family name to my own, rendering my name Ian Fidencio Haney López. No doubt influencing the theories of race I outline and subscribe to, in my experience race reveals itself as plastic, inconstant, and to some extent volitional. That is the thesis of this chapter.

Biological Race

There are no genetic characteristics possessed by all blacks but not by nonblacks; similarly, there is no gene or cluster of genes common to all whites but not to nonwhites.[16] One's race is not determined by a single gene or gene cluster, as is, for example, sickle-cell anemia. Nor are races marked by important differences in gene frequencies, the rates of appearance of certain gene types. The data compiled by various scientists demonstrate, contrary to popular opinion, that intragroup differences exceed intergroup differences. That is, greater genetic variation exists *within* the populations typically labeled black and white than *between* these populations.[17] This finding refutes the supposition that racial divisions reflect fundamental genetic differences.

Rather, the notion that humankind can be divided along white, black, and yellow lines reveals the social rather than the scientific origin of race. The idea that there exist three races and that they are Caucasoid, Negroid, and Mongoloid is rooted in the European imagination of the Middle Ages, which encompassed only Europe, Africa, and the Near East. This view found its clearest modern expression in Count Arthur de Gobineau's *Essay on the Inequality of Races*, published in France in 1853–1855.[18] The peoples of the American continents, the Indian subcontinent, east Asia, Southeast Asia, and Oceania—living outside the imagination of Europe and Count Gobineau—are excluded from the three major races for social and political reasons, not for scientific ones. Nevertheless, the history of science has long been the history of failed efforts to justify these social beliefs.[19] Along the way, various minds tried to fashion practical human typologies along the following physical axes: skin color, hair texture, facial angle, jaw size, cranial capacity, brain mass, frontal lobe mass, brain surface fissures and convolutions, and even body lice. As one scholar notes, "The nineteenth century was a period of exhaustive and—as it turned out—futile search for criteria to define and describe race differences."[20]

To appreciate the difficulties of constructing races solely by reference to physical characteristics, consider the attempt to define race by skin color. On the basis of white skin, for example, one can define a race that includes most of the peoples of Western Europe. However, this grouping is threatened by the subtle gradations of skin color as one moves south or east, and becomes untenable when the fair-skinned peoples of northern

China and Japan are considered. In 1922, in *Ozawa v. United States*,[21] the Supreme Court nicely explained this point. When Japanese-born Takao Ozawa applied for citizenship he asserted, as required by the Naturalization Act, that he was a "white person." Counsel for Ozawa pointedly argued that to reject Ozawa's petition for naturalization would be "to exclude a Japanese who is 'white' in color." This argument did not persuade the Court: "Manifestly, the test [of race] afforded by the mere color of the skin of each individual is impracticable as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races."[22] In rejecting Ozawa's petition for citizenship, the Court recognized that racial boundaries do not follow skin color. If they did, some now secure in their white status would have to be excluded, and others firmly characterized as nonwhite would need to be included. As the *Ozawa* Court correctly tells us, "mere color of the skin" does not provide a means to racially divide people.

The rejection of race in science is now almost complete. In the end, we should embrace the historian Barbara Fields's succinct conclusion with respect to the plausibility of biological races: "Anyone who continues to believe in race as a physical attribute of individuals, despite the now commonplace disclaimers of biologists and geneticists, might as well also believe that Santa Claus, the Easter Bunny and the tooth fairy are real, and that the earth stands still while the sun moves."[23]

Racial Illusions

Unfortunately, few in this society seem prepared to relinquish fully their subscription to notions of biological race. This includes Congress and the Supreme Court. Congress's anachronistic understanding of race is exemplified by a 1988 statute that explains that "the term 'racial group' means a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent."[24] The Supreme Court, although purporting to sever race from biology, also seems incapable of doing so. In *Saint Francis College v. Al-Khazraji*,[25] the Court determined that an Arab could recover damages for racial discrimination under 42 U.S.C. §1981. Writing for the Court, Justice Byron White appeared to abandon biological notions of race in favor of a sociopolitical conception, explaining, "Clear-cut categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that differences between individuals of the same race are often greater than the differences between the 'average' individuals of different races."[26] Despite this seeming rejection of biological race, Justice White continued, "The Court of Appeals was thus quite right in holding that §1981, 'at a minimum,' reaches discrimination against an individual 'because he or she is genetically part of an ethnically and physiognomically distinctive subgrouping of *homo sapiens*.'"[27] By adopting the lower court's language of genetics and distinctive subgroupings, Justice White demonstrates the Court's continued reliance on blood as a metonym for race. During oral argument in *Metrobroadcasting v. FCC*, Justice Antonin Scalia again revealed the Court's understanding of race as a matter of blood. Scalia attacked the argument that granting minorities broadcasting licenses would enhance diversity by blasting "the policy as a matter of

'blood,' at one point charging that the policy reduced to a question of 'blood, not background and environment.'"[28]

Racial Formation

Race must be viewed as a social construction. That is, human interaction rather than natural differentiation must be seen as the source and continued basis for racial categorization. The process by which racial meanings arise has been labeled racial formation.[29] In this formulation, race is not a determinant or a residue of some other social phenomenon but rather stands on its own as an amalgamation of competing societal forces. Racial formation includes both the rise of racial groups and their constant reification in social thought. I draw upon this theory but use the term "racial fabrication" to highlight four important facets of the social construction of race. First, humans rather than abstract social forces produce races. Second, as human constructs, races constitute an integral part of a whole social fabric that includes gender and class relations. Third, the meaning systems surrounding race change quickly rather than slowly. Finally, races are constructed relationally, against one another, rather than in isolation. Fabrication implies the workings of human hands and suggests the possible intention to deceive. More than the industrial term "formation," which carries connotations of neutral constructions and processes indifferent to individual intervention, referring to the fabrication of races emphasizes the human element and evokes the plastic and inconstant character of race. An archaeological exploration of the racial identity of Mexicans will illustrate these four elements of race.

In the early 1800s, people in the United States ascribed to Latin Americans nationalities and, separate from these, races. Thus, a Mexican might also be white, Indian, black, or Asian. By the 1840s and 1850s, however, U.S. Anglos looked with distaste on Mexicans in terms that conflated and stigmatized their race and nationality. This animus had its source in the Anglo-Mexican conflicts in the Southwest, particularly in Texas and California. In the newly independent Texas, war propaganda from the 1830s and 1840s purporting to chronicle Mexican atrocities relied on racial disparagements. Little time elapsed following the U.S. annexation of Mexican territory in 1848 before laws began to reflect and reify Anglo racial prejudices. Social prejudices quickly became legal ones, highlighting the close ties between race and law. In 1855, for example, the California legislature targeted Mexicans as a racial group with the so-called Greaser Act. Ostensibly designed to discourage vagrancy, the law specifically applied to "all persons who are commonly known as 'Greasers' or the issue of Spanish and Indian blood . . . and who go armed and are not peaceable and quiet persons."[30]

Typifying the arrogant belligerence of the times are the writings of T. J. Farnham:

> No one acquainted with the indolent, mixed race of California, will ever believe that they will populate, much less, for any length of time, govern the country. The law of Nature which curses the mulatto here with a constitution less robust than that of either race from which he sprang, lays a similar penalty upon the mingling of the Indian and white races in California and Mexico. They must fade away; while the mixing of different branches of the Caucasian family in the

> States will continue to produce a race of men, who will enlarge from period to period the field of their industry and civil domination, until not only the Northern States of Mexico, but the Californias also, will open their glebe [land] to the pressure of its unconquered arm. The old Saxon blood must stride the continent, must command all its northern shores, must here press the grape and the olive, here eat the orange and the fig, and in their own unaided might, erect the altar of civil and religious freedom on the plains of the Californias.[31]

We can use Farnham's racist hubris to illustrate the four points enumerated earlier regarding racial fabrication.

First, the transformation of "Mexican" from a nationality to a race came about through the dynamic interplay of myriad social forces. As the various strains in this passage indicate, Farnham's racialization of Mexicans does not occur in a vacuum but in the context of dominant ideology, perceived economic interests, and psychological necessity. In unabashedly proclaiming the virtue of raising industry and harnessing nature, Farnham trumpeted the dominant Lockean ideology of the time, an ideology that confirmed the superiority of the industrialized Yankees and the inferiority of the pastoral Mexicans and Indians and justified the expropriation of their lands.[32] By lauding the commercial and economic interests of colonial expansion, Farnham also appealed to the freebooting capitalist spirit of America, recounting to his East Coast readers the riches that lay for their taking in a California populated only by mixed-breed Mexicans. Finally, Farnham's assertions regarding the racial character of these Mexicans filled the psychological need to justify conquest: The people already in California, Farnham assured his readers, would "fade away" under nature's curse and, in any event, were as a race "unfit" to govern their own land. Racial fabrication cannot be explained in terms of a few causal factors but must be viewed as a complex process subject to manifold social forces.

Second, because races are constructed, ideas about race form part of a wider social fabric into which other relations, not least gender and class, are also woven. Farnham's choice of martial and masculine imagery is not an accident but a reflection of symbiosis in the construction of racial and gender hierarchies during the nineteenth century.[33] This symbiosis was reflected, for example, in distinct patterns of gender racialization during the era of frontier expansion—the native men of the Southwest were depicted as indolent, slothful, cruel, and cowardly Mexicans, while the women were described as fair, virtuous, and lonely Spanish maidens. Consider the following leaden verse:

> *The Spanish maid, with eye of fire,*
> *At balmy evening turns her lyre*
> *And, looking to the Eastern sky,*
> *Awaits our Yankee chivalry*
> *Whose purer blood and valiant arms,*
> *Are fit to clasp her budding charms.*
>
> *The* man*, her mate, is sunk in sloth—*
> *To love, his senseless heart is loth:*
> *The pipe and glass and tinkling lute,*

A sofa, and a dish of fruit;
A nap, some dozen times by day;
Somber and sad, and never gay.[34]

This doggerel depicts the Mexican women as Spanish, linking their sexual desirability to European origins, while concurrently comparing the purportedly slothful Mexican man to the ostensibly chivalrous Yankee. Social renditions of masculinity and femininity often carry with them racial overtones, just as racial stereotypes invariably embody some elements of sexual identity. The archaeology of race soon becomes the excavation of gender and sexual identity.

Farnham's appeal to industry also reveals the close interconnection between racial and class structures. The observations of Arizona mine owner Sylvester Mowry reflect this linkage: "The question of [resident Mexican] labor is one which commends itself to the attention of the capitalist: cheap, and under proper management, efficient and permanent. They have been peons for generations. They will remain so, as it is their natural condition."[35] When Farnham wrote in 1840, before U.S. expansion into the Southwest, Yankee industry stood in counterpoint to Mexican indolence. When Mowry wrote in 1863, after fifteen years of U.S. regional control, Anglo capitalism stood in a fruitful managerial relationship to cheap, efficient Mexican labor. The nearly diametric change in the conception of Mexicans held by Anglos, from indolent to industrious, reflects the emergence of an Anglo economic elite in the Southwest and illustrates the close connection between class relations and ideas about race. The syncretic nature of racial, gender, and class constructs suggests that a global approach to oppression is not only desirable but *necessary* if the amelioration of these destructive social hierarchies is to be achieved.

Third, as evidenced through a comparison of the stereotypes of Mexicans propounded by Farnham and Mowry, racial systems of meaning can change at a relatively rapid rate. In 1821, when Mexico gained its independence, its residents were not generally considered a race. Twenty years later, as Farnham's writing shows, Mexicans were denigrated in explicitly racial terms as indolent cowards. About another two decades after that, Mowry lauds Mexicans as naturally industrious and faithful. The rapid emergence of Mexicans as a race, and the similarly quick transformations wrought in their perceived racial character, exemplify the plasticity of race. Accretions of racial meaning are not sedimentary products that once deposited remain solid and unchanged or subject to only a slow process of abrasion, erosion, and buildup. Instead, the processes of racial fabrication continuously melt down, mold, shatter, and recast races: Races are not rocks; they are plastics.

Fourth and finally, races are relationally constructed. Despite their conflicting views on the work ethic of Mexicans, the fundamental message delivered by Farnham and Mowry is the same: Though war, conquest, and expansion separate their writings, both tie race and class together in the exposition of Mexican inferiority and Anglo superiority. The denigration of Mexicans and the celebration of Anglos are inseverable. The attempt to racially define the conquered, subjugated, or enslaved is at the same time an attempt to racially define the conqueror, the subjugator, or the enslaver.[36] Races are categories of difference that exist only in society: They are produced by myriad conflicting social forces; they overlap and inform other social categories; they are fluid rather than

static and fixed; and they make sense only in relationship to other racial categories, having no meaningful independent existence. Race is socially constructed.

Conclusion

I close where I began, with *Hudgins v. Wright*. The women in that case lived in a liminal area between races, being neither and yet both black and Indian. Biologically, they were neither. Any objective basis for racial divisions fell into disrepute a hundred years ago, when early ethnology proved incapable of delineating strict demarcations across human diversity. Despite Judge Tucker's beliefs and the efforts of innumerable scientists, the history of nineteenth-century anthropology convincingly demonstrates that morphological traits cannot be employed as physical arbiters of race. More recently, genetic testing has made clear the close connection all humans share, as well as the futility of explaining those differences that do exist in terms of racially relevant gene codes. The categories of race previously considered objective, such as Caucasoid, Negroid, and Mongoloid, are now widely regarded as empty relics, persistent shadows of the social belief in races that permeated early scientific thought. Biological race is an illusion.

Social race, however, is not, and it is here that the Wrights' race should be measured. At different times, the Wrights were socially both black and Indian. As slaves and in the mind of Hudgins, they were black; as free women and in their argument for liberty, they were Indian. The particular racial options confronting the Wrights reflect the history of racial fabrication in the United States. Races are thus not biological groupings but social constructions. Even though far from objective, race remains obvious. Walking down the street, we consistently rely on pervasive social mythologies to assign races to the other pedestrians. The absence of any physical basis to race does not entail the conclusion that race is wholly hallucination. Race has its genesis and maintains its vigorous strength in the realm of social beliefs.

For the Wrights, their race was not a phantasm but a contested fact on which their continued enslavement turned. Their struggle makes clear the importance of chance, context, and choice in the social mechanics of race. Aspects of human variation like dark skin or African ancestry are chance, not denotations of distinct branches of humankind. These elements stand in as markers widely interpreted to connote racial difference only in particular social contexts. The local setting in turn provides the field of struggle on which social actors make racially relevant choices. For the Wrights, freedom came because they chose to contest their race. Without their decision to argue that they were Indian and thus free, generations to come might have been reared in slavery.

This is the promise of choice at its brightest: By choosing to resist racial constructions, we may emancipate ourselves and our children. Unfortunately, uncoerced choice in the arena of U.S. race relations is rare, perhaps nonexistent. Two facets of this case demonstrate the darkened potential of choice. First, the women's freedom ultimately turned on Hannah's long straight hair, not on their decision to resist. Without the legal presumptions that favored their features, presumptions that were in a sense the concrete embodiments of the social context, they would have remained slaves. Furthermore, these women challenged their race, not the status ascribed to it. By arguing that they were Indian and not black, free rather than enslaved, the women lent unfortunate legitimacy to the legal and social presumptions in favor of black slavery. The context and

consequences of the Wrights' actions confirm that choices are made in a harsh racist social setting that may facilitate but more likely will forestall freedom and that, in our decisions to resist, we may shatter but more probably will inadvertently strengthen the racial structures around us. Nevertheless, race is not an inescapable physical fact. Rather, it is a social construction that, however perilously, remains subject to contestation at the hands of individuals and communities alike.

NOTES

1. Hudgins v. Wright, 11 Va. 134 (1 Hen. & M.) (Sup. Ct. App. 1806).

2. *Id*. at 139–40.

3. *Id*. at 140–41.

4. Michael Omi & Howard Winant, Racial Formation in the United States: From the 1960s to the 1980s, at 63 (1986).

5. See Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 Harv. L. Rev. 817 (1991).

6. See, e.g., *Developments in the Law: Race and the Criminal Process*, 101 Harv. L. Rev. 1472 (1988).

7. See, e.g., Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 Cal. L. Rev. 1511, 1521–26 (1991).

8. See, e.g., Patricia J. Williams, The Alchemy of Race and Rights (1991).

9. See, e.g., Randall Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Rev. 1388 (1988); *Developments in the Law*, *supra* note 6.

10. See, e.g., Judith Resnick, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. Chi. L. Rev. 671 (1989).

11. See, e.g., Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. Penn. L. Rev. 1163 (1991); Twila Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. Fam. L. 51 (1990–91).

12. Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 Duke L.J. 705, 729 (citing Mario L. Baeza, *Telecommunications Reregulation and Deregulation: The Impact on Opportunities for Minorities*, 2 Harv. Blackletter J. 7 (1985)).

13. Omi & Winant, *supra* note 4, at 62. For an extended discussion of "common sense" in the construction of racial identities, see Stuart Alan Clarke, *Fear of a Black Planet: Race, Identity Politics, and Common Sense*, 21 Socialist Rev. no. 3–4, 37 (1991).

14. City of Richmond v. J. A. Croson Co., 488 U.S. 469, 505 (1989). For a critique of Justice O'Connor's decision in *Croson*, see Patricia J. Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 Mich. L. Rev. 2128 (1989).

15. See, e.g., Derrick Bell, Faces at the Bottom of the Well: The Permanence of Racism (1992); Gary PeIler, *Race Consciousness*, 1990 Duke L.J. 758.

16. See generally Leon Kamin et al., Not in Our Genes: Biology, Ideology, and Human Nature (1984); Alan Almquist & John Cronin, *Fact, Fancy, and Myth on Human Evolution*, 29 Current Anthropology 520 (1988); Bruce Bower, *Race Falls from Grace*, 140 Sci. News 380 (1991).

17. See Richard C. Lewontin, *The Apportionment of Human Diversity*, 6 Evolutionary Biology 381, 397 (1972). See generally L. L. Cavalli-Sforza, *The Genetics of Human Populations*, 231 Sci. Am. 80 (Sept. 1974).

18. Thomas F. Gossett, Race: The History of an Idea in America 342–47 (1975).

19. See generally Stephen Jay Gould, The Mismeasure of Man (1981); William Stanton, The Leopard's Spots: Scientific Attitudes Toward Race in America, 1815–59 (1960); Nancy Stepan, The Idea of Race in Science: Great Britain, 1800–1960 (1982).

20. Gossett, *supra* note 18, at 65–83. Charles Darwin proposed several of these axes, arguing at one point that "[w]ith civilized nations, the reduced size of the jaws from lessened use, the habitual play of different muscles serving to express different emotions, and the increased size of the brain from greater intellectual activity, have together produced a considerable effect on their general appearance

in comparison with savages." *Id.* at 78 (quoted without attribution to a specific source). Darwin also supposed that the body lice of some races could not live on the bodies of members of other races, thus prompting him to suggest that "a racial scale might be worked out by exposing doubtful cases to different varieties of lice." *Id.* at 81. Leonardo da Vinci is another icon of intellectual greatness guilty of harboring ridiculous ideas regarding race. Da Vinci attributed racial differences to the environment in a novel manner, arguing that those who lived in hotter climates worked at night and so absorbed dark pigments, while those in cooler climates were active during the day and correspondingly absorbed light pigments. *Id.* at 16.

21. 260 U.S. 178 (1922).

22. *Id.* at 197.

23. See Barbara Jeanne Fields, *Slavery, Race and Ideology in the United States of America*, 181 New Left Rev. 95–96 (1990).

24. Genocide Convention Implementation Act of 1987, 18 U.S.C. §1093 (1988).

25. 481 U.S. 604 (1987).

26. *Id.* at 610, n.4.

27. *Id.* at 613.

28. Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind*," 44 Stan. L. Rev. 1, 32 (1991) (citing Ruth Marcus, *FCC Defends Minority License Policies: Case Before High Court Could Shape Future of Affirmative Action*, Wash. Post, Mar. 29, 1990, at A8).

29. Omi & Winant, *supra* note 4, at 61.

30. Cal. Stat. 175 (1855), excerpted in Robert F. Heizer & Alan J. Almquist, The Other Californians: Prejudice and Discrimination Under Spain, Mexico, and the United States to 1920, at 151 (1971). The recollections of "Dame Shirley," who resided in a California mining camp between 1851 and 1852, record efforts by the ascendant Anglos to racially denigrate Mexicans. "It is very common to hear vulgar Yankees say of the Spaniards, 'Oh, they are half-civilized black men!' These unjust expressions naturally irritate the latter, many of whom are highly educated gentlemen of the most refined and cultivated manner." L.A.K.S. Clappe, The Shirley Letters from the California Mines, 1851–1852, at 158 (1922), quoted in Heizer & Almquist, *supra*, at 141.

31. T. J. Farnham, Life, Adventures, and Travel in California 413 (1840), quoted in Heizer & Almquist, *supra* note 30, at 140.

32. See generally Robert A. Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 Wis. L. Rev. 219.

33. See Nancy Leys Stepan, *Race and Gender: The Role of Analogy in Science*, in Anatomy of Racism 38 (David Theo Goldberg ed., 1990).

34. Reginald Horsman, Race and Manifest Destiny: The Origins of American Racial Anglo-Saxonism 233 (1981) (citation omitted).

35. Sylvester Mowry, The Geography of Arizona and Sonora 67 (1863), quoted in Ronald Takaki, Iron Cages: Race and Class in Nineteenth-Century America 163 (1990).

36. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1373 (1988).

25. Cracking the Egg

Which Came First—Stigma or Affirmative Action?

ANGELA ONWUACHI-WILLIG, EMILY HOUH, AND MARY CAMPBELL

For nearly thirty years, the American public has debated the merits of race-based affirmative action in higher education. From Allan Bakke's challenge to the admissions program at the University of California, Davis, School of Medicine, to legislative challenges in states such as Arizona and Colorado, opponents of race-based affirmative action have attacked the practice as discriminatory and unconstitutional.

The initial challenges to affirmative action focused primarily on arguments concerning the policy's ineffectiveness as well as unfairness to innocent whites. Later, opponents highlighted the policy's unfairness to racial minorities. According to them, the most damaging consequence of affirmative action was the stigma that racial minorities supposedly experienced because of these programs. Proponents of this view identified both internal stigma, or doubt of one's own qualifications, and external stigma, or the burden of the doubts of others in one's qualifications, as reasons for dismantling affirmative action programs.

For example, in 1992, Terry Eastland, a former fellow at the Ethics and Public Policy Center and a former publisher of the *American Spectator*, proclaimed that stigma was "[p]erhaps the most damning judgment against affirmative action . . . [given that it] comes in the form of objections that could only be expressed by blacks and members of other minority groups typically included in affirmative action programs." Eastland focused primarily on the harms of internal stigma, which are "the feeling[s] of dependency, inadequacy, and at times guilt that can strike those who believe themselves to be beneficiaries of affirmative action." Eastland gave as an example a statement from a Latino officer at Bank of America: "Sometimes I wonder: Did I get this job because of my abilities, or because they needed to fill a quota?"

Arguments concerning the internal effects of stigma have gained ground because of the voice given to them by conservative members of racial minority groups, such as Shelby Steele, who once asserted that "when a black student enters college, the myth of inferiority compounds the normal anxiousness over whether he or she will be good

A version of this chapter previously appeared as Angela Onwuachi-Willig, Emily Houh, and Mary Campbell, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 Cal. L. Rev. 1299 (2008). Originally published in the *California Law Review*.

enough,"[1] or Justice Clarence Thomas, who denounced the policy in his concurrence in *Adarand Constructors, Inc. v. Pena*:

> [T]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. . . . Inevitably, [affirmative action] programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.[2]

In addition to internal stigma, opponents of affirmative action charge that it creates external stigma: "the burden of being treated or viewed differently by others, or as though one is unqualified, based on the assumption that one is a beneficiary of affirmative action."[3] For example, in *Grutter v. Bollinger*, Justice Thomas, perhaps reflecting on personal experiences, wrote:

> It is uncontested that each year, the [University of Michigan] Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. Who can differentiate between those who belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the "beneficiaries" of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed "otherwise qualified," or it did not, in which case asking the question itself unfairly marks those blacks who succeed without discrimination.[4]

Justice Thomas's arguments in *Grutter* echo past statements by black conservatives, such as Steele, who similarly argued that "[m]uch of the 'subtle' discrimination that blacks talk about is often (not always) discrimination against the stigma of questionable competence that affirmative action delivers to blacks."[5] Professor Richard Sander of University of California, Los Angeles, School of Law attributed the high attrition rate of black and Latino attorneys at law firms to the same mechanism.[6] (See Chapter 73.)

Given the effectiveness of the stigma argument as a rhetorical and substantive weapon against affirmative action, we decided to explore the relationship between stigma and law school affirmative action admissions policies by collecting, for the first time ever, survey responses from students in the 2009 class at seven high-ranked public law schools. Four of these schools (the University of Cincinnati, the University of Iowa, the University of Michigan, and the University of Virginia) employed race-based affirmative action, while the remaining three (University of California at Berkeley and at Davis, and the University of Washington) did not.

We focused primarily on internal stigma for two reasons. First, we wanted to test the causal connection between stigma and affirmative action—the argument that affirmative action results in internal feelings of inferiority by its beneficiaries. Although previous studies had found that minority students at elite institutions of higher education graduated at very high rates and went on to have careers as distinguished as those of their white peers, none of these studies specifically addressed the thoughts and feelings of minority law students while in school. Consequently, in our study, we placed special emphasis on exploring the extent students of color feel stigmatized and, if they do, whether affirmative action causes it. We wanted to see whether potential beneficiaries of affirmative action would agree with activist Eva Patterson, who once facetiously proclaimed, "'Stigmatize [us], give [us] that degree.' [It's not] [a]s though if you don't have [an elite] degree you're not stigmatized as a black person."

Research Plan

To accomplish our study of both internal and external stigma, during the summer and fall of 2007 we conducted through e-mail an anonymous web-based survey of law students from the class of 2009 at several law schools. Our survey expressly informed subjects of our research interests and asked students to focus on race-based affirmative action, which we defined as "the act of considering race, ethnicity, and diversity as a plus factor in admissions for and recruitment of underrepresented racial minorities." The survey asked students about a range of topics, including whether they believed that they were eligible for affirmative action, whether they supported diversity as an interest of educational institutions, whether they thought that they were viewed differently because of perceptions of them as affirmative action beneficiaries, and what proportion of students from different races they believed had been admitted because of affirmative action.

In determining which schools to include in our study, we focused on public rather than private law schools because the former are the institutions that are actually vulnerable to equal protection lawsuits and state voter initiatives. In fact, the ten public law schools on our invitation list either had been directly targeted by initiatives that eliminated affirmative action programs on their campuses or were, by virtue of their elite status, vulnerable to attack by anti-affirmative-action proponents. We then selected law schools that were legally permitted to employ affirmative action policies when the class of 2009 was admitted and those that were not to compare student perceptions of affirmative action and stigma as influenced by their environment and school culture. Second, we identified law schools in the first tier because we suspected that discussion and intensity of feeling toward affirmative action would increase as the schools' selectivity rose, thereby creating fertile ground for the collection of data. Finally, we chose law schools where at least one of us had a contact.

Results and Analysis

Our most important finding is that among students of color at the four schools that do have affirmative action programs and the three that do not, questions about feeling stigmatized elicited no statistically significant difference in their responses. Students

surveyed who believe their group is eligible for affirmative action at both types of schools report relatively low levels of internal stigma in response to questions about whether they feel they deserve to be at the school and whether they feel stigmatized by affirmative action. Thus, the stigma of dependence that is often described by those who are opposed to affirmative action is no more common in the four schools with affirmative action than in the three without it. The students attending both types of schools also gave statistically equivalent responses to the question of whether affirmative action sends a message that students of color cannot succeed without assistance.

Students similarly do not report negative effects of external stigma. Most respondents disagree that classmates or teachers treat them differently because of affirmative action stigma. The responses to questions regarding external stigma also do not vary significantly between students who attend surveyed schools with affirmative action programs and those who attend surveyed schools without them. This result means only that students of color do not perceive negative treatment because of affirmative action; negative reactions from teachers or classmates may objectively still be occurring. Nonetheless, this finding is important because the arguments regarding the negative impact of stigma on students of color are based on the assumption that the students of color feel stigmatized or burdened by affirmative action.

Experiences of Stigma

Students of color were thus no more likely to report experiences of stigma in schools with affirmative action programs than in ones without them. The argument that affirmative action policies send the message that students of color depend on assistance—and that these students will have a negative experience in school because of those messages—finds little support in our data. Law students feel similar (relatively low) levels of stigma regardless of whether their school practices affirmative action. As one respondent attending a school without affirmative action put it, "[My university] apparently does not use affirmative action in its admissions policies; however, the stigma is still here[,] . . . which is ironic, because I'm usually the only black student in my classes."

None of the racial groups surveyed reported feeling high levels of stigma; for example, the modal response for all groups to "I feel stigmatized by affirmative action" was "strongly disagree." However, small differences emerged among groups. Among students who believe that their group is eligible for affirmative action, blacks reported feeling somewhat higher levels of stigma than Latinos, Asian Pacific Americans, and other respondents. Black students were significantly less likely than other minority respondents to believe that affirmative action sends an overall message of dependence. While the data suggest that college students who were first in their families to attend college were marginally more likely to feel stigma, this effect is not significant because the black and Latino students surveyed were disproportionately likely to be first-generation students. Those who have a diverse friendship group in law school are also less likely to report feelings of stigma, suggesting the powerful impact of social networks. Finally, those who attend law school in a politically conservative state are less likely to report experiencing stigma. This result suggests that, controlling for other individual and school factors, those who attend law schools in politically conservative settings are less likely to report negative treatment from teachers, negative treatment from other students, and general stigma.

Attitudes Toward Affirmative Action Policies and Classroom Diversity

We find significant differences in attitudes toward affirmative action. Males are significantly less likely than female respondents to support it, while blacks and Latinos are significantly more likely than all the other racial groups to support it. In addition, respondents who believed they experienced a diverse background as a child are also less likely to support affirmative action, while those who report a diverse set of current friends are slightly more likely to support the policy. Finally, those attending law school in politically conservative states are significantly less likely to support affirmative action.

The relationship between reporting growing up in a diverse environment and rejecting affirmative action policies might be a product of knowing students of color from privileged backgrounds. One student, for example, noted:

> [M]any of the minority students that benefit from affirmative action come from privilege, while their poorer counterparts never make it to the application process for law school. I am white, every one of my friends in law school is a minority of one type or other, but they all come from rich families (their parents are lawyers, doctors, business owners), while I grew up extremely poor (single mom raised 6 kids as a substitute teacher) and have never been able to benefit from these types of programs.

Another noted:

> [Affirmative action] should be abolished, but not without a replacement system which, in my opinion, should put more emphasis on reaching out to poor students, regardless of their race. . . . [W]hen it came time to apply to college, I became resentful of my black and [H]ispanic classmates in a way I never had been before. . . . I felt slighted and angry, not at my friends, but at a system which favored students who were less qualified than I was, but who had received the exact same education and gifted instruction that I had for 8 years.

The finding that those respondents who developed more diverse friend networks in law school were slightly more likely to support affirmative action suggests that there might be important differences between experiences at a young age and experiences during higher education that deserve further exploration in future research.

Regression analysis revealed that the largest difference between surveyed students who attend a law school with affirmative action and those who attend one without it was a function of the share of the law school population that the students believed were admitted under affirmative action. Surveyed students who attend schools that used affirmative action in admissions decisions reported that they believed a significantly higher percentage of black and Latino students were admitted because of affirmative action. Male respondents also gave higher estimates of the share of the black and Latino student population they thought were admitted in this fashion, while black students reported lower estimates. Those who reported growing up in a diverse school and neighborhood also reported slightly higher estimates. Finally, white students reported slightly lower

estimates of the number of Latinos they thought were admitted because of affirmative action than the estimates excluded racial groups reported. This effect is marginally significant but deserves further exploration because it suggests that the perceptions of whites may differ from that of other minority groups regarding how much Latinos benefit from affirmative action.

Students' Responses to the Complexity of Affirmative Action

Finally, when we solicited comments at the end of the survey, many students reported that they wished they could provide more nuanced responses than were possible in the web-based survey. One student wrote:

> I don't think [the questions] will catch the more complex attitudes of my fellow law students towards affirmative action. Some of them—like myself—are strong supporters of affirmative action in its present form but would like to see a discourse on affirmative action that didn't ring in exclusionary terms to some and that took into account class origin, geographical circumstance, educational history and the fact that many of us are multi-lingual, multi-cultural, multi-ethnic multi-racial in ways that the old-time discourse and practice of affirmative action has not accounted for affirmatively and in public.

The comments that called for a revision of affirmative action policies—many called for more focus on socioeconomic status—demonstrate both a more nuanced understanding of affirmative action than we can hope to capture in a web-based survey and a strong belief (among those respondents who support and those who oppose current affirmative action policies) that integrating class-based remedies into affirmative action policies would be perceived as more legitimate than purely race-based remedies. In other words, many surveyed students wrote that they supported affirmative action policies designed less to make up for past discrimination and more to build a student body that takes into account the many kinds of diversity including, but not limited to, race.

NOTES

1. Shelby Steele, The Content of Our Character 134 (1st ed. 1990).
2. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring).
3. Ashley M. Hibbett, *The Enigma of the Stigma: A Case Study on the Validity of the Stigma Arguments Made in Opposition to Affirmative Action Programs in Higher Education*, 21 Harv. Black Letter L.J. 75, 77 (2005).
4. Grutter v. Bollinger, 539 U.S. 306, 373 (2003) (Thomas, J., dissenting).
5. Steele, *supra* note 1, at 120.
6. Richard H. Sander, *The Racial Paradox of the Corporate Law*, 84 N.C. L. Rev. 1755, 1812 (2006).

From the Editors

Issues and Comments

Are you persuaded by Richard Delgado's argument that racial insults are harmful enough to warrant legal sanction? By Peggy Davis's arguments that microaggressions befall minorities all the time and that law itself is, often, a microaggression? Is the definition of "harm" a political question, one that elite groups will generally insist be resolved in ways that do not alter their prerogatives too greatly?

Does implicit bias research strengthen the minority (civil rights) position? Sufficiently so that we should regulate broadcast news and workplace interactions in the manner Jerry Kang and Devon Carbado and Mitu Gulati suggest?

Is social science in general a promising avenue for those seeking to reform the legal system in a nonracist direction, as Gregory Parks and Jeffrey Rachlinski suggest? Or is social science itself a universalizing instrument that is likely only to reflect the needs and perspectives of the dominant group and hence unlikely to serve the cause of social transformation?

Does what we call race even exist, except in our heads—or perhaps as a means of constructing, or going along with, white superiority, as Ian Haney López argues?

If you thought that affirmative programs stigmatize minorities on campus and mark them as the beneficiaries of undeserved privilege, does the selection by Angela Onwuachi-Willig, Emily Houh, and Mary Campbell make you doubt your position?

The reader seeking further discussion of the foundations of race may wish to reconsider Part II (on stories and narratives relating to race and racism) and note how race, class, sex, and sexual orientation intersect (Parts VII and IX). A well-known article by Charles Lawrence on unconscious racism appears in Part VI. On an anticolonialist approach to subordination, see generally the work of Robert Williams, excerpted in this volume and listed in the Suggested Readings for Parts II and III.

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PART V

CRIME

WITH THE NEWS that a high proportion of men of color—perhaps as many as the number enrolled in college—are enmeshed in the American criminal justice system at any given time, scholarly and journalistic attention has focused on the role of race in our system of punishment. Recent highly publicized trials in which race has seemingly played a part have, if anything, heightened this attention.

Suppose that a group (say, whites) is statistically more likely than another (say, blacks or Latinos) to commit a certain type of crime (say, the white-collar variety). Still, only a very small percentage of whites—less than 10 percent—regularly commit this type of crime. What follows from these figures? Would it be permissible to watch whites closely and to engage in electronic surveillance to make sure they do not commit crimes of stealth such as embezzlement or securities fraud? If, during some daily transaction, one encountered a white working in a certain position, such as that of a bank teller, would one be morally justified in crossing the aisle and seeking another teller? What if the crime is one of violence and the group supposedly at greater risk of committing it, black?

The American criminal justice system is highly discretionary. At various points police may exercise a decision to stop this motorist rather than that one; prosecutors, to charge this defendant with a more serious offense or a lighter one; judges, to sentence longer or shorter prison terms—all based on discretionary factors having to do with the character, past, and potential of the accused. What place does, and should, race play in this process? And where do jurors fit in all of this? May they exercise their discretion to nullify the law and acquit minority youth guilty of minor offenses, such as possession of small amounts of marijuana, if they believe the police are racist and the youth of greater value to the minority community outside, rather than behind, bars? This part addresses these and other questions. To consider similar issues, see also Chapter 49 in Part X and Chapter 53 in Part XI.

26. Race *Ipsa Loquitur*

Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes

JODY D. ARMOUR

It is a stormy night in a combined residential and commercial neighborhood in a predominantly white upper-middle-class section of a major city. The time is 10:30. Although most of the fashionable shops and boutiques in the neighborhood have closed, the neighborhood bank contains an automatic teller. The machine is located in a lobby between two sets of glass doors; the first set opens directly into the bank and is locked at closing each day, while the second leads to the public sidewalk and remains open twenty-four hours a day.

A middle-aged resident of the neighborhood enters the bank's lobby, inserts her bank card into the machine, and requests $200. As she waits for her transaction to be processed, the woman suddenly notices a figure moving directly toward the lobby from across the street. Focusing her full attention on the approaching figure, she notes that the person is a young man wearing a trench coat with an upturned collar and a tarpaulin hat pulled down even with his eyes (perhaps in deference to the pouring rain) and that he is black.

The man glances down the deserted street as he reaches the lobby and then enters, pushing his right shoulder against one of the swinging glass doors. As he pushes the door open, he unbuttons the collar of his trench coat with his right hand and reaches into the coat in the direction of his left armpit. With his eyes focused on the space beneath his coat into which he is reaching, he takes hold of something and begins to withdraw it.

Panic-stricken at the image before her and conscious of the rhythmic clicking of the automatic teller counting out ten fresh, clean twenty-dollar bills, the woman pulls a pistol from her purse and levels it at the entering figure. As the young man looks up from his coat, he sees the pistol trained on him and reflexively thrusts his right hand—which now contains a billfold retrieved from his inside breast pocket—out in front of him while shouting at the woman not to shoot. Perceiving what she takes for a handgun thrust in her direction, together with the man's unintelligible loud shouts, the woman shoots and kills the black man.

In claiming self-defense, the woman may argue that the black victim's race is relevant to the reasonableness of her belief that she was about to be attacked. Her claim might

A version of this chapter previously appeared as Jody D. Armour, *Race* Ipsa Loquitur*: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 Stan. L. Rev. 781 (1994). Originally published in the *Stanford Law Review*.

be based on any of three distinct arguments. First, that it was reasonable to consider the victim's race in assessing the danger he posed because most people would do so. She might introduce studies or anecdotes demonstrating the frequency with which Americans make assumptions about an individual's character on the basis of race and argue that she should not be punished for basing her response on the widely held belief that blacks are more prone than whites to be criminals. Second, she could claim that, independent of typical American beliefs, her consideration of the victim's race was reasonable because blacks commit a disproportionate number of violent crimes and therefore pose a greater statistical threat. In framing this argument, she would show that quantifiable statistical discrepancies exist between the crime rates of blacks and nonblacks, and she would assert that she knew of, and reasonably relied on, these statistical probabilities when deciding to shoot.

Finally, if the woman had previously been violently assaulted by a black individual, she might claim that her overreaction to the victim's race was reasonable in light of her earlier traumatic experience. One recent case accorded legal weight to such "negrophobia" by holding that an ordinary person assaulted by an anonymous black individual might develop a pathological fear of all blacks sufficient to justify an award of disability benefits. Invoking the same psychological proposition, our defendant might claim that her negrophobia is relevant to the reasonableness of her reactions to the supposed assailant.

Because the concept of reasonableness is central to self-defense doctrine, each of these arguments might work. Indeed, it has been well documented that defendants in self-defense cases exploit the racial prejudices of jurors in asserting the reasonableness of their fear of supposed assailants who are black. The meaning of race does not necessarily speak for itself in these cases; defense attorneys construe race in subtle and not-so-subtle ways with the goal of exonerating their clients. The salience and significance of the victim's race will turn on the arguments that lawyers employ and that courts countenance. Accordingly, the core issue is whether courts should countenance race-based claims of reasonableness in self-defense cases.

To appreciate the growing acceptance of race-based evidence and arguments in self-defense cases, one need go no further than the celebrated New York subway vigilante case of *People v. Goetz*.[1] The defendant, Bernhard Goetz, successfully claimed that his shooting of four black teenagers after one of them requested five dollars was justified as an act of self-defense. Professor Fletcher, a legal theorist who witnessed the entire trial, identified numerous unmistakable instances of the defense "indirectly and covertly" "play[ing] on the racial factor." One such trial tactic involved re-creating the shooting of the teenagers, for which the defense called in four "props" to act as the four black victims:

> The nominal purpose of the demonstration was to show the way in which each bullet entered the body of each victim. The defense's real purpose, however, was to re-create for the jury, as dramatically as possible, the scene that Goetz encountered when four young black passengers began to surround him. For that reason [Goetz's attorney] asked the Guardian Angels to send him four young black men to act as the props in the demonstration. In came the four young black Guardian Angels, fit and muscular, dressed in T-shirts, to play the parts of the four victims in a courtroom minidrama.[2]

Although the witness who was surrounded by these young black men was not authorized to testify about the typical person's fear of being accosted by four such individuals, the defense "designed the dramatic scene so that the implicit message of menace and fear would be so strong that testimony would not be needed." The defense also played on the racial factor by "relentlessly" characterizing the victims as "savages," "vultures," "'the predators' on society," and "the 'gang of four.'" As Fletcher insightfully notes:

> These verbal attacks signaled a perception of the four youths as representing something more than four individuals committing an act of aggression against a defendant. That "something more" requires extrapolation from their characteristics to the class of individuals for which they stand. There is no doubt that one of the characteristics that figures in[to] this implicit extrapolation is their blackness.[3]

Exploitation of racial fears is also evident in the trial of the four white Los Angeles police officers who beat Rodney King. Although this was not strictly a self-defense case, the controversy it generated at least partly concerned the white policemen's highly distorted perception of the threat posed by an unarmed black man, a perception that the Simi Valley jury considered reasonable during the state court trial. Professor Lawrence Vogelman describes the defense's use of racial stereotypes as an appeal to the "Big Black Man" syndrome. (Significantly, "big black males" also figure centrally in the legally recognized negrophobia that I analyze later.) In Vogelman's words:

> Rodney King was portrayed as the prototypical "Big Black Man." He was portrayed as larger than life, with superhuman strength. It was in this context that jurors, while watching the video of King being brutally beaten, described him as being "in control." He had to be stopped. After all, as the map introduced by the defense so clearly indicated, his "destination" was Simi Valley.[4]

Indeed, one of the defendants, Stacey C. Koon, testified that King was "a monster-like figure akin to a Tasmanian devil."[5] In his closing argument, the attorney for defendant Laurence M. Powell stressed that the officers' blows were controlled efforts to subdue King, a black man who was stopped for speeding, who tried to evade the police, and who only reluctantly complied with their commands.

The Formal Structure of Self-Defense Doctrine

Self-defense is the use of a reasonable amount of force against another when the defender reasonably believes that she is in immediate danger of unlawful bodily harm from the other and that the use of such force is necessary to protect against this danger. The defender must have *honestly* and *reasonably* believed that the feared attack was *imminent*, and that her response to it was both *necessary* and *proportional*. To be exonerated, then, our hypothetical bank patron must show that she honestly and reasonably believed that she had to act when she did to avoid being killed or seriously injured and that nothing less than deadly force would save her.

Reasonableness is the linchpin of a valid self-defense claim in two respects. First, even if the elements of imminence, necessity, and proportionality are absent, a

defendant's self-defense claim is valid as long as the defendant has a reasonable, subjective belief that they are present. For example, even though the bank patron in our hypothetical was not actually being attacked by the black victim, she has a valid claim if her mistaken belief that she was under attack was reasonable. The reasonableness of a belief is a rough index of its honesty; that is, the more reasonable the belief seems to a jury, the more likely a jury is to be convinced that the defendant honestly held the belief herself. Thus, reasonableness plays a pivotal role in shaping a defendant's strategy in presenting her self-defense claim.

The Reasonable Racist

The Reasonable Racist asserts that, even if his belief that blacks are "prone to violence" stems from pure prejudice, he should be excused for considering the victim's race before using force because most similarly situated Americans would have done so as well. Because inasmuch as the criminal justice system operates on the assumption that "blame is reserved for the (statistically) deviant,"[6] an individual racist in a racist society cannot be condemned for an expression of human frailty as ubiquitous as racism.

With regard to his claim that average Americans share his fear of black violence, the Reasonable Racist can point to evidence such as a 1990 University of Chicago study that found that over 56 percent of Americans consciously believe that blacks tend to be "violence prone."[7] Moreover, numerous recent news stories chronicle the widespread exclusion of blacks from shops and taxicabs by anxious storekeepers and cabdrivers, many of whom openly admit to making race-based assessments of the danger posed by prospective patrons. Few would want to agree with the Reasonable Racist's assertion that every white person in America harbors racial animus as he does; nonetheless, it is unrealistic to dispute the depressing conclusion that, for many Americans, crime has a black face.

The flaw in the Reasonable Racist's self-defense claim lies in his primary assumption that the sole objective of criminal law is to punish those who deviate from statistically defined norms. For even if the typical American believes that blacks' propensity toward violence justifies a quicker and more forceful response when a suspected assailant is black, this is legally significant only if the law defines *reasonable* beliefs as *typical.* The reasonableness inquiry, however, extends beyond typicality to consider social interests. Hence not all typical beliefs are per se reasonable.

The notion that typical beliefs are reasonable finds expression in certain familiar personifications of the reasonableness requirement, such as "the ordinary prudent man," and "the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves."[8] Operationally, the jurors—themselves typical people holding typical beliefs—ordinarily judge the reasonableness of the defendant's beliefs by projecting themselves into the defendant's situation and asking whether they would have shared his beliefs under the circumstances. If the answer is yes, the Reasonable Racist maintains, the defendant should be exculpated because the behavior of an average person is not morally blameworthy.

Typical beliefs may be considered reasonable for two very different reasons. First, they are presumed to be accurate. Most of our claims to knowledge about the world rest on typical beliefs; we assume that the propositions about the world that everyone knows (propositions often equated with common sense) are true unless we have reason to doubt

them. Accordingly, typical beliefs about the propensity of blacks toward violence are reasonable insofar as we have no reason to doubt them. Some commentators, and even some civil rights leaders, hold that heightened fear of black violence is factually justified.

Second, typical beliefs may justify behavior even if inaccurate or irrational. This is the claim of reasonableness invoked by both the Reasonable Racist and what I call the Involuntary Negrophobe. According to this claim, even admittedly wrong judgments about a fact or situation should be excused if most people would have reached the same wrong conclusions under similar circumstances. This argument rests on the premise that "blame is reserved for the (statistically) deviant; we are blamed only for those actions and errors in judgment that others would have avoided."[9] Under a noninstrumental theory of criminal liability, it is unjust to punish someone like the Reasonable Racist since his typical beliefs are by definition not morally blameworthy.

The Reasonable Racist's claim that "blame is reserved for the (statistically) deviant," however, rests on a superficial understanding of the moral norm implicit in the reasonable person test. Professor Fletcher points out that the actual moral norm implicit in the reasonable person test is that blame is reserved for persons who fail to overcome character flaws that they can fairly be expected to surmount for the sake of important social interests.[10]

Two hypothetical cases of alleged duress help illustrate this point. In the first case, "someone kills another to avoid a slap in the face"; in the second, "a government employee discloses official secrets to avoid having his car stolen." Unless the defendants suffer from a pathological phobia of facial touches or having property stolen, most people would characterize the first defendant's unwillingness to suffer a slap in the face to save a human life as cowardice and the other defendant's refusal to part with a personal chattel for the sake of national security as selfishness. Most people would not excuse either defendant since "we can fairly expect of a man that he conquer his cowardice in the interest of saving human lives, or of a government official that he overcome his selfishness when governmental secrets are at stake."[11]

The Model Penal Code and common law courts would dictate this result by considering the traits of the fictitious reasonable person or person of reasonable firmness. The Model Penal Code provides an affirmative defense of duress for a defendant who commits what would otherwise be a crime if the threat that compels him to commit it is such that a person of "reasonable firmness" in his situation would have been unable to resist it. If a person of "reasonable firmness" would be cowardly or selfish in the hypothetical scenarios, then the threatened slap and the threatened dispossession furnish each of the actors with an adequate defense. Common law courts, however, would never endow these fictitious exemplars with such attributes under these circumstances, "[b]ecause these are traits that men can be fairly expected to surmount to save the life of another or to protect other vital interests."[12]

This analysis exposes the fallacy of equating reasonableness with typicality. With respect to race, prevailing beliefs and attitudes may fall short of what we can fairly expect of people from the standpoint of what Professor Melvin Eisenberg refers to as "social morality."[13] If we accept that racial discrimination violates contemporary social morality, then an actor's failure to overcome his racism for the sake of another's health, safety, and personal dignity is blameworthy and thus unreasonable, independent of whether it is typical. Although in most cases the beliefs and reactions of typical people reflect

what may fairly be expected of a particular actor, this rule of thumb should not be transformed into or confused with a normative or legal principle. Nevertheless, this is precisely the error the Reasonable Racist makes in claiming that the moral norm implicit in the objective test of reasonableness extends no further than the proposition that "blame is reserved for the (statistically) deviant."

The Intelligent Bayesian

> There is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start thinking about robbery—then look around and see somebody white and feel relieved.
>
> **—The Rev. Jesse Jackson, in a speech in Chicago decrying black-on-black crime**[14]

A second argument that a defendant may advance to justify acting on race-based assumptions is that, given statistics demonstrating blacks' disproportionate commission of crime, it is reasonable to perceive a greater threat from a black than a white person. Walter Williams, a conservative black economist, refers to such an individual as an "Intelligent Bayesian," named for Sir Thomas Bayes, the father of statistics.[15] On its surface, the claim of the Intelligent Bayesian appears relatively free of the troubling implications of the Reasonable Racist's defense. While the Reasonable Racist explicitly admits his prejudice and bases his claim for exoneration on its prevalence, the Intelligent Bayesian invokes the objectivity of numbers. The Bayesian's claim is simple: "As much as I regret it, I must act differently toward blacks because it is logical to do so." The Bayesian relies on numbers that reflect not the prevalence of racist attitudes among whites but the statistical disproportionality with which blacks commit crimes.

Although they constitute roughly 12 percent of the population, blacks are arrested for 62 percent of armed robberies, and "the *rate* of robbery arrests among blacks is roughly twelve times the rate of non-blacks."[16] Even assuming considerable bias in police arrests, "it is nonetheless implausible that actual rates of robbery by race are even close."[17] In addition to race, the Bayesian may consider other personal characteristics of a supposed assailant—such as youth, gender, dress, posture, body movement, and apparent educational level—before deciding how to respond. Having assessed these objective indices of criminality, the Bayesian argues that his conduct was reasonable (and thus not morally blameworthy) because it was rational.

A threshold problem with the Intelligent Bayesian's claim is the practical impossibility of determining whether a particular defendant is an Intelligent Bayesian or a Reasonable Racist. For countless Americans, fears of black violence stem from the complex interaction of cultural stereotypes, racial antagonisms, unremitting representations of black violence in the mass media, and other elements. The tendency of individuals to credit only those statistics and images that confirm their preexisting biases exacerbates these irrational influences. Thus, even if race does in some measure increase the probability that an ambiguous person is an assailant, defendants and fact finders will inevitably exaggerate the *weight* properly accorded to this fact. Although, as Fletcher points out, "it is difficult to expect the ordinary person in our time not to perceive race as one—just one—of the factors defining the 'kind' of person who poses a danger,"[18] the

typical person tends to perceive race as the *overriding* factor when the supposed assailant is black. Yet employing race as the dominant index of dangerousness cannot be statistically justified; blacks arrested for violent crimes composed less than 1 percent of the black population in 1991 and less than 1.7 percent of the black male population, making the odds that any particular black person will commit a violent crime very long indeed.

For white Bayesians, cultural differences increase the danger of overestimating the threat posed by a supposed black assailant. Nonverbal cues such as eye contact and body communication, for instance, vary among subcultures. If the female bank patron in our opening hypothetical were white (I intentionally left her racial identity undefined), her misinterpretation of the black victim's eye and body movements as furtive and threatening may have resulted from cultural differences in nonverbal cues, illogically distorting her perception of danger.

Even if we accept the Bayesian's claim that his greater fear of blacks results wholly from his unbiased analysis of crime statistics, biases in the criminal justice system undermine the reliability of the statistics themselves. A *Harvard Law Review* survey of race and the criminal process, for example, found that "racial discrimination by police officers in choosing whom to arrest most likely causes arrest statistics to exaggerate what differences might exist in crime patterns between blacks and whites, thus making any reliance on arrest patterns misplaced."[19] Consequently, although the rate of robbery arrests among blacks is roughly twelve times that of nonblacks, it does not necessarily follow that a particular black person is twelve times more likely to be a robber than a nonblack.

Although biases in the criminal justice system exaggerate the differences in rates of violent crime by race, it may, tragically, still be true that blacks commit a disproportionate number of crimes. Given that the blight of institutional racism continues disproportionately to limit the life chances of African Americans and that desperate circumstances increase the likelihood that individuals caught in this web may turn to desperate undertakings, such a disparity, if it exists, should sadden but not surprise us. As Professor Guido Calabresi points out:

> [O]ne need not be a racist to admit the possibility that the stereotypes may have some truth to them. I don't believe in race, but if people are treated badly in a racist society on account of an irrelevant characteristic such as color or language, it should not be surprising if they react to that treatment in their everyday behavior.[20]

To the extent that socioeconomic status explains any overrepresentation of blacks in robbery and assault, race serves merely as a proxy for socioeconomic status. But if race is a proxy for socioeconomic factors, then race loses its predictive value when one controls for those factors. Thus, if an individual is walking through an impoverished, "crime-prone neighborhood," as Reverend Jackson might have had in mind, and if he has already weighed the character of the neighborhood in judging the dangerousness of his situation, then it is illogical for him to consider the racial identity of the person whose suspicious footsteps he hears: He has already taken into account the socioeconomic factors for which race is a proxy, and considering the racial identity of the ambiguous

person under such circumstances constitutes what one writer aptly refers to as "double-counting."[21]

To accept the usefulness of statistical generalization as a general matter is not to agree that such generalizations are appropriate in all cases. The use of statistical generalizations entails significant social costs, notwithstanding obvious benefits to defendants. Such generalizations may subvert the criminal justice system's promise that each defendant will be tried according to the specific facts of his case. Ultimately, the courts' reliance on statistical generalizations may provide an official imprimatur on stereotypes about the class in question. In the case of the Intelligent Bayesian, countenancing race-based statistics might further entrench stereotypes about blacks as criminals in the public's collective consciousness.

The use of race-based generalizations in court has an especially grievous effect: It subverts the rationality of the justice system and encourages an inequitable weighing of the costs and benefits of acting on such generalizations. In fact, race-based statistical evidence may be so effective at tapping into pervasive and deeply ingrained racial prejudices as to render such evidence more prejudicial than probative, justifying its exclusion under federal and state evidence codes.

To understand how the use of race-based statistical generalizations undermines the rationality of the justice system, it is essential to understand the nature of the determination juries make in self-defense cases. In judging the reasonableness of the defendant's use of deadly defensive force, the fact finders do not merely make an empirical judgment (on either statistical or particular grounds) about the magnitude of risk either actually or apparently posed by a supposed assailant. They must also decide whether the defendant should have waited for the ambiguous or suspicious victim to clarify his violent intentions before resorting to deadly force. Predictions—about the world generally and about human behavior in particular—always present some risk of error. The more information we possess about a given situation, the smaller the risk of error in our judgments about it.

Taking the time to gather information, however, may be costly. And nowhere are information costs higher than in the self-defense setting, where the only way to gather more information is to wait for the suspicious person to manifest his violent intentions before responding with force. Hence the *cost of waiting* is increased risk for the person who wants to defend herself successfully. If that person considers blacks to pose a significantly greater threat of assault than whites, she will not wait as long for an ambiguous black person to clarify his violent intentions as for a white person.

On the other hand, the *costs of not waiting* as long for blacks with unclear intentions as for similarly situated nonblacks go well beyond the physical injuries suffered by the immediate black victims of putative self-defense. Not waiting as long for blacks to clarify their intentions destroys what Patricia Williams refers to as "the fullness of [African Americans'] public, participatory selves."[22] That is, hastier use of force against blacks forces blacks who do not want to be mistaken for assailants to avoid ostensibly public places (such as white neighborhoods, automatic tellers, and even Manhattan boutiques) and core community activities (such as shopping, jogging, sightseeing, or just hanging out). Moreover, race-based predictions of an individual's behavior insufficiently recognize individual autonomy by reducing people to predictable objects rather than treating them as autonomous entities.

Own-race favoritism induces some white fact finders to overvalue the interests of the white defendant and the group to which he belongs, while other-race antagonism causes some to undervalue the interests of the black victim. In self-defense cases, this means that prejudice may cause juries (often all white) to miscalculate the costs of not waiting as long for blacks to reveal their intentions as for nonblacks, since an individual and a group with which they do not identify will bear those costs, while one of their own would bear the cost of waiting for a suspected assailant to exhibit violent intentions. If juries were roughly half black and half white, the biases of white and black fact finders (both own-race and other-race) would tend to offset each other, minimizing the influence of racial bias on the fact-finding process. But blacks often have no voice in jury deliberations, and therefore evidence that emphasizes race unfairly increases the likelihood that the interests of black victims of putative self-defense will not be vindicated.

Thus, even assuming that race-based statistical evidence is probative of the magnitude of risk posed by an unknown black person, it threatens to undermine the rational determination of how long the defendant should have waited for the stranger to clarify his intentions before resorting to deadly force. In the words of the Federal Rules of Evidence, its "probative value [may be] substantially outweighed by the danger of unfair prejudice."[23] And surely a paragon of rational thinking like the Intelligent Bayesian would not press for the admission of evidence that subverts the rationality of the fact-finding process.

The Involuntary Negrophobe

> Among the many violent reactions I had in the weeks following the rape, including despair, helplessness, a sense that my life was over, was a visceral, desperate fear of all strange black and brown men. Walking alone in Mount Pleasant, an inner-city Washington, D.C., neighborhood, I had a panic attack as it seemed that each of the dozens of Central American men streaming toward and past me on the sidewalk was about to pull a knife and stab me.[24]

This frank and chilling description by Professor Micaela di Leonardo of her reaction to being raped by a black male suggests the profoundly personal level on which the link between race and violence may be forged. In contrast to both the Reasonable Racist (whose fear of blacks stems from and is reinforced by the mass media and traditional racial myths) and the Intelligent Bayesian (whose racial fears rest on crime statistics), Professor di Leonardo's fear emerged after a violent personal assault. To what extent, then, should such involuntary negrophobia be relevant to claims of self-defense?

Suppose the patron who shot the young black man in our ATM hypothetical had been mugged by black teenagers nine months before the night of the shooting. Suppose further that after the mugging she developed what her psychiatrist diagnosed as a post-traumatic stress disorder, triggered by contact with blacks, which induced her to overestimate the black victim's threat on the night of the shooting. Under these circumstances, the defendant could claim that her admittedly paranoid fear of the young black victim was reasonable for someone mugged in the past by black assailants. As open-ended and dangerous as this claim of reasonableness may seem, courts have already accepted its underlying doctrinal and psychological propositions. The doctrinal foundation

of the negrophobe's claim is the widely accepted subjective test of reasonableness, which takes into account both the defendant's past experiences and the psychological effects of those experiences. Under this standard of reasonableness, the fact finder compares the defendant's judgments not to those of a typical person drawn from the general population but to those of a person *in the situation* of the defendant. The defendant's situation for purposes of this standard includes not only the immediate circumstances of the fatal encounter but also the psychological effects of experiences she has undergone before the fatal encounter. Thus, as long as a typical person could develop the same misperceptions as did the defendant under exposure to the same external forces, the defendant's misperceptions will be found reasonable.

The psychological premise underlying the negrophobe's claim is that a typical person assaulted by a black individual could conceivably develop a pathological phobia toward *all* blacks. In 1990, a Florida judge awarded workers' compensation benefits to a negrophobic claimant on precisely this proposition.[25] Even more surprisingly, every appellate court that has reviewed this controversial case has affirmed the benefits award. In the case in question, Ruth Jandrucko, a fifty-nine-year-old white woman, filed a workers' compensation claim after she was mugged by a young black male while making a customer service visit for her employer. As a result of the attack, she suffered a fractured vertebra in her back and developed what experts diagnosed as a post-traumatic stress disorder causing physical and psychological reactions to blacks. Although her vertebral fracture eventually healed, her phobia toward blacks—particularly "big, black males"—persisted. Ms. Jandrucko claimed that her phobia rendered her incapable of working around African Americans; hence, she argued, she could not find gainful employment.

Accepting Ms. Jandrucko's argument, Florida compensation claims judge John G. Tomlinson, Jr., awarded her total disability benefits for her phobia. In reaching his decision, Judge Tomlinson found that before her assault Ms. Jandrucko exhibited no apparent "pre-existing racial prejudice or predisposition to psychiatric illness."[26] In other words, she was an ordinary person before the assault. As reported in the *Washington Post*, Judge Tomlinson commented that Ms. Jandrucko's pathological fear of blacks was not an exercise of "private racial prejudice" but instead a mere "work-related phobia." In Judge Tomlinson's view, "It is not relevant what the subject of her phobia is."[27]

From the standpoint of personal culpability, the sine qua non of criminal liability for noninstrumentalists, Judge Tomlinson accurately concluded that the subject of a person's pathological phobia is not relevant. This view emphasizes the involuntary nature of a post-traumatic stress disorder: Insofar as a defendant can claim that "I couldn't help myself," she cannot be blamed for her reactions, regardless of the subject of her disorder. Thus, under a purely noninstrumental regime, there is no reason to limit legal recognition of negrophobia to workers' compensation cases; once an involuntary condition is identified in any context, no just basis exists for imposing liability (including criminal liability) on an actor. The instrumentalist approach, in contrast, focuses on the broader implications of recognizing some legal claims and withholding legal recognition from others. "Instrumentalism," as I employ the term in this chapter, refers to legal decision making that considers the social implications of legal rules and aims to affect future behavior. Essentially, instrumentalism is concerned with general social welfare and the future.

Legal recognition of the Involuntary Negrophobe's claims would subvert the general welfare by destroying the legitimacy of the courts. The paramount social function of the courts is the resolution of disputes. But the power of a third party to conclusively resolve disputes must rest on some basis, "such as his access to supernatural forces, his charismatic attributes, or his reputation as a Solomonic figure with a special ability to discern justice."[28] In a complex, impersonal, and officially secular society like ours, this basis is the courts' apparent objectivity, particularly their neutrality with respect to the parties before them. The widespread sense of injustice that followed the acquittal of four police officers in the Rodney King beating case, triggering some of the worst rioting in American history, reveals a tangible price that society pays when courts lose their perceived objectivity, and thus their legitimacy, in the eyes of at least some in society. Significantly, the riots did not erupt when the images of King's beating initially saturated the airwaves but only after the announcement of the verdicts. The black and Latino communities waited for the justice system to honor its promise of neutrality and took to the streets only when that promise seemed so blatantly flouted.

The instrumentalist, then, is concerned about implications for the courts' perceived legitimacy were the courts to sanction the claim that race-based fear can be so involuntary as to provide a basis of exculpation. To accept such a claim, the courts would have to equate racism with recognized judgment-impairing conditions—such as insanity and youthfulness—which, when successfully invoked, justify a not guilty determination. But although racism may be a condition that afflicts all Americans in contemporary society, it is a condition that the courts themselves historically perpetuated through their enforcement of runaway slave laws, Jim Crow laws, antimiscegenation laws, and the like. In the eyes of blacks, the courts' long-standing complicity in the perpetuation of racism would cast grave doubt on their neutrality in a decision to excuse a party for his anti-black attitudes.

Treating negrophobia as insanity raises additional problems. Despite acknowledgment that genuine insanity may so severely impair an individual's sense of reality, of right, and of wrong as to nullify the possibility of culpability for that individual, there is a widespread perception that sane but guilty defendants exploit the insanity defense to escape long mandatory prison sentences or the death penalty. Were people to develop the same skepticism with respect to defenses invoking negrophobia, the result might well be a total loss of faith in the criminal justice system's ability to adjudicate race-based claims fairly and effectively. Blacks, already concerned with a perceived dual standard operating in the court system, would justifiably perceive the courts' crediting of such claims as the advent of a new legal loophole potentially enabling racists to express their venomous prejudices without consequence. Furthermore, to the extent that the legal system signals to either reasonable or pathological racists that they may act without fear of serious consequences, it may ultimately inhibit blacks' full participation in society.

In the case of the panic-stricken bank patron, granting legal recognition to her self-defense claim communicates the state's approval of racial bias regardless of what theory she pursues; it sends the message that "your dread of blacks is a valid excuse for taking the life of an innocent black person." In conveying such messages, the court reinforces derogatory cultural stereotypes and stigmatizes all Americans of African descent.

NOTES

1. 68 N.Y.2d 96, 497 N.E.2d 41, 506 N.Y.S.2d 18 (1986).

2. George P. Fletcher, A Crime of Self-Defense: Bernhard Goetz and the Law on Trial 206, 207 (1988).

3. *Id*. at 130, 206.

4. Lawrence Vogelman, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 Fordham Urb. L.J. 571, 574 (1993).

5. *Latest Defense Witness in Rodney King Trial Backfires*, L.A. Sentinel, Apr. 1, 1993, at A4. Another officer, under cross-examination by the defense, described King's beating as "a scene from a monster movie." *Beating: "Scene from Monster Movie,"* Atlanta J. & Const., Mar. 11, 1992, at A3.

6. Mark Kelman, *Reasonable Evidence of Reasonableness*, 17 Critical Inquiry 798, 801 (1991).

7. Tom W. Smith, Ethnic Images 9, 16 (Dec. 1990) (General Social Survey Topical Report No. 19, on file with the *Stanford Law Review*).

8. This formulation is quoted in an English case, *Hall v. Brooklands Auto Racing Club*, [1933] 1 K.B. 205, 224, and attributed to an unnamed American author. See also Guido Calabresi, Ideals, Beliefs, Attitudes, and the Law 23 (1985).

9. Kelman, *supra* note 6, at 801.

10. George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. Cal. L. Rev. 1269, 1291 (1974).

11. *Id.*

12. *Id.*

13. Melvin A. Eisenberg, The Nature of the Common Law 15 (1988).

14. *Perspectives*, Newsweek, Dec. 13, 1993, at 17.

15. Walter E. Williams, *The Intelligent Bayesian*, in *The Jeweler's Dilemma*, New Republic, Nov. 10, 1986, at 18.

16. Kelman, *supra* note 6, at 814 n.20.

17. *Id*.

18. Fletcher, *supra* note 2, at 206.

19. *Developments in the Law—Race and the Criminal Process*, 101 Harv. L. Rev. 1473, 1508 (1988).

20. Calabresi, *supra* note 8, at 28.

21. Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 Yale L.J. 214, 238 (1983).

22. Patricia J. Williams, The Alchemy of Race and Rights 46 (1991).

23. Fed. R. Evid. 403.

24. Micaela di Leonardo, *White Lies, Black Myths: Rape, Race, and the Black "Underclass,"* Village Voice, Sept. 22, 1992, at 30. Professor di Leonardo points out that she is an academic specialist on race, class, and gender in America and that before her rape, she had been a rape crisis counselor and had taught classes on rape at Yale. *Id.*

25. Jandrucko v. Colorcraft/Fuqua Corp., No. 163-20-6245 (Fla. Dep't of Lab. & Empl. Sec. Apr. 26, 1990).

26. *Id*. at 8.

27. William Booth, *Phobia About Blacks Brings Workers' Compensation Award*, Wash. Post, Aug. 13, 1992, at A3.

28. Eisenberg, *supra* note 13, at 8–9.

27. The New Jim Crow

MICHELLE ALEXANDER

Conversations and debates about race—much less racial caste—are frequently dismissed as yesterday's news, not relevant to the current era. Media pundits and more than a few politicians insist that we, as a nation, have finally moved beyond race and entered into the era of postracialism and color blindness. Not just in America but around the world, President Obama's election has been touted as the final nail in the coffin of Jim Crow, the bookend placed on the history of racial caste in America.

This triumphant notion of postracialism is nothing more than fiction—a type of Orwellian doublespeak made no less sinister by virtue of the sincerity of those espousing it. Racial caste is not dead; it is alive and well in America. The mass incarceration of poor people of color in the United States amounts to a new caste system—one specifically tailored to the political, economic, and social challenges of our time. It is the moral equivalent of Jim Crow.

I first encountered the idea of a new racial caste system in the mid-1990s when I was rushing to catch a bus in Oakland, California, and a bright orange poster caught my eye. It screamed in large bold print, "THE DRUG WAR IS THE NEW JIM CROW." I recall pausing for a moment and skimming the text of the flyer. A radical group was holding a community meeting about police brutality, the new three-strikes law in California, the drug war, and the expansion of America's prison system. The meeting was being held at a small community church a few blocks away; it had seating capacity for no more than fifty people. I sighed and muttered to myself something like, "Yeah, the criminal justice system is racist in many ways, but it really doesn't help to make such absurd comparisons. People will just think you're crazy." I then crossed the street and hopped on the bus. I was headed to my new job, director of the Racial Justice Project for the American Civil Liberties Union (ACLU) in northern California.

When I began my work at the ACLU, I assumed the criminal justice system had problems of racial bias, much in the same way that all major institutions in our society do. As a civil rights lawyer, I had litigated numerous class-action employment discrimination cases, and I understood well the many ways that racial stereotyping can permeate

A version of this chapter previously appeared as Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7 (2011). Originally published in the *Ohio State Journal of Criminal Law*.

subjective decision-making processes at all levels of an organization with devastating consequences. While at the ACLU, I shifted my focus from employment discrimination to criminal justice reform and dedicated myself to the task of working with others to identify and eliminate racial bias whenever and wherever it reared its ugly head.

By the time I left the ACLU, I had come to suspect that I was wrong about the criminal justice system. It was not just another institution infected with racial bias but rather a different beast entirely. The activists who posted the sign on the telephone pole were not crazy; nor were the smattering of lawyers and advocates around the country who were beginning to connect the dots between our current system of mass incarceration and earlier forms of social control. Belatedly, I came to see that mass incarceration in the United States had, in fact, emerged as a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow.

I state my basic thesis in the introduction to my book *The New Jim Crow*:

> What has changed since the collapse of Jim Crow has less to do with the basic structure of our society than the language we use to justify it. In the era of colorblindness, it is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt. So we don't. Rather than rely on race, we use our criminal justice system to label people of color "criminals" and then engage in all the practices we supposedly left behind. Today it is perfectly legal to discriminate against criminals in nearly all the ways it was once legal to discriminate against African Americans. Once you're labeled a felon, the old forms of discrimination—employment discrimination, housing discrimination, denial of the right to vote, and exclusion from jury service—are suddenly legal. As a criminal, you have scarcely more rights, and arguably less respect, than a black man living in Alabama at the height of Jim Crow. We have not ended racial caste in America; we have merely redesigned it.[1]

I reached this conclusion reluctantly. Like many civil rights lawyers, I was inspired to attend law school by the civil rights victories of the 1950s and 1960s. Even in the face of growing social and political opposition to remedial policies such as affirmative action, I clung to the notion that the evils of Jim Crow lie behind us and that, while we have a long way to go to fulfill the dream of an egalitarian, multiracial democracy, we have made real progress. I understood the problems plaguing poor communities of color, including crime and rising incarceration rates, to be a function of poverty and lack of access to quality education—the continuing legacy of slavery and Jim Crow. I strenuously resisted the idea that a new caste system was operating in this country; I was nearly offended by the notion. But after years of working on issues of racial profiling, police brutality, and drug law enforcement in poor communities of color and attempting to assist people released from prison to reenter a society that never seemed to have much use for them in the first place, I had a series of experiences that began an awakening to a racial reality that is so obvious to me now that what seems odd in retrospect is that I was blind to it for so long.

Here are some facts I uncovered in the course of my work and research that you probably have not heard on the evening news:

- More African American adults are under correctional control today—in prison or jail, on probation or parole—than were enslaved in 1850, a decade before the Civil War began.
- In 2007 more black men were disenfranchised than in 1870, the year the Fifteenth Amendment was ratified prohibiting laws that explicitly deny the right to vote on the basis of race. During the Jim Crow era, African Americans continued to be denied access to the ballot through poll taxes and literacy tests. Those laws have been struck down, but today felon disenfranchisement laws accomplish what poll taxes and literacy tests ultimately could not.
- In many large urban areas in the United States, the majority of working-age African American men have criminal records; in Chicago, the figure in a recent year was nearly 80 percent.

Those bearing criminal records and cycling in and out of our prisons today are part of a growing undercaste—not class, caste—a group of people, defined largely by race, who are relegated to a permanent second-class status by law, denied the right to vote, automatically excluded from juries, and legally discriminated against in employment, housing, access to education, and public benefits, much as their grandparents and great-grandparents were during the Jim Crow era.

When I tell people that mass incarceration amounts to a New Jim Crow, I frequently meet with shocked disbelief: "How can you say that a racial caste system exists? Just look at Barack Obama! Just look at Oprah Winfrey! Just look at the black middle class!" But we ought to question our emotional reflexes. The great success of some African Americans in recent years does not mean that a caste system no longer exists. No caste system in the United States has ever governed all black people. There have always been free blacks and black success stories, even during slavery and Jim Crow. During slavery, some blacks owned slaves—not many, but some. And during Jim Crow, some black lawyers and doctors practiced their profession; not many, but some. The unprecedented nature of black achievement in formerly white domains does not mean the end of racial caste. If history is any guide, it may have simply taken a different form. Racism is highly adaptable. The rules and reasons the legal system employs to enforce status relations of any kind evolve and change. In my book, I describe the cyclical rebirths of racial caste in America. Since our nation's founding, African Americans have been repeatedly controlled through institutions, such as slavery and Jim Crow, that appear to die but then are reborn in new form, tailored to the needs and constraints of the time.

For example, following the collapse of slavery, the system of convict leasing came about—a system many historians believe was worse than slavery. After the Civil War, police arrested black men by the thousands for minor crimes, such as loitering and vagrancy, and sent them to prison. They were then leased to plantations. It was our nation's first prison boom. The idea was that prisoners leased to plantations were supposed to earn their freedom. But the catch was they could never earn enough to pay back the plantation owner the cost of their food, clothing, and shelter and thus were effectively re-enslaved, sometimes for the rest of their lives. It was a system more brutal in many respects than slavery, because plantation owners had no economic incentive to keep convicts healthy or even alive. They could always get another one.

The criminal justice system effectively re-creates caste in America. Consider how our prison system has quintupled for reasons that have stunningly little do with crime. In less than thirty years, the U.S. penal population exploded from around three hundred thousand to more than two million. The United States now has the highest rate of incarceration in the world, dwarfing that of nearly every developed country, including highly repressive regimes like China and Iran.

In fact, if our nation were to return to the incarceration rates of the 1970s—a time when civil rights activists thought that imprisonment rates were egregiously high—we would have to release four out of five people who are in prison today. More than a million people employed by the criminal justice system could lose their jobs. That is how enormous and deeply entrenched the new system has become in a very short time. The overwhelming majority of the increase in imprisonment has been poor people of color, with the most astonishing rates of incarceration found among black men. Several years ago in Washington, D.C.—our nation's capital—three out of four young black men (and nearly all those in the poorest neighborhoods) could expect to serve time in prison. Rates of incarceration nearly as shocking can be found in other communities of color across America.

What accounts for this vast new system of control? Crime rates? No, they have remarkably little to do with skyrocketing incarceration rates. Crime rates have fluctuated over the past thirty years and are currently at historical lows, but incarceration rates have soared. Most criminologists and sociologists today acknowledge that crime rates and incarceration rates have, for the most part, moved independently of one another. Rates of imprisonment—especially black imprisonment—have soared regardless of whether crime has been rising or falling in any given community or the nation as a whole.

So what does explain this vast new system of control, if not crime rates? Ironically, the activists who posted the sign on that telephone pole were right: the War on Drugs. It and the get-tough movement explain the explosion in incarceration in the United States and the emergence of a vast, new racial undercaste. In fact, drug convictions alone accounted for about two-thirds of the increase in the federal system and more than half the increase in the state prison population between 1985 and 2000. Drug convictions have increased more than 1,000 percent since the drug war began, an increase that bears no relationship to patterns of drug use or sales.

The drug war has been waged almost exclusively in poor communities of color, even though studies consistently find that people of all races use and sell drugs at remarkably similar rates. This evidence defies our basic stereotype of a drug dealer as a black kid standing on a street corner with his pants hanging down. Drug dealing happens in the ghetto, to be sure, and everywhere else in America as well. Illegal drug markets, it turns out—like American society generally—are relatively segregated by race. Blacks tend to sell to blacks, whites to whites, Latinos sell to each other. University students sell to each other. People of all races use and sell drugs. A kid in rural Kansas does not drive to the 'hood to get his pot or meth or cocaine; he buys it from somebody down the road. In fact, the research suggests that where significant differences by race can be found, white youth are more likely to commit drug crimes than youth of color.

But that is not what you would guess when entering our nation's prisons and jails, overflowing as they are with black and brown drug offenders. In the United States, those who do time for drug crime are overwhelmingly black and brown. In some states, African Americans constitute 80 to 90 percent of all drug offenders sent to prison.

Violent crime is not responsible for the prison boom. Violent offenders tend to get longer sentences than nonviolent offenders, which is why the former compose such a large share of the prison population. One study suggests that the entire increase in imprisonment can be explained by sentence length, not increases in crime. To get a sense of how large a contribution the drug war has made to mass incarceration, consider that more people languish in prison today just for drug offenses than were incarcerated in 1980 for all reasons. The reality is that the overwhelming majority of people who are swept into this system are nonviolent offenders.

Note that most people who are under correctional control are not in prison or jail. As of 2008, approximately 2.3 million people were in prisons and jails, and a staggering 5.1 million people were under "community correctional supervision"—that is, on probation or parole. Millions more have felony records and spend their lives cycling in and out of prison, unable to find work or shelter, unable to vote or serve on juries. This system depends on the prison label, not prison time. It does not matter whether you have actually spent time in prison; your second-class citizenship begins the moment you are branded a felon. It is this badge of inferiority—the criminal record—that ushers you into a parallel social universe in which discrimination is perfectly legal.

How did this system of control come to pass? Most people believe that the War on Drugs arose in response to rising drug crime and the emergence of crack cocaine in inner city communities. But drug crime was actually declining, not rising, when President Ronald Reagan officially declared the drug war in 1982. From the outset, the war had little to do with drug crime and much to do with racial politics.

The drug war was part of a highly successful Republican Party strategy—often known as the Southern Strategy—of using racially coded political appeals on issues of crime and welfare to attract poor and working-class white voters who were resentful of, and threatened by, desegregation, busing, and affirmative action. Poor and working-class whites had their world rocked by the civil rights movement. White elites could send their kids to private schools and give them the advantages of wealth. But poor and working-class whites were faced with a social demotion. It was their kids who might be bused across town and forced to compete for the first time with a new group of people they had long believed to be inferior for decent jobs and educational opportunities. Affirmative action, busing, and desegregation created feelings of vulnerability, fear, and anxiety among a group already struggling for survival.

Republican party strategists found that promises to "get tough" on "them"—the racially defined others—could induce many poor and working-class whites to defect from the Democratic New Deal Coalition and join the Republican Party. As H. R. Haldeman, President Richard Nixon's chief of staff, put it, "[T]he whole problem is really the blacks. The key is to devise a system that recognizes this while not appearing to."[2]

A couple years after the drug war was announced, crack cocaine hit the streets of inner-city communities. The Reagan administration seized on this development, publicizing inner-city crack babies, crack mothers, the so-called crack whores, and drug-related violence. The goal was to make inner-city crack abuse and violence a media sensation that would bolster public support for the drug war and would lead Congress to devote millions of dollars in additional funding to it.

The plan worked. For more than a decade, black drug dealers and users became regulars in newspaper stories and saturated the evening TV news—forever changing

our conception of who the drug users and dealers are. Once the enemy in the war was racially defined, a wave of punitiveness took over. Congress passed harsh mandatory minimum sentences for drug crimes—sentences longer than murderers receive in many countries. Many black politicians joined the get-tough bandwagon, unwittingly contributing to a system of social control that would, in less than two decades, become unprecedented in world history.

Almost immediately, Democrats began competing with Republicans to prove that they could be even tougher on "them." In President Bill Clinton's boastful words, "I can be nicked on a lot, but no one can say I'm soft on crime."[3] The facts bear him out. His policies produced the largest increases in federal and state prison inmates of any American president. Unsatisfied, he and the so-called new Democrats championed legislation banning drug felons from public housing (no matter how minor the offense) and denying them basic public benefits, including food stamps, for life. Discrimination in virtually every aspect of political, economic, and social life is now perfectly legal, once you're labeled a felon.

Media images of violence in ghetto communities led many to believe that the drug war focused on the most serious offenders. Yet nothing could be further from the truth. Federal funding has flowed to those state and local law enforcement agencies that dramatically increase the volume of drug arrests, not those most successful in bringing down the bosses. What has been rewarded in this war is sheer numbers—the sheer volume of drug arrests. Sometimes the rewards have been pecuniary—federal drug forfeiture laws allow state and local law enforcement agencies to keep for their own use 80 percent of the cash, cars, and homes seized from drug suspects, thus granting law enforcement a direct monetary interest in the profitability of the drug market itself.

People of color have been rounded up en masse for relatively minor, nonviolent drug offenses. In 2005, for example, four out of five drug arrests were for possession, only one out of five for sales. Most people in state prison for drug offenses have no history of violence or even of significant selling activity. In fact, during the 1990s—the period of the most dramatic expansion of the drug war—nearly 80 percent of the increase in drug arrests was for possession of marijuana, a drug generally considered less harmful than alcohol or tobacco and at least as prevalent in middle-class white communities as in the inner city.

In this way, a new racial undercaste has come about in an astonishingly short period of time. Millions of people of color are now saddled with criminal records and legally denied the very rights that were supposedly won in the civil rights movement.

The U.S. Supreme Court, for its part, has mostly turned a blind eye to race discrimination in the criminal justice system. The Court has closed the courthouse doors to claims of racial bias at every stage of the criminal justice process, from stops and searches to plea bargaining and sentencing. Law enforcement officials are largely free to discriminate on the basis of race today, provided that no one admits it. In *McCleskey v. Kemp* and *United States v. Armstrong*, the Supreme Court made clear that only evidence of conscious, intentional racial bias—the sort of bias that is nearly impossible to prove these days in the absence of an admission—is deemed sufficient. No matter how impressive the statistical evidence, no matter how severe the racial disparities and racial impacts might be, the Supreme Court is not interested. The Court has, as a practical matter,

closed the door to claims of racial bias in the criminal justice system. It has immunized the new caste system from judicial scrutiny for racial bias, much as it once rallied to legitimate and protect slavery and Jim Crow.

Significant differences mark mass incarceration and earlier forms of racial control. Yet all three—slavery, Jim Crow, and mass incarceration—have operated as tightly networked systems of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race. Just consider a few of the rules, laws, and policies that apply to people branded felons today and ask yourself if they remind you of a bygone era:

- Denial of the right to vote. Forty-eight states and the District of Columbia deny prisoners this right. Even after the term of punishment expires, states are free to deny people who have been labeled felons the right to vote for a period of years or their entire lives. In a few states, one in four black men has been permanently disenfranchised. Nationwide, nearly one in seven black men is either temporarily or permanently disenfranchised as a result of felon disenfranchisement laws.
- Exclusion from jury service. One hallmark of Jim Crow was the systematic exclusion of blacks from juries. Today, those labeled felons are automatically excluded from juries; others are routinely excluded if they have had negative experiences with law enforcement. Good luck finding a person of color in a ghetto community today who has not yet had a negative experience with law enforcement. The all-white jury is no longer a thing of the past in many regions of the country, in part because so many African Americans have been labeled felons and excluded from juries.
- Employment discrimination. Employment discrimination against felons is deemed legal and absolutely routine. Regardless of whether your felony occurred three months ago or thirty-five years ago, for the rest of your life you're required to check that box on employment applications asking the dreaded question: "Have you ever been convicted of a felony?" In one survey, about 70 percent of employers said they would not hire a drug felon convicted for sales or possession. Most states also deny a wide range of professional licenses to people labeled felons. In some states, you can't even get a barber's license if you're a felon.
- Housing discrimination. Housing discrimination is perfectly legal. Public housing projects as well as private landlords are free to discriminate against criminals. In fact, those labeled felons may be barred from public housing for five years or more and legally discriminated against for the rest of their lives. These laws make it difficult for former prisoners to find shelter, a basic human right.
- Public benefits. Discrimination in public benefits is legal against those who have been labeled felons. In fact, federal law renders drug offenders ineligible for food stamps for the rest of their lives. Fortunately, some states have opted out of the federal ban, but it remains that thousands of people, including pregnant women and people with HIV/AIDS, are denied even food stamps, simply because they were once caught with drugs.

During the Jim Crow era, light-skinned blacks often tried to pass as white to avoid the stigma, shame, and discrimination associated with their race. Today, people labeled criminals lie not only to employers and housing officials but also to their friends, acquaintances, and family members. Children of prisoners lie to friends and relatives, saying, "I don't know where my daddy is." Grown men who have been out of prison for years still glance down and look away when asked who they will vote for on Election Day, ashamed to admit they can't vote. They try to "pass" to avoid the stigma and discrimination associated with the new caste system. Even in neighborhoods hardest hit by mass incarceration—places where nearly every house has a family member behind bars or recently released from prison—people rarely "come out" fully about their own criminal history or that of their loved ones, even when speaking with relatives, friends, and neighbors.

More than forty-five years ago, Martin Luther King, Jr., warned that blindness and indifference to racial groups is actually more important than racial hostility to the creation and maintenance of systems of racial control. Those who supported slavery and Jim Crow, he argued, typically were not bad or evil people; they were just blind. Many segregationists were kind to their black shoe shiners and maids and genuinely wished them well. Even the justices who decided the infamous *Dred Scott* case, which ruled "that the Negro had no rights which the white man was bound to respect," were not wicked men, he said. On the whole, they were decent and dedicated men. But, he hastened to add, "[t]hey were victims of spiritual and intellectual blindness. They knew not what they did. The whole system of slavery was largely perpetuated by sincere though spiritually ignorant persons."[4]

The same is true today. People of good will—and bad—have been unwilling to see black and brown men and women, in their humanness, as entitled to the same care, compassion, and concern that would be extended to one's friends, neighbors, or loved ones.

After all, who among us would want a loved one struggling with drug abuse to be put in a cage, labeled a felon, and then subjected to a lifetime of discrimination, scorn and social exclusion? Most Americans would not wish that fate on anyone they cared about. But whom do we care about? In America the answer to that question is still linked to race. Dr. King recognized that it was this indifference to the plight of African Americans that supported the institutions of slavery and Jim Crow. And this callous racial indifference supports mass incarceration today.

Affirmative action, though, has put a happy face on this racial reality. Seeing black people graduate from Harvard and Yale and become CEOs or corporate lawyers—not to mention president of the United States—causes us all to marvel at what a long way we have come. As recent data show, though, much of black progress is a myth. In many respects, if you take into account prisoners, African Americans as a group are doing no better than they were when King was assassinated and uprisings swept inner cities across America.

When we pull back the curtain and take a look at what our so-called color-blind society creates without affirmative action, we see a familiar social, political, and economic structure—the structure of racial caste. And the entry into this new caste system can be found at the prison gate.

NOTES

1. Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 2 (2010).

2. Willard M. Oliver, The Law & Order Presidency 126–27 (2003).

3. Michael Kramer, *The Political Interest Frying Them Isn't the Answer*, Time, Mar. 14, 1994, at 32, available at http://www.time.com/time/magazine/article/0,9171,980318,00.html.

4. Martin Luther King, Jr., Strength to Love 45 (Fortress Press 1981) (1963).

28. Racially Based Jury Nullification

Black Power in the Criminal Justice System

PAUL BUTLER

I was a Special Assistant U.S. Attorney in the District of Columbia in 1990. I prosecuted people accused of misdemeanor crimes, mainly the drug and gun cases that overwhelm the local courts of most American cities. As a federal prosecutor, I represented the United States of America and used that power to put people, mainly African American men, in prison. I am also an African American man. While at the U.S. Attorney's office, I made two discoveries that profoundly changed the way I viewed my work as a prosecutor and my responsibilities as a black person.

The first discovery occurred during a training session for new assistants conducted by experienced prosecutors. We rookies were informed that we would lose many of our cases, despite having persuaded a jury beyond a reasonable doubt that the defendant was guilty. We would lose because some black jurors would refuse to convict black defendants who they knew were guilty. The second discovery was even more unsettling. It occurred during the trial of Marion Barry, then the second-term mayor of the District of Columbia. Barry was being prosecuted by my office for drug possession and perjury. I learned, to my surprise, that some of my fellow African American prosecutors hoped that the mayor would be acquitted, even though he was obviously guilty of at least one of the charges—he had smoked cocaine on FBI videotape. These black prosecutors wanted their office to lose because they believed that the prosecution of Barry was racist.

Federal prosecutors in the nation's capital hear many rumors about prominent officials engaging in illegal conduct, including drug use. Some African American prosecutors wondered why, of all those people, the government chose to set up the most famous black politician in Washington, D.C. They also asked themselves why, if crack is so dangerous, the FBI had allowed the mayor to smoke it. Some members of the predominantly black jury must have had similar concerns: They convicted the mayor of only one count of a fourteen-count indictment, despite the trial judge's assessment that he had "never seen a stronger government case."[1] Some African American prosecutors thought that the jury, in rendering its verdict, jabbed its black thumb in the face of a racist prosecution, and that idea made those prosecutors glad.

A version of this chapter previously appeared as Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L.J. 677 (1995). Originally published in the *Yale Law Journal*.

My thesis is that the black community is better off when some nonviolent lawbreakers remain in the community rather than go to prison. The decision as to what kind of conduct by African Americans ought to be punished is better made by African Americans themselves, on the basis of the costs and benefits to their community, than by the traditional criminal justice process, which is controlled by white lawmakers and white law enforcers. Legally, the doctrine of jury nullification gives the power to make this decision to African American jurors who sit in judgment of African American defendants. Considering the costs of law enforcement to the black community and the failure of white lawmakers to devise significant nonincarcerative responses to black antisocial conduct, it is the moral responsibility of black jurors to emancipate some guilty black outlaws.

Through jury nullification, I want to dismantle the master's house with the master's tools. My intent, however, is not purely destructive; this project is also constructive, because I hope that the destruction of the status quo will lead not to anarchy but rather to development of noncriminal ways of addressing antisocial conduct. Criminal conduct among African Americans is often a predictable reaction to oppression. Sometimes it is a symptom of internalized white supremacy; other times it is a reasonable response to the racial and economic subordination every African American faces every day. Punishing black people for the fruits of racism is wrong if that punishment is premised on the idea that it is the black criminal's just deserts. Hence, the new paradigm of justice I suggest rejects punishment for the sake of retribution and endorses it, with qualifications, for the ends of deterrence and incapacitation.

What Is Jury Nullification?

Jury nullification occurs when a jury acquits a defendant who it believes is guilty of the crime charged. In finding the defendant not guilty, the jury refuses to be bound by the facts of the case or the judge's instructions regarding the law. Instead, the jury votes its conscience. In the United States, jury nullification originally was based on the common law idea that the function of a jury was to decide justice, which included judging the law as well as the facts. If jurors believed that applying a law would lead to an unjust conviction, they were not compelled to convict someone who had broken it.[2] Although most American courts now disapprove of a jury's deciding anything other than the facts, the Double Jeopardy Clause of the Fifth Amendment prohibits appellate reversal of a jury's decision to acquit, regardless of the reason for the acquittal. Thus, even when a trial judge thinks that a jury's acquittal directly contradicts the evidence, the jury's verdict must be accepted as final. The jurors, in judging the law, function as an important and necessary check on government power.

The Moral Case for Jury Nullification by African Americans

Any juror legally may vote for nullification in any case, but certainly, jurors should not do so without some principled basis. The reason why some historical examples of nullification are viewed approvingly is that most of us now believe that the jurors in those cases did the morally right thing; it would have been unconscionable, for example, to punish those slaves who committed the crime of escaping to the North for their

freedom. It is true that nullification later would be used as a means of racial subordination by some Southern jurors, but that does not mean that nullification in the approved cases was wrong. It only means that those Southern jurors erred in their calculus of justice. I distinguish racially based nullification by African Americans from recent right-wing proposals for jury nullification on the ground that the former is sometimes morally right and the latter is not. How to assign the power of moral choice is a difficult problem. Yet we should not allow that difficulty to obscure that legal resolutions require moral decisions, judgments of right and wrong. The fullness of time permits us to judge the fugitive slave case differently from the Southern pro-white-violence case. One day we will be able to distinguish between racially based nullification and that proposed by right-wing groups. We should remember that the morality of the historically approved cases was not so clear when those brave jurors acted. Then, as now, it is difficult to see the picture when you are inside the frame.

Imagine a country in which more than half the young male citizens are under the supervision of the criminal justice system, either awaiting trial, in prison, or on probation or parole. Imagine a country in which two-thirds of the men can anticipate being arrested before they reach age thirty. Imagine a country in which more young men are in prison than in college. Now give the citizens of the country the key to the prison. Should they use it?

Such a country bears some resemblance to a police state. When we criticize a police state, we think that the problem lies not with the citizens of the state but rather with the form of government or law or with the powerful elites and petty bureaucrats whose interests the state serves. Similarly, racial critics of American criminal justice locate the problem not so much with the black prisoners as with the state and its actors and beneficiaries. As evidence, they cite their own experiences and other people's stories, African American history, understanding gained from social science research on the power and pervasiveness of white supremacy, and ugly statistics like those in the preceding paragraph.

African Americans and the Betrayal of Democracy

Jury nullification is plainly subversive of the rule of law—the idea that courts apply settled doctrine and do not "dispense justice in some ad hoc, case-by-case basis."[3] To borrow a phrase from the D.C. Circuit, jury nullification "betrays rather than furthers the assumptions of viable democracy."[4] Because the Double Jeopardy Clause makes this power part and parcel of the jury system, the issue becomes whether black jurors have any moral right to "betray[] . . . democracy" in this sense. I believe that they do. First, the idea of the rule of law is more mythological than real, and second, democracy, as practiced in the United States, has betrayed African Americans far more than they could ever betray it.

The Rule of Law as Myth

The idea that any result can be derived from the preexisting legal doctrine, either in every case or many cases, is a fundamental principle of legal realism (and, now, critical legal theory). The argument, in brief, is that law is indeterminate and incapable of neutral interpretation. When judges decide cases, they choose legal principles to determine

particular outcomes. Even if a judge wants to be neutral, she cannot, because ultimately, she is vulnerable to an array of personal and cultural biases and influences; she is only human. In an implicit endorsement of the doctrine of jury nullification, legal realists also suggest that, even if neutrality were possible, it would not be desirable, because no general principle of law can lead to justice in every case. It is difficult for an African American knowledgeable of the history of her people in the United States not to profess, at minimum, sympathy for legal realism. Most blacks are aware of countless examples in which African Americans were not afforded the benefit of the rule of law: Think, for example, of the institution of slavery in a republic purportedly dedicated to the proposition that all men are created equal or the law's support of state-sponsored segregation even after the Fourteenth Amendment guaranteed blacks equal protection. That the rule of law ultimately corrected some of the large holes in the American fabric is evidence more of its malleability than of its virtue; the rule of law had, in the first instance, justified the holes.

If the rule of law is a myth, or at least is not applicable to African Americans, the criticism that jury nullification undermines it loses force. The black juror is simply another actor in the system, using her power to fashion a particular outcome; the juror's act of nullification—like that of the citizen who dials 911 to report Ricky but not Bob, or the police officer who arrests Lisa but not Mary, or the prosecutor who charges Kwame but not Brad, or the judge who finds that Nancy was illegally entrapped but Verna was not—exposes the indeterminacy of law but does not create it.

The Moral Obligation to Disobey Unjust Laws

For the reader unwilling to concede the mythology of the rule of law, I offer another response to the concern about violating it. Assuming, for the purposes of argument, that the rule of law exists, no moral obligation attaches to follow an unjust law. This principle is familiar to many African Americans who practiced civil disobedience during the civil rights protests of the 1950s and 1960s. Indeed, Martin Luther King, Jr., suggested that morality requires that unjust laws not be obeyed. As I stated above, the difficulty of determining which laws are unjust should not obscure the need to make that determination.

Radical critics believe that the criminal law is unjust when applied to some antisocial conduct by African Americans: The law uses punishment to treat social problems that are the result of racism and that should be addressed by other means such as medical care or the redistribution of wealth. African Americans should obey most criminal law: It protects them. I concede, however, that this limitation is not *morally* required if one accepts the radical critique, which applies to all criminal law.

Democratic Domination

Related to the undermining-the-law critique is the charge that jury nullification is antidemocratic. The trial judge in the *Barry* case, for example, in remarks made after the conclusion of the trial, expressed this criticism of the jury's verdict: "The jury is not a mini-democracy, or a mini-legislature. . . . They are not to go back and do right as they see fit. That's anarchy. They are supposed to follow the law."[5] A jury that nullifies

"betrays rather than furthers the assumptions of viable democracy."[6] In a sense, the argument suggests that the jurors are not playing fair: The citizenry made the rules, so the jurors, as citizens, ought to follow them.

What does calling a democracy viable assume about the power of an unpopular minority group to make the laws that affect them? It assumes that the group has the power to influence legislation. The American majority-rule electoral system is premised on the hope that the majority will not tyrannize the minority but rather represent the minority's interests. Indeed, in creating the Constitution, the framers attempted to guard against the oppression of the minority by the majority. Unfortunately, these attempts were expressed more in theory than in actual constitutional guarantees, a point made by some legal scholars, particularly critical race theorists.

Democratic domination undermines the basis of political stability, which depends on the inducement of "losers to continue to play the political game, to continue to work within the system rather than to try to overthrow it."[7] Resistance by minorities to the operation of majority rule may take several forms, including "overt compliance and secret rejection of the legitimacy of the political order."[8] I suggest that another form of this resistance is racially based jury nullification.

If African Americans believe that democratic domination exists, they should not back away from lawful self-help measures, like jury nullification, on the ground that they are antidemocratic. African Americans are not a numerical majority in any of the fifty states, which are the primary sources of criminal law. In addition, they are not even proportionally represented in the U.S. House of Representatives or in the Senate. As a result, African Americans wield little influence over criminal law, state or federal. African Americans should embrace the antidemocratic nature of jury nullification because it provides them with the power to determine justice in a way that majority rule does not.

"Justice Must Satisfy the Appearance of Justice":[9] The Symbolic Function of Black Jurors

A second distinction one might draw between the traditionally approved examples of jury nullification and its practice by contemporary African Americans is that, in the case of the former, jurors refused to apply a particular law (e.g., a fugitive slave law) on the grounds that it was unfair, while in the case of the latter, jurors are not so much judging discrete statutes as they are refusing to apply those statutes to members of their own race. This application of race consciousness by jurors may appear to be antithetical to the American ideal of equality under the law.

This critique, however, like the betraying-democracy version, raises the question of whether the ideal actually applies to African Americans. As stated above, racial critics answer this question in the negative. They, especially the liberal critics, argue that the criminal law is applied in a discriminatory fashion. Furthermore, on several occasions, the Supreme Court has referred to the usefulness of black jurors to the rule of law in the United States. In essence, black jurors symbolize the fairness and impartiality of the law. As a result of the ugly history of discrimination against African Americans in the criminal justice system, the Supreme Court has had numerous opportunities to consider the

significance of black jurors. In so doing, the Court has suggested that these jurors perform a symbolic function, especially when they sit on cases involving African American defendants, and the Court has typically made these suggestions in the form of rhetoric about the social harm caused by the exclusion of blacks from jury service. I will refer to this role of black jurors as the legitimization function. This function stems from every jury's political function of providing American citizens with "the security . . . that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse."[10] In addition to, and perhaps more important than, seeking the truth, the purpose of the jury system is "to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair."[11] This purpose is consistent with the original purpose of the constitutional right to a jury trial, which was "to prevent oppression by the Government."[12]

When blacks are excluded from juries, beyond any harm done to the juror who suffers the discrimination or to the defendant, the social injury of the exclusion is that it "undermine[s] . . . public confidence—as well [it] should."[13] Because the United States is both a democracy and a pluralist society, it is important that diverse groups appear to have a voice in the laws that govern them. Allowing black people to serve on juries strengthens "public respect for our criminal justice system and the rule of law."[14]

But what of the black juror who endorses racial critiques of American criminal justice? Such a person holds no "confidence in the integrity of the criminal justice system." If she is cognizant of the implicit message that the Supreme Court believes her presence sends, she might not want her presence to be the vehicle for that message. Let us assume that there is a black defendant who, the evidence suggests, is guilty of the crime with which he has been charged and a black juror who thinks too many black men are in prison. The black juror has two choices: She can vote for conviction, thus sending another black man to prison and implicitly allowing her presence to support public confidence in the system that puts him there, or she can vote not guilty, thereby acquitting the defendant or at least causing a mistrial. In choosing the latter, the juror makes a decision not to be a passive symbol of support for a system for which she has no respect. Rather than signaling her displeasure with the system by breaching "community peace," the black juror invokes the political nature of her role in the criminal justice system and votes no. In a sense, the black juror engages in an act of civil disobedience, except that her choice is better than civil disobedience because it is lawful. Is the black juror's race-conscious act moral? Absolutely. It would be farcical for her to be the sole color-blind actor in the criminal process, especially when it is her blackness that advertises the system's fairness.

A Proposal for Racially Based Jury Nullification

In cases of violent *malum in se* crimes like murder, rape, and assault, jurors should consider the case strictly on the evidence presented, and if they have no reasonable doubt that the defendant is guilty, they should convict. For nonviolent *malum in se* crimes such as theft or perjury, nullification is an option that the juror should consider, although there should be no presumption in favor of it. A juror might vote for acquittal, for

example, when a poor woman steals from Tiffany's but not when the same woman steals from her next-door neighbor. Finally, in cases involving nonviolent *malum prohibitum* offenses, including victimless crimes like narcotics offenses, there should be a presumption in favor of nullification.

This approach seeks to incorporate the most persuasive arguments of both the racial critics and the law enforcement enthusiasts. If my model is faithfully executed, fewer black people would go to prison; to that extent, the proposal ameliorates one of the most severe consequences of law enforcement in the African American community. At the same time, the proposal, by punishing violent offenses and certain others, preserves any protection against harmful conduct that the law may offer potential victims. If the experienced prosecutors at the U.S. Attorney's office are correct, some violent offenders currently receive the benefit of jury nullification, doubtless from a misguided, if well-intentioned, attempt by racial critics to make a political point. Under my proposal, violent lawbreakers would go to prison.

In the language of criminal law, the proposal adopts utilitarian justifications for punishment: deterrence and isolation. To that extent, it accepts the law enforcement enthusiasts' faith in the possibility that law can prevent crime. The proposal does not, however, judge the lawbreakers as harshly as the enthusiasts would judge them. Rather, it assumes that, regardless of the reasons for their antisocial conduct, people who are violent should be separated from the community, for the sake of the nonviolent. The proposal's justifications for the separation are that the community is protected from the offender for the duration of the sentence and that the threat of punishment may discourage future offenses and offenders. I am confident that balancing the social costs and benefits of incarceration would not lead black jurors to release violent criminals simply because of race. While I confess agnosticism about whether the law can deter antisocial conduct, I am unwilling to experiment by abandoning any punishment premised on deterrence.

The proposal eschews the retributive, or just deserts, theory for two reasons. First, I am persuaded by racial and other critiques of the unfairness of punishing people for negative reactions to racist, oppressive conditions. In fact, I sympathize with people who react negatively to the countless manifestations of white supremacy that black people experience daily. While my proposal does not excuse all antisocial conduct, it will not punish such conduct on the premise that the intent to engage in it is evil. The antisocial conduct is no more evil than the conditions that cause it, and accordingly, the just deserts of a black offender are impossible to know. And even if just deserts were susceptible to accurate measure, I would reject the idea of punishment for retribution's sake. Black people have a community that needs building and children who need rescuing, and as long as a person will not hurt anyone, the community needs him there to help. Assuming that he actually will help is a gamble but not a reckless one, for the just African American community will not leave the lawbreaker be: It will, for example, encourage his education and provide his health care (including narcotics dependency treatment) and, if necessary, sue him for child support. In other words, the proposal demands of African Americans responsible self-help outside the criminal courtroom as well as inside it. When the community is richer, perhaps then it can afford anger.

What If White People Start Nullifying Too?

One concern is that whites will nullify in cases of white-on-black crime. But white people do this now. The white jurors who acquitted the police officers who beat up Rodney King are a good example. There is no reason why my proposal should cause white jurors to acquit white defendants who are guilty of violence against blacks any more frequently. My model assumes that black violence against whites would be punished by black jurors; I hope that white jurors would do the same in cases involving white defendants.

If white jurors were to begin applying my proposal to cases with white defendants, then they, like the black jurors, would be choosing to opt out of the criminal justice system. For pragmatic political purposes, that would be excellent. Attention would then be focused on alternative methods of correcting antisocial conduct much sooner than it would if only African Americans raised the issue.

How Do You Control Anarchy? Implementing the Proposal

Why would a juror willing to ignore a law created through the democratic process follow my proposal? There is no guarantee that she would. But when we consider that black jurors are already nullifying on the basis of race because they do not want to send another black man to prison, we recognize that these jurors are willing to use their power in a politically conscious manner. Many black people have concerns about their participation in the criminal justice system as jurors and might be willing to engage in organized political conduct, not unlike the civil disobedience that African Americans practiced in the South in the 1950s and 1960s. It appears that some black jurors now excuse some conduct—like murder—that they should not excuse. My proposal, however, provides a principled structure for the exercise of the black juror's vote. I am not encouraging anarchy. Instead, I am reminding black jurors of their privilege to serve a higher calling than law: justice. I am suggesting a framework for what justice means in the African American community.

Because many states prohibit jurors from being instructed about jury nullification, information about this privilege would have to be communicated to black jurors before they sat. In addition, jurors would need to be familiar with my proposal's framework for analyzing whether nullification is appropriate in a particular case. Disseminating this information should not be difficult. African American culture—through mediums such as church, music (particularly rap songs), black newspapers and magazines, literature, storytelling, film (including music videos), soapbox speeches, and convention gatherings—facilitates intraracial communication. At African American cultural events, such as concerts or theatrical productions, the audience could be instructed on the proposal, either orally or through the dissemination of written material; this type of political expression at a cultural event would hardly be unique—voter registration campaigns are often conducted at such events. The proposal could be the subject of rap songs, which are already popular vehicles for racial critiques, or of ministers' sermons. Advocates might also stand outside a courthouse and distribute flyers to prospective jurors. During deliberations, those jurors could then explain to other jurors their prerogative—their power—to decide justice rather than simply the facts. If the defense attorneys cannot

inform the people of their power, the people can inform themselves. And once informed, the people would have a formula for what justice means in the African American community rather than having to decide it on an ad hoc basis.

NOTES

1. Christopher B. Daly, *Barry Judge Castigates Four Jurors; Evidence of Guilt Was "Overwhelming," Jackson Tells Forum*, Wash. Post, Oct. 31, 1990, at Al (quoting U.S. District Judge Thomas Penfield Jackson). The trial judge's comments were made after the verdict.

2. See Jeffrey Abramson, We, the Jury: The Jury System and the Ideal of Democracy 61 (1994).

3. Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. Cal. L. Rev. 277, 313 (1985).

4. United States v. Dougherty, 473 F.2d 1113, 1136 (D.C. Cir. 1972).

5. Barton Gellman, *Barry Judge's Remarks Break Judicial Norms*, Wash. Post, Nov. 2, 1990, at D1, D3.

6. *Id.*

7. Nicholas R. Miller, *Pluralism and Social Choice*, 77 Am. Pol. Sci. Rev. 734, 742 (1983).

8. Robert A. Dahl, A Preface to Democratic Theory 97–98 (1956).

9. Offutt v. United States, 348 U.S. 11, 14 (1954).

10. Balzac v. Porto Rico, 258 U.S. 298, 310 (1922).

11. Powers v. Ohio, 499 U.S. 400, 413 (1991).

12. Duncan v. Louisiana, 391 U.S. 145, 155 (1968).

13. Georgia v. McCollum, 505 U.S. 42, 49 (1992).

14. Batson v. Kentucky, 476 U.S. 79, 99 (1986).

29. Race and Self-Defense

Toward a Normative Conception of Reasonableness

CYNTHIA KWEI YUNG LEE

> Fear of the foreign is sometimes a black streak that runs through America's political culture. We see instances of [this] when it involves hate crimes, not necessarily directed at black Americans, but at foreign Americans.
>
> **—Mike McCurry, White House press secretary in the Clinton administration**[1]

Most discussions on the subject of race and the American criminal justice system have focused on the black-white paradigm. Such focus may be justified because of the history of slavery and the current discrimination practiced against blacks in this country. Nonetheless, because of this focus, issues concerning other nonwhites tend to be overlooked. This is unfortunate because other nonwhites are also subject to socially constructed notions about race.

It is almost oxymoronic to speak of foreign Americans, yet the term "foreign American" conveys meaning—Asian Americans and Latinos. Many Americans associate Asian Americans with foreignness. The person who asks an Asian American, "Where are you from?" usually expects a response like "Japan" (or China or Korea)—not "Texas" (or Ohio or northern California). This focus on the Asian in "Asian American" is deep rooted. During World War II, when the United States was at war with Japan, hostility toward Japan extended to all persons of Japanese ancestry. From 1942 to 1945, Japanese Americans were incarcerated in internment camps even though no evidence suggested that Americans of Japanese descent were disloyal to the United States.

The Asian-as-foreigner stereotype is evident today, though it has taken on more subtle forms. During the O. J. Simpson trial, much of the racial joking in the case was directed at two Asian Americans associated with the case. The Honorable Lance Ito, the judge who presided over the trial, and criminalist Dennis Fung, two Asian Americans who speak articulately and without a noticeable accent, were portrayed as bumbling, heavily accented Asians who could barely speak English by radio station disc jockeys, publishing houses, and even a U.S. senator. During the Simpson trial, the historical impulse to mock others on the basis of racial difference was fulfilled by poking fun at the

A version of this chapter previously appeared as Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 Minn. L. Rev. 367 (1996). Originally published in the *Minnesota Law Review*.

Asian Americans associated with the trial, constructing them as Asians with heavy accents characteristic of the Asian-as-foreigner stereotype.

Sometimes the Asian-as-foreigner stereotype takes on more ominous manifestations. In 1982, Vincent Chin, a Chinese American, was beaten to death *with a baseball bat* by Ronald Ebens and Michael Nitz, two white Detroit autoworkers. Before killing Chin, Ebens and Nitz, illustrating the all-too-common confusion between Chinese Americans and Japanese Americans and between Asian Americans and Asian nationals, called Chin a "Nip." They also accused Chin of contributing to the loss of jobs in the automobile industry, yelling, "It's because of you little mother fuckers that we're out of work." They pleaded guilty to manslaughter and were each sentenced to three years of probation and fined $3,780. When discussing the light sentence, the judge explained, "*Had it been a brutal murder*, those fellows would be in jail now."[2] It is unclear what led the judge to think the baseball bat beating was not a brutal murder, yet the judge was not alone in his sentiments. Friends of Ebens and Nitz claimed the beating was just an accident, despite witness reports that Ebens swung the baseball bat at Chin's head as if he were hitting a home run, Chin's skull was fractured in several places, and police officers who arrived on the scene said pieces of Chin's brain were splattered all over the sidewalk.

Because of the confusion between Asian Americans and Asian nationals, symptomatic of the Asian-as-foreigner stereotype, the killing of Yoshihiro Hattori, a Japanese foreign exchange student, by Rodney Peairs, a Louisiana homeowner who claimed he acted in self-defense and was acquitted, has special significance for both Asian nationals and Asian Americans. On October 17, 1992, two sixteen-year-old high school students, Hattori and Webb Haymaker, were looking for a Halloween party in the suburbs of Baton Rouge, Louisiana, when they came to the home of Rodney and Bonnie Peairs and rang the doorbell. The Peairs's home was decorated for Halloween and was only a few doors away from the correct house. Hattori was dressed as the character played by John Travolta in *Saturday Night Fever*, wearing a white tuxedo jacket and carrying a small camera. No one answered the front door, but the boys heard the clinking of window blinds coming from the rear of the carport area. The boys walked around the house in that direction. A moment later, Bonnie Peairs opened the door. Webb Haymaker started to say, "We're here for the party." When Hattori came around the corner to join Webb, Mrs. Peairs slammed the door and screamed for her husband to get the gun. Without asking any questions, Rodney Peairs went to the bedroom and grabbed a laser-scoped .44 magnum Smith and Wesson, one of a number of guns Peairs owned.

The two boys had walked away from the house and were on the sidewalk about ten yards from the house when Peairs rushed out of the house and into the carport area. The carport light was on, and a street light was located in front of the house, illuminating the carport and sidewalk area. Hattori, the Japanese exchange student, turned and approached Peairs, smiling apologetically and explaining, "We're here for the party," in heavily accented English. Rather than explaining to Hattori that he had the wrong house, Peairs pointed his gun at Hattori and shouted, "Freeze!" Hattori, who did not understand the English word "freeze," continued to approach Peairs. Peairs fired one shot at Hattori's chest. Hattori collapsed and died on the spot. The entire incident—from the time Peairs opened the door to the time he fired his gun at Hattori—took place in approximately three seconds.

Peairs was charged with manslaughter. At trial, Peairs's attorney argued that Peairs shot Hattori because he honestly and reasonably believed the unarmed Hattori was about to kill or seriously harm him. The judge instructed the jury that to acquit Peairs on the ground of self-defense, the jury needed to find that Peairs reasonably believed he was in imminent danger of losing his life or receiving great bodily harm and that the killing was necessary to save himself from that danger. After little more than three hours of deliberating, the jury returned a verdict of not guilty. The courtroom erupted with applause. In contrast to the public's outrage at the perceived shortness of the deliberation process in the O. J. Simpson case when jurors in that case reached a verdict in less than four hours, there was little if any public outrage at the three hours of deliberation and resulting acquittal in the *Peairs* case.

On the issue of whether Peairs acted reasonably in self-defense, several facts suggest he did not. Rather than calling the police, looking outside the window to see what was outside, or even asking his wife why she was screaming, Peairs immediately went to his bedroom closet, grabbed a loaded gun, and went to the carport area to confront the boys outside. The boys were in the process of leaving the premises; Peairs easily could have avoided any confrontation by permitting them to leave. Additionally, Peairs might have chosen a less fatal course of action. He could have fired a warning shot or aimed for a less vital portion of Hattori's body.

The *Peairs* case is complicated by the fact that the racial nature of the case was less obvious than that of the *Goetz* case.[3] While many Asian American groups felt the verdict was unjust and racist, non–Asian Americans explained the verdict as merely a tragic misunderstanding or an unfortunate incident. Most people have overlooked the degree to which racial stereotypes about Japanese people might have affected the jury's interpretation of the facts and their determination that Peairs acted reasonably. Just as the attorney representing Bernhard Goetz covertly and effectively played the race card, Peairs's attorney subtly and effectively appealed to prejudice against the Japanese "enemy." Playing on the Asian-as-foreigner stereotype, which was all the more readily believed in this case involving a true Asian foreigner, Peairs's attorney told the jury that Hattori was acting in a menacing, aggressive fashion, "like a stranger invading someone's home turf."[4]

Bonnie Peairs's trial testimony is also significant. When asked to describe Hattori, Mrs. Peairs responded, "*I guess he appeared Oriental. He could have been Mexican or whatever.*"[5] Mrs. Peairs was unable to tell whether Hattori was "Oriental" or "Mexican" or neither. All she knew was that Hattori looked different, foreign. Her comment highlights the way minorities are often lumped together as a homogeneous group outside the American community.

If Webb Haymaker had been the victim, it is unlikely that the spectators in the courtroom would have responded with applause to the not guilty verdict. If Haymaker, the boy from the neighborhood, rather than Hattori, a foreigner from Japan, had been the victim in this case, the defense would have had a more difficult time portraying the victim as "a crazy man," "frightening," or "scary," terms used to describe Hattori. If Haymaker had been the victim, the presence of his parents in the courtroom and in the community would have made it much more difficult for the defense to paint a credible picture of the victim as the bad guy. But Haymaker was not the victim; Hattori, a Japanese foreigner, was the one shot and killed.

The Latino-as-Foreigner and Latino-as-Criminal Stereotypes

The stereotyping of Latinos and Latinas in American culture has received relatively little attention in legal scholarship. Notwithstanding the paucity of legal attention to Latino stereotypes, it is clear that Latino stereotypes are varied and complex. Not all Latinos suffer from the same stereotypes because some Latinos look like their white but non-Latino counterparts, while other Latinos do not. The fair-skinned Cuban in Florida who can pass as white may receive different treatment than the dark-skinned Mexican American in the Southwest.

Unfortunately, Latinos suffer from an aggregation of negative stereotypes experienced by both African Americans and Asian Americans. Perhaps most commonly, Latinos, like Asian Americans, are perceived as foreigners, outsiders, or immigrants. The Latino-as-foreigner stereotype might have influenced a Capitol police security aide to accuse Congressman Luis Gutierrez, a Puerto Rican American who was born in Chicago and is a United States citizen, of presenting false congressional credentials. Leaping to the conclusion that the congressman was a foreigner after seeing his daughter and niece with two small Puerto Rican flags, the security aide told Gutierrez that he should go back to where he came from.

The Latino-as-foreigner stereotype is particularly troublesome when it slides into the Latino-as-illegal-immigrant stereotype. In certain parts of the country, people commonly associate brown-skinned persons who speak English with a Spanish accent with illegal immigration, particularly if they are unskilled or employed as domestic or menial laborers. Even if the person speaks English without an accent, he or she may be subject to the illegal immigrant stereotype.

Like African Americans, Latinos suffer from a Latino-as-criminal stereotype. This stereotype often affects young male Latinos, who are assumed to be gang members, particularly if they live in a low-income high-crime neighborhood and wear baggy pants and T-shirts. The Latino-as-criminal stereotype is linked to the Latino-as-illegal-immigrant stereotype because the undocumented are often characterized as lawbreakers. Another stereotype, the Latino-as-macho stereotype, casts Latinos as hot-tempered and prone to violence.

The perception that young Latinos who dress a certain way are dangerous criminal gang members who pose a threat of serious bodily injury to those who confront them, coupled with the notion that Latinos tend to be hot-blooded and prone to violence, may contribute to the low frequency of prosecution for homicide and assault cases involving Latino victims. In numerous instances, Latinos have been shot, beaten, or killed by citizens or police officers claiming justifiable use of deadly force under circumstances calling into question whether the use of deadly force was truly warranted. In many of these cases, despite the fact that the Latino victim was unarmed or shot in the back, criminal charges were not brought against the person claiming justifiable homicide.

On January 31, 1995, eighteen-year-old Cesar René Arce and twenty-year-old David Hillo, two Mexican Americans, were spray-painting columns supporting the Hollywood Freeway in Los Angeles at about 1:00 A.M. William Masters II, a white man carrying a loaded gun without a permit in his fanny pack, was out for a late-night walk and saw the two boys spray-painting the columns. Masters picked up a piece of paper from the ground and wrote down the license plate number of the young men's car. Masters claims

that when Arce saw him writing, Arce blocked the sidewalk and demanded that he hand over the paper. A scuffle ensued in which Arce tried to rip the paper from Masters's hand and Masters tried to jam the rest of the paper into his pocket. According to Masters, when Hillo held up a screwdriver in a threatening manner, Masters handed over the piece of paper and began walking away. Masters claims he thought the boys were following him, so he swung around and fired at Arce and then shot Hillo in the buttocks. The shot directed at Arce hit him in his back and killed him.

Masters told the first police officers at the scene, "I shot him because he was spray-painting."[6] Later, Masters claimed he shot the boys in self-defense. In yet another explanation, Masters claimed that he shot the boys because they tried to rob him. Masters was arrested and jailed on suspicion of murder. When he was released from custody, Masters called the two youths he shot "skinhead Mexicans" and blamed Arce's mother for his death because she failed to raise Arce well.

The Los Angeles County District Attorney's Office declined to prosecute Masters on the ground that Masters acted in self-defense—even though the shot that killed Arce entered from his back. In contrast, the Los Angeles County District Attorney's Office filed murder and manslaughter charges against two black men (one of whom was the rap singer known as Snoop Doggy Dogg) who claimed they shot another black man in self-defense, disbelieving their self-defense claim largely because the victim was shot in the back and buttocks. The decision not to file criminal homicide charges against Masters was also based on the prediction that the government would have had a difficult time convincing a jury to return a conviction against him. The government's case would have rested primarily on testimony by Hillo, the young man who survived the shooting. Hillo would have been a poor witness since he gave conflicting versions of the facts in interviews with the police. Moreover, judging from public reaction to the event, the community was extremely supportive of Masters. Telephone calls reportedly flooded into the police station where Masters was held, offering money and legal assistance. Sandi Webb, a councilwoman from Simi Valley, a town a few miles away, declared her support for Masters by stating, "Kudos to William Masters for his vigilant anti-graffiti efforts and for his foresight in carrying a gun for self-protection. If [Los Angeles] refuses to honor Masters as a crime-fighting hero, then I invite him to relocate to our town."[7]

Racial stereotypes affect all people, including prosecutors, judges, and jurors. The *Masters* case is difficult because fear of crime and increasing gang violence are legitimate fears held by many, particularly in Southern California. Graffiti on freeway overpasses, public buildings, and private property is a reminder that the threat of violent crime is not far off. Supporters of Masters were likely reacting to this fear of crime and gang violence. As one supporter explained, "Whatever he did doesn't bother me. I'm not saying shooting people is the way to do it. . . . But [the graffiti] is just disgusting. It doesn't seem like anyone's doing anything about it."[8]

However legitimate the fear of crime and the threat of gang violence that graffiti symbolizes, such fear of crime in general does not satisfy the more specific requirement in self-defense doctrine that one have a reasonable belief in an imminent threat of death or serious bodily injury by a particular individual. In this country, defacing property with graffiti is not a capital offense. If the state is not permitted to execute graffiti offenders after a trial and conviction, surely private citizens have no greater right to kill them.

The support William Masters generated for shooting two young Mexican American males engaged in spray-painting is striking when contrasted with the Michael Fay incident, in which a non-Latino white American teenager was caught painting graffiti in Singapore, less than one year earlier. In 1994, Michael Fay pleaded guilty to two counts of vandalism and two counts of mischief, admitting that he was one of a group of youths who spray-painted eighteen cars, threw eggs at other cars, and switched license plates on still others.

When a Singaporean judge sentenced Fay to four months in prison, a $2,230 fine, and six lashes with a rattan cane, many Americans rallied to Fay's defense. Fay's mother appealed to U.S. government officials, stating, "Caning is not something the *American* public would want *an American* to go through. It's barbaric."[9] Fay's mother further described her son as "a *typical* teen-ager" who played on the *American* football team.[10] Apparently agreeing with her, U.S. embassy officials and members of the American Chamber of Commerce condemned the severity of the sentence. Ralph Boyce, charge d'affaires of the American embassy, stated, "[W]e see a large discrepancy between the offence and the punishment. The cars were not permanently damaged. The paint was removed with paint thinner. Caning leaves permanent scars."[11] Even U.S. president Bill Clinton made a strong protest to the Singapore government, asking for reconsideration of the sentence.

In the *Masters* case, a white American shot two Mexican Americans after catching them in the act of spray-painting columns supporting a public freeway and was called a crime-fighting hero even though he killed one of the youths. In the Michael Fay case, the Singaporean government prosecuted a white American teenager for spray-painting eighteen cars and engaging in other acts of vandalism. Many Americans were outraged at the caning punishment the Singaporean government imposed on Fay. If a Singaporean citizen had shot and killed Fay after catching him in the act of spray-painting the Singaporean citizen's car, it is unlikely that Americans would view the Singaporean as a hero, even if the Singaporean claimed, as Masters did, that he thought Fay was going to hurt him and shot Fay in self-defense. Stereotypes of Mexican American youths as criminal gang members undoubtedly spelled the difference in the American public's mind.

Stereotypes play a more important role in our thinking and interactions with other people than we may be willing to admit. We all make assumptions about people. Often our assumptions are linked to perceived racial identities. Stereotyping, in and of itself, is not necessarily evil but can become evil when it results in harmful consequences. Because one of the purposes of the law is to ensure fair and equal treatment, the law should discourage reliance on stereotypes, especially when doing so results in harmful action such as the use of deadly force.

NOTES

1. John Marelius, *Clinton Issues Call for Healing*, S.D. Union Trib., June 11, 1996, at Al.
2. Dana Sachs, *The Murderer Next Door*, Mother Jones, July–Aug. 1989, at 54 (emphasis added).
3. *People v. Goetz* 68 N.Y.2d 96, 497 N.E.2d 41, 506 N.Y.S.2d 18 (1986).
4. *Defense Depicts Japanese Boy As "Scary,"* N.Y. Times, May 21, 1993, at A10.
5. Testimony of Bonnie Peairs, *State v. Peairs* (May 22, 1993), at 22 (on file with author; emphasis added); telephone interview with Richard Haymaker, Webb Haymaker's father (Mar. 14, 1996).

6. Luis A. Carillo, *How to Kill a Latino Kid and Walk Free*, L.A. Times, Nov. 27, 1995, at B5; see also Ann W. O'Neill, *Tagger's Killer Faces Firearms Charges*, L.A. Times, Feb. 24, 1995, at Bl; Nicholas Riccardi, *Death of a Tagger a Typical Street Mystery for Police*, L.A. Times, Apr. 7, 1995, at Al.

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9. Franki V. Ransom, *"This Is Brutal": Clinton, Hall Vow to Aid Dayton Team in Singapore*, Dayton Daily News, Mar. 5, 1994, at lA (emphasis added).

10. *Id.* (emphasis added).

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From the Editors

Issues and Comments

Many self-defense classes teach students to assess what risks might be posed by various situations, such as a man in a suit and tie versus one in tattered clothes, a well-lit street versus a dark alley. Are judgments in these situations as irrational as those based on race? In light of Jody Armour's discussion, does acceptance of racial fear as a defense constitute governmental sanction of racism? Should a woman cross the street late at night to avoid crossing paths with four black or Latino teenagers wearing hooded sweatshirts?

What should society do about the high rate of incarceration that Michelle Alexander describes? If that high rate amounts to a racial caste system, what should we do about it? Would changing the drug laws be a good start?

With the Paul Butler article in mind, is it morally permissible to let a man known to be guilty go free in order to make a statement about the incarceration rate of others in his group, or must one always treat the guilty as such? Is the author suggesting, in effect, that acquittal is proper when the poor steal from Tiffany's but not when they steal from their neighbors? Would you, personally, be more likely to acquit for theft of a luxury item or for theft of a necessity (such as food from a neighbor)? How would you feel if the victim had some moral duty (for example, to help a neighbor) but ignored it?

Do the light sentences for causing the deaths of Asians and Latinos that Cynthia Lee describes imply that an Asian or Latino life is less valuable than a Caucasian one? The author suggests that these sentences may be the result of what Caucasians perceive as Asians' and Latinos' "threatening" nature. But what about the more common stereotypes that portray Asians as studious, hard-working, and economically successful and Latinos as romantic lovers and lazy layabouts?

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PART VI

STRUCTURAL DETERMINISM

SEVERAL CRITICAL RACE theorists focus on how the entire structure of legal thought, or at least of major doctrines like the First Amendment, influences its content, always tending toward maintaining the status quo. Some of these authors believe that once we understand how our categories, tools, and doctrines influence us, we may escape their sway and work more effectively for liberation. Others, such as Derrick Bell, hold that even this insight will do little to free us, although working against oppression brings its own rewards.

Part VI opens with Derrick Bell's classic "Serving Two Masters," which points out how civil rights attorneys, by virtue of their status and position, often fail to represent the real interests of their clients, pursuing instead the search for high-flown and highly aspirational goals that rarely arrive.

Charles Lawrence continues with a much-cited analysis of civil rights law's failure to acknowledge the harms of unconscious racism. Next Richard Delgado and Jean Stefancic explain how the First Amendment, a mainstay of liberal jurisprudence, is of little use to racial reformers but instead deepens minorities' predicament.

And Juan Perea closes the part with a discussion of how the single force that most shaped society's treatment of Latinos is not slavery—as it is with blacks—but conquest and how the law has failed to come to grips with these two groups' radically different needs and problems.

30. Serving Two Masters

Integration Ideals and Client Interests in School Desegregation Litigation

DERRICK A. BELL, JR.

> In the name of equity, we . . . seek dramatic improvement in the quality of the education available to our children. Any steps to achieve desegregation must be reviewed in light of the black community's interest in improved pupil performance as the primary characteristic of educational equality. We define educational equity as the absence of discriminatory pupil placement and improved performance for all children who have been the objects of discrimination. We think it neither necessary, nor proper to endure the dislocations of desegregation without reasonable assurances that our children will instructionally profit.
>
> **—Coalition of black community groups in Boston, Freedom House Institute on Schools and Education, 1975**

How should the term "client" be defined in school desegregation cases that are litigated for decades, determine critically important constitutional rights for thousands of minority children, and usually entail major restructuring of a public school system? How should civil rights attorneys represent the often diverse interests of clients and class in school suits? Do they owe any special obligation to class members who emphasize educational quality and who probably cannot obtain counsel to advocate their divergent views? Do the political, organizational, and even philosophical complexities of school desegregation litigation justify a higher standard of professional responsibility on the part of civil rights lawyers to their clients or more diligent oversight of the lawyer-client relationship by bench and bar?

As is so often the case, a crisis of events motivates this long overdue inquiry. The great crusade to desegregate the public schools has faltered. There is increasing opposition to desegregation at both local and national levels (not all of which can now be condemned simply as "racist"), while the once vigorous support of federal courts is on the decline. New barriers have arisen—inflation makes the attainment of racial balance more expensive, the growth of black populations in urban areas renders it more difficult, and an increasing number of social science studies question the validity of its educational assumptions.

A version of this chapter previously appeared as Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470 (1976). Originally published in the *Yale Law Journal*.

Civil rights lawyers dismiss these new obstacles as legally irrelevant. Having achieved so much by courageous persistence, they have not wavered in their determination to implement *Brown v. Board of Education*[1] using racial balance measures developed in the hard-fought legal battles of the last few decades. This stance entails great risk for clients whose educational interests may no longer accord with the integration ideals of their attorneys. Now that traditional racial balance remedies are becoming increasingly difficult to achieve or maintain, there is tardy concern that racial balance may not be the relief actually desired by the victims of segregated schools.

School Litigation: A Behind-the-Scenes View[2]

Although *Brown* was not a test case with a result determined in advance, the legal decisions that undermined and finally swept away the "separate but equal" doctrine of *Plessy v. Ferguson*[3] were far from fortuitous. Their genesis can be found in the volumes of reported cases stretching back to the mid-nineteenth century, cases in which every conceivable aspect of segregated schools was challenged. By the early 1930s, the NAACP, with the support of a foundation grant, had organized a concerted program of legal attacks on racial segregation. In October 1934, Vice-Dean Charles H. Houston of the Howard University Law School was retained by the NAACP to direct this campaign. According to the NAACP Annual Report for 1934, "[T]he campaign [was] a carefully planned one to secure decisions, rulings and public opinion on the broad principle instead of being devoted to merely miscellaneous cases."[4] These strategies were intended to eliminate racial segregation, not merely in the public schools, but throughout society. The public schools were chosen because they presented a far more compelling symbol of the evils of segregation and a far more vulnerable target than segregated railroad cars, restaurants, or restrooms. Initially, the NAACP's school litigation was aimed at the most blatant inequalities in facilities and teacher salaries. The next target was the obvious inequality in higher education evidenced by the almost total absence of public graduate and professional schools for blacks in the South.

Thurgood Marshall succeeded Houston in 1938 and became director-counsel of the NAACP Legal Defense and Educational Fund (LDF) when it became a separate entity in 1939. Jack Greenberg, who succeeded Marshall in 1961, recalled that the legal program "built precedent," treating each case in a context of jurisprudential development rather than as an isolated private lawsuit.[5] Of course, it was not possible to plan the program with precision: "How and when plaintiffs sought relief and the often unpredictable course of litigation were frequently as influential as any blueprint in determining the sequence of cases, the precise issues they posed, and their outcome."[6] But as lawyer-publisher Loren Miller observed of *Brown* and the four other school cases decided with it, "There was more to this carefully stage-managed selection of cases for review than meets the naked eye."[7]

In 1955, the Supreme Court rejected the NAACP request for a general order requiring desegregation in all school districts, issued the famous "all deliberate speed" mandate, and returned the matter to the district courts. It quickly became apparent that most school districts would not comply with *Brown* voluntarily. Rather, they retained counsel and determined to resist compliance as long as possible.

By the late 1950s, the realization by black parents and local branches of the NAACP that litigation would be required, together with the snail's pace at which most of the school cases progressed, brought about a steady growth in the size of school desegregation dockets. Because of their limited resources, the NAACP and LDF adopted the following general pattern for initiating school suits: A local attorney would respond to the request of an NAACP branch to address its members concerning their rights under the *Brown* decision. Those interested in joining a suit as named plaintiffs would sign retainers authorizing the local attorney and members of the NAACP staff to represent them in a school desegregation class action. Subsequently, depending on the facts of the case and the availability of counsel to prepare the papers, a suit would be filed. In most instances, the actual complaint was drafted or at least approved by a member of the national legal staff. With few exceptions, local attorneys were not considered expert in school desegregation litigation and served mainly as a liaison between the national staff lawyers and the local community.

Named plaintiffs, of course, retained the right to drop out of the case at any time. They did not seek to exercise control over the litigation, and during the early years there was no reason for them to do so. Suits were filed, school boards resisted the suits, and civil rights attorneys tried to overcome the resistance. Obtaining compliance with *Brown* as soon as possible was the goal of both clients and attorneys. But in most cases, that goal would not be realized before the named plaintiffs had graduated or left the school system.

The civil rights lawyers would not settle for anything less than a desegregated system. While the situation did not arise in the early years, it was generally made clear to potential plaintiffs that the NAACP was not interested in settling the litigation in return for school board promises to provide better segregated schools. Black parents generally believed that the victory in *Brown* entitled the civil rights lawyers to determine the basis of compliance. There was no doubt that perpetuating segregated schools was unacceptable, and the civil rights lawyers' strong opposition to such schools had the full support of both the named plaintiffs and the class they represented. Charges to the contrary initiated by several Southern states were malevolent in intent and premature in time.

The Theory

The rights vindicated in school litigation literally did not exist before 1954. Despite hundreds of judicial opinions, these rights have yet to be clearly defined. This is not surprising. Desegregation efforts aimed at lunchrooms, beaches, transportation, and other public facilities were designed merely to gain access to those facilities. Any actual racial mixing has been essentially fortuitous; it was hardly part of the rights protected (to eat, travel, or swim on a nonracial basis). The strategy of school desegregation is much different. The actual presence of white children is said to be essential to the right in both its philosophical and pragmatic dimensions. In essence the arguments are that blacks must gain access to white schools because "equal educational opportunity" means integrated schools and because only school integration will make certain that black children receive the same education as white children. This theory of school desegregation, however, fails to encompass the complexity of achieving equal educational opportunity for children to whom it so long has been denied.

The NAACP and the LDF, responsible for virtually all school desegregation suits, usually seek to establish a racial population at each school that (within a range of 10 to 15 percent) reflects the percentage of whites and blacks in the district. But in a growing number of the largest urban districts, the school system is predominantly black. The resistance of most white parents to sending their children to a predominantly black school and the accessibility of a suburban residence or private school to all but the poorest renders implementation of such plans extremely difficult. Although many whites undoubtedly perceive a majority black school as ipso facto a poor school, the schools can be improved and white attitudes changed. All too little attention has been given to making black schools educationally effective. Furthermore, the disinclination of white parents to send their children to black schools has not been lessened by charges made over a long period of time by civil rights groups that black schools are educationally bankrupt and unconstitutional per se.[8] NAACP policies nevertheless call for maximizing racial balance within the district as an immediate goal while supporting litigation that will eventually require the consolidation of predominantly white surrounding districts.

The basic civil rights position that *Brown* requires maximum feasible desegregation has been accepted by the courts and successfully implemented in smaller school districts throughout the country. The major resistance to further progress has occurred in the large urban areas of both South and North where racially isolated neighborhoods make school integration impossible without major commitments to the transportation of students, often over long distances. The use of the school bus is not a new phenomenon in American education, but the transportation of students over long distances to schools where their parents do not believe they will receive a good education has predictably created strong opposition in white and even black communities.

The busing issue has made concrete what many parents long have sensed and what new research has suggested:[9] Court orders mandating racial balance may be (depending on the circumstances) educationally advantageous, irrelevant, or even *disadvantageous*. Nevertheless, civil rights lawyers continue to argue that black children are entitled to integrated schools without regard to the educational effect of such assignments. That position might well have shocked many of the justices who decided *Brown*, and hardly encourages those judges asked to undertake the destruction and resurrection of school systems in our large cities that this reading of *Brown* has come to require.

Troubled by the resistance and disruptions caused by busing over long distances, those judges have increasingly rejected such an interpretation of *Brown*. They have established new standards that limit relief across district lines[10] and that reject busing for intradistrict desegregation "when the time or distance of travel is so great as to either risk the health of children or significantly impinge on the educational process."[11] Litigation in the large cities has dragged on for years and often culminated in decisions that approve the continued assignment of large numbers of black children to predominantly black schools.

Lawyer-Client Conflicts: Sources and Rationale

Civil Rights Rigidity Surveyed

Having convinced themselves that *Brown* stands for desegregation and not education, the established civil rights organizations steadfastly refuse to recognize reverses in the

school desegregation campaign—reverses that, to some extent, have been precipitated by their rigidity. They seem to be reluctant to evaluate objectively the high risks inherent in a continuation of current policies.

Many thoughtful observers now doubt that *Brown* can be implemented only by the immediate racial balancing of school populations. But civil rights groups refuse to recognize what courts in Boston, Detroit, and Atlanta have now made obvious: Where racial balance is not feasible because of population concentrations, political boundaries, or even educational considerations, there is adequate legal precedent for court-ordered remedies that emphasize educational improvement rather than racial balance.

The plans adopted in these cases were formulated without the support and often over the objection of the NAACP and other civil rights groups. They are intended to upgrade educational quality, and like racial balance, they may have that effect. But neither the NAACP nor the court-fashioned remedies are sufficiently directed at the real evil of pre-*Brown* schools: the state-supported subordination of blacks in every aspect of the educational process. Racial separation is only the most obvious manifestation of this subordination. Providing unequal and inadequate school resources and excluding black parents from meaningful participation in school policy making are at least as damaging to black children as enforced separation.

Whether based on racial balance precedents or compensatory education theories, remedies that fail to attack all policies of racial subordination almost guarantee that the basic evil of segregated schools will survive and flourish, even in those systems where racially balanced schools can be achieved. Low academic performance and large numbers of disciplinary and expulsion cases are only two of the predictable outcomes in integrated schools where the racial subordination of blacks is reasserted in, if anything, a more damaging form.[12]

The literature in both law and education discusses the merits and availability of educational remedies in detail.[13] The purpose here has been simply to illustrate that alternative approaches to "equal educational opportunity" are possible and have been inadequately explored by civil rights attorneys. Although some of the remedies fashioned by the courts themselves have been responsive to the problem of racial subordination, plaintiffs and courts seeking to implement such remedies are not assisted by counsel representing plaintiff classes. Much more effective remedies for racial subordination in the schools could be obtained if the creative energies of the civil rights litigation groups could be brought into line with the needs and desires of their clients.

Clients and Contributors

The hard-line position of established civil rights groups on school desegregation is explained in part by pragmatic considerations. These organizations are supported by middle-class blacks and whites who believe fervently in integration. At their socioeconomic level, integration has worked well, and they are certain that once whites and blacks at lower economic levels are successfully mixed in the schools, integration also will work well at those levels. Many of these supporters either reject or fail to understand suggestions that alternatives to integrated schools should be considered, particularly in majority-black districts. They will be understandably reluctant to provide financial support for policies that they think unsound, possibly illegal, and certainly disquieting. The

rise and decline of the Congress of Racial Equality (CORE) provides a stark reminder of the fate of civil rights organizations relying on white support while espousing black self-reliance.[14]

Jack Greenberg, LDF director-counsel until 1984, acknowledges that fund-raising concerns may play a small role in the selection of cases. Even though civil rights lawyers often obtain the clients, Greenberg reports, "there may be financial contributors to reckon with who may ask that certain cases be brought and others not."[15] He hastens to add that within broad limits lawyers "seem to be free to pursue their own ideas of right, . . . affected little or not at all by contributors."[16] The reassurance is double-edged. The lawyers' freedom to pursue their own ideas of right may pose no problems as long as both clients and contributors share a common social outlook. But when the views of some or all of the clients change, a delayed recognition and response by the lawyers is predictable.[17]

School expert Ron Edmonds contends that civil rights attorneys often do not represent their clients' best interests in desegregation litigation, because "they answer to a minuscule constituency while serving a massive clientele."[18] Edmonds distinguishes civil rights attorneys' clients (the persons on whose behalf suit is filed) from their "constituents" (those to whom attorneys must answer for their actions).[19] He suggests that in class action school desegregation cases the mass of lower-class black parents and children are merely clients. To define constituents, Edmonds asks, "[To] what class of Americans does the civil rights attorney feel he must answer for his professional conduct?"[20] The answer can be determined by identifying those with whom the civil rights attorney confers as he defines the goals of the litigation. He concludes that those who currently have access to the civil rights attorney are whites and middle-class blacks who advocate integration and categorically oppose majority black schools.

Edmonds suggests that, more than other professionals, the civil rights attorney labors in a closed setting isolated from most of his clients. No matter how numerous, the attorney's clients cannot become constituents unless they have access to him before or during the legal process. The result is the pursuit of metropolitan desegregation without sufficient regard for the probable instructional consequences for black children. In sum, he charges, "A class action suit serving only those who pay the attorney fee has the effect of permitting the fee paying minority to impose its will on the majority of the class on whose behalf suit is presumably brought."[21]

The Resolution of Lawyer-Client Conflicts

Some civil rights lawyers, like their more candid poverty law colleagues, are making decisions, setting priorities, and undertaking responsibilities that should be determined by their clients and shaped by the community. It is essential that lawyers "lawyer" and not attempt to lead clients and class. Commitment renders restraint more, not less, difficult, and the inability of black clients to pay handsome fees for legal services can cause their lawyers, unconsciously perhaps, to adopt an attitude of "we know what's best" in determining legal strategy. Unfortunately, clients are all too willing to turn everything over to the lawyers. In school cases, perhaps more than in any other civil rights field, the attorney must be more than a litigator. The willingness to innovate, organize, and negotiate—and the ability to perform each with skill and persistence—is of crucial importance. In

this process of overall representation, the apparent—and sometimes real—conflicts of interest between lawyer and client can be resolved.

Finally, commitment to an integrated society should not be allowed to interfere with the ability to represent effectively parents who favor education-oriented remedies. Those civil rights lawyers, regardless of race, whose commitment to integration is buoyed by doubts about the effectiveness of predominantly black schools should seriously reconsider the propriety of representing blacks, at least in those school cases involving heavily minority districts.

This seemingly harsh suggestion is dictated by practical as well as professional considerations. Lacking more viable alternatives, the black community has turned to the courts. After several decades of frustration, the legal system, for complex reasons, responded. Law and lawyers have received perhaps too much credit for that response.[22] The quest for symbolic manifestations of new rights and the search for new legal theories have too often failed to prompt an assessment of the economic and political conditions that so influence the progress and outcome of any social reform improvement.

In school desegregation blacks have a just cause, but that cause can be undermined as well as furthered by litigation. A test case can be an important means of calling attention to perceived injustice; more important, school litigation presents opportunities for improving the weak economic and political position that renders the black community vulnerable to the specific injustices the litigation is intended to correct. Litigation can and should serve lawyer and client as a community-organizing tool, an educational forum, a means of obtaining data, a method of exercising political leverage, and a rallying point for public support.

But even when directed by the most resourceful attorneys, civil rights litigation remains an unpredictable vehicle for gaining benefits, such as quality schooling, that a great many whites do not enjoy. The risks present in such efforts increase dramatically when civil rights attorneys, for idealistic or other reasons, fail to consider continually the limits imposed by the social and political circumstances under which clients must function even if the case is won. In the closest of lawyer-client relationships this continual reexamination can be difficult; it becomes much harder when much of the representation takes place hundreds of miles from the site of the litigation.

Ultimately, blacks must provide an enforcement mechanism that will give educational content to the constitutional right recognized in *Brown*. Simply placing black children in white schools will seldom suffice. Lawyers in school cases who fail to obtain judicial relief that reasonably promises to improve the education of black children serve poorly both their clients and their cause.

In 1935, W.E.B. Du Bois, in the course of a national debate over the education of blacks that has not been significantly altered by *Brown*, expressed simply but eloquently the message of the coalition of black community groups in Boston with which this article began:

> [T]he Negro needs neither segregated schools nor mixed schools. What he needs is Education. What he must remember is that there is no magic, either in mixed schools or in segregated schools. A mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk, is bad. A segregated school with ignorant placeholders, inadequate

> equipment, poor salaries, and wretched housing is equally bad. Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things seldom are equal, and in that case, Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer.[23]

Du Bois spoke neither for the integrationist nor the separatist but for poor black parents unable to choose, as can the well-to-do of both races, which schools will educate their children. Effective representation of these parents and their children presents a still unmet challenge for all lawyers committed to civil rights.

NOTES

1. 347 U.S. 483 (1954).

2. The author was a staff attorney specializing in school desegregation cases with the NAACP Legal Defense Fund from 1960 to 1966. From 1966 to 1968 he was deputy director, Office for Civil Rights, U.S. Department of Health, Education, and Welfare.

3. 163 U.S. 537 (1896).

4. J. Greenberg, Race Relations and American Law 34–35 (1959). For an account of the development of the NAACP's legal program, see Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 Stan. L. Rev. 207, 214–18 (1976).

5. See Greenberg, *supra* note 4, at 37.

6. *Id.*

7. L. Miller, The Petitioners: The Story of the Supreme Court of the United States and the Negro 334 (1966).

8. L. Fein, The Ecology of the Public Schools: An Inquiry into Community Control 6 (1971). Fein also notes:

> In effect, the liberal community, both black and white, was caught up in a wrenching dilemma. The only way, it appeared, to move a sluggish nation towards massive amelioration of the Negro condition was to show how terrifyingly debilitating were the effects of discrimination and bigotry. The more lurid the detail, the more guilt it would evoke, and the more guilt, the more readiness to act. Yet the same lurid detail that did, in the event, prompt large-scale federal programs, also reinforced white convictions that Negroes were undesirable objects of interaction.

Id. at 6.

9. As one author summarized the situation, "During the past 20 years considerable racial mixing has taken place in schools, but research has produced little evidence of dramatic gains for children and some evidence of genuine stress for them." N. St. John, School Desegregation Outcomes for Children 136 (1975). Some writers are more hopeful; see, for example, Meyer Weinberg, *The Relationship Between School Desegregation and Academic Achievement: A Review of the Research*, 39 Law & Contemp. Prob. 241 (1975). Others are more cautious; see, for example, Elizabeth G. Cohen, *The Effects of Desegregation on Race Relations*, 39 Law & Contemp. Prob. 271 (1975); and Edgar G. Epps, *The Impact of School Desegregation on Aspirations, Self-Concepts and Other Aspects of Personality*, 39 Law & Contemp. Prob. 300 (1975).

10. In Milliken v. Bradley, 418 U.S. 717, 745 (1974), the Supreme Court held (5–4) that desegregation remedies must stop at the boundary of the school district unless it can be shown that deliberately segregative actions were "a substantial cause of interdistrict segregation."

11. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 30–31 (1971).

12. See generally Hawkins v. Coleman, 3766 F. Supp. 1330 (N.D. Tex. 1974) (disproportionately high discipline and suspension rates for black students in the Dallas school system found to be the results of "white institutional racism"). During the 1972–1973 school year, black students were

suspended at more than twice the rate of any other racial or ethnic group. Children's Defense Fund, School Suspensions: Are They Helping Children? 12 (1975). The report suggests the figure is due in large part to the result of racial discrimination, insensitivity, and ignorance as well as to "a pervasive intolerance by school officials for all students who are *different* in any number of ways." *Id.* at 9. See also Winifred Green, *Separate and Unequal Again*, Inequality in Educ., July 1973, at 14.

13. For a collection of sources, see D. Bell, *Waiting on the Promise of* Brown, 39 Law & Contemp. Prob. 341, 352–66 & nn.49–119 (1975).

14. See A. Meter & E. Rudwick, Core: A Study in the Civil Rights Movement, 1942–1968 (1973).

15. J. Greenberg, *Litigation for Social Change*, Record of N.Y.C.B.A. 320, 349 (1974).

16. *Id.*

17. Professor Leroy Clark, a former LDF lawyer, is more critical than his former boss about the role of financial contributors in setting civil rights policy:

> [T]here are two "clients" the civil rights lawyer must satisfy: (1) the immediate litigants (usually black), and (2) those liberals (usually white) who make financial contributions. An apt criticism of the traditional civil rights lawyer is that too often the litigation undertaken was modulated by that which was "salable" to the paying clientele who, in the radical view, had interests threatened by true social change. Attorneys may not make conscious decisions to refuse specific litigation because it is too "controversial" and hard to translate to the public, but no organization dependent on a large number of contributors can ignore the fact that the "appeal" of the program affects fund-raising. Some of the pressure to have a "winning" record may come from the need to show contributors that their money is accomplishing something socially valuable.

Clark, *The Lawyer in the Civil Rights Movement—Catalytic Agent or Counter-Revolutionary?*, 19 Kan. L. Rev. 459, 469 (1971).

The litigation decisions made under the pressure of so many nonlegal considerations are not always unanimous. A few years earlier, the LDF decided not to represent the militant black communist Angela Davis. LDF officials justified their refusal on the grounds that the criminal charges brought against Davis did not present civil rights issues. The decision, viewed by staff lawyers as an unconscionable surrender to conservative contributors, caused a serious split in LDF ranks. A few lawyers resigned because of the dispute, and others remained disaffected for a long period.

18. R. Edmonds, *Advocating Inequity: A Critique of the Civil Rights Attorney in Class Action Desegregation Suits*, 3 Black L.J. 176, 178 (1974). Edmonds at the time of writing served as director of the Center for Urban Studies, Harvard Graduate School of Education.

19. *Id.*

20. *Id.* at 179.

21. *Id.*

22. Blacks lost in *Plessy v. Ferguson* in part because the timing was not right. The Supreme Court and the nation had become reactionary on the issue of race. As LDF Director-Counsel Greenberg has acknowledged:

> [Plaintiff's attorney in *Plessy*, Albion W.] Tourgee recognized [that the tide of history was against him] and spoke of an effort to overcome its effect by influencing public opinion. But this, too, was beyond his control. All the lawyer can realistically do is marshall the evidence of what the claims of history may be and present them to the court. But no matter how skillful the presentation, *Plessy* and *Brown* had dynamics of their own. Tourgee would have won with *Plessy* in 1954. The lawyers who brought *Brown* would have lost in 1896.

Greenberg, *supra* note 15, at 334.

23. W.E.B. Du Bois, *Does the Negro Need Separate Schools?*, 4 J. Negro Educ. 328, 335 (1935).

31. The Id, the Ego, and Equal Protection

Reckoning with Unconscious Racism

CHARLES R. LAWRENCE III

It is 1948. I am sitting in a kindergarten classroom at the Dalton School, a fashionable and progressive New York City private school. My parents, both products of a segregated Mississippi school system, have come to New York to attend graduate and professional school. They have enrolled me and my sisters here at Dalton to avoid sending us to the public school in our neighborhood, where the vast majority of the students are black and poor. They want us to escape the ravages of segregation, New York style.

It is circle time in the five-year-old group, and the teacher is reading us a book. As she reads, she passes the book around the circle so that each of us can see the illustrations. The book's title is *Little Black Sambo*. Looking back, I remember only one part of the story, one illustration: Little Black Sambo is running around a stack of pancakes with a tiger chasing him. He is very black and has a minstrel's white mouth. His hair is tied up in many pigtails, each with a different color ribbon. I have seen the picture before the book reaches my place in the circle. I have heard the teacher read the "comical" text describing Sambo's plight and have heard the laughter of my classmates. There is a knot in the pit of my stomach. I feel panic and shame. I do not have the words to articulate my feelings—words like "stereotype" and "stigma" that might help cathart the shame and place it outside me, where it began. But I am slowly realizing that, as the only black child in the circle, I have some kinship with the tragic and ugly hero of this story—that my classmates are laughing at me as well as at him. I wish I could laugh along with my friends. I wish I could disappear.

I am in a vacant lot next to my house with black friends from the neighborhood. We are listening to *Amos and Andy* on a small radio and laughing uproariously. My father comes out and turns off the radio. He reminds me that he disapproves of this show that pokes fun at Negroes. I feel bad—less from my father's reprimand than from a sense that I have betrayed him and myself, that I have joined my classmates in laughing at us.

Today, I am certain that my kindergarten teacher was not intentionally racist in choosing *Little Black Sambo*. I knew even then, from a child's intuitive sense, that she

A version of this chapter previously appeared as Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987). Originally published in the *Stanford Law Review*.

was a good, well-meaning person. A less benign combination of racial mockery and profit motivated the white men who produced the radio show and played the roles of Amos and Andy. But we who had joined their conspiracy by our laughter had not intended to demean our race.

It is 1960. I am a student at Haverford College. Again, I am a token black presence in a white world. A companion whose face and name I can't remember seeks to compliment me by saying, "I don't think of you as a Negro." I understand his benign intention and accept the compliment. But the knot is in my stomach again. Once again, I have betrayed myself.

This happened to me more than a few times. Each time my interlocutor was a good, liberal, white person who intended to express feelings of shared humanity. I did not yet understand the racist implications of how the feelings were conceptualized. I am certain that my white friends did not either. We had not yet grasped the compliment's underlying premise: To be thought of as a Negro is to be thought of as less than human. We were all victims of our culture's racism. We had all grown up on *Little Black Sambo* and *Amos and Andy*.

Another ten years pass. I am thirty-three. My daughter, Maia, is three. I greet a pink-faced, four-year-old boy on the steps of her nursery school. He proudly presents me with a book he has brought for his teacher to read to the class. "It's my favorite," he says. The book is a new edition of *Little Black Sambo*.

This chapter reconsiders the doctrine of discriminatory purpose that entered the law with the 1976 decision *Washington v. Davis*.[1] This now well-established doctrine requires plaintiffs challenging the constitutionality of a facially neutral law to prove a racially discriminatory purpose on the part of those responsible for the law's enactment or administration.

Minorities, civil rights advocates, and scholars have been virtually unanimous in condemning *Davis* and its progeny, for two reasons. The first is that a motive-centered doctrine of racial discrimination places a very heavy, and often impossible, burden of persuasion on the wrong side of the dispute. Improper motives are easy to hide. And because behavior results from the interaction of a multitude of motives, governmental officials will always be able to argue that racially neutral considerations prompted their actions. Moreover, when several decision makers were responsible for a law or action, proof of racially discriminatory motivation is even more difficult.

The second objection to the *Davis* doctrine is that the injury of racial inequality exists irrespective of the decision makers' motives. Does the black child in a segregated school experience less stigma and humiliation because the local school board did not consciously set out to harm her? Are blacks less prisoners of the ghetto because the decision that excludes them from an all-white neighborhood was made with property values and not race in mind? If the "facts of racial inequality are the real problem,"[2] heightened judicial scrutiny is appropriate regardless of motive.[3]

My own sympathies lie with the critics of the doctrine of discriminatory purpose. The problems posed by an effects-based disproportionate-impact standard do not seem insurmountable. And none of the current doctrine's defenders explains why it is important to search for bad motives or why such a search is the only alternative to an impact test. But I do not intend to simply add another chapter to this debate. Rather, I wish to suggest another way to think about racial discrimination that more accurately describes both its origins and the nature of the injury it inflicts.

Much of one's inability to know racial discrimination when one sees it results from a failure to recognize that racism is both a crime and a disease.[4] This failure is compounded by a reluctance to admit that the illness of racism infects almost everyone. Acknowledging and understanding the malignancy are prerequisites to the discovery of an appropriate cure. But the diagnosis is difficult, because our own contamination with the very illness for which a cure is sought impairs our comprehension of the disorder.

Scholarly and judicial efforts to explain the constitutional significance of disproportionate impact and governmental motive in cases alleging racial discrimination treat these two categories as mutually exclusive. I argue that this is a false dichotomy. Traditional notions of intent do not reflect how decisions about racial matters are a product of factors that can be characterized as neither intentional (in the sense that certain outcomes are self-consciously sought) nor unintentional (in the sense that the outcomes are random, fortuitous, and uninfluenced by the decision maker's beliefs, desires, and wishes).

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.

Freudian theory posits that the human mind defends itself against the discomfort of guilt by denying or refusing to recognize those ideas, wishes, and beliefs that conflict with what the individual has learned is good or right. While our historical experience has made racism an integral part of our culture, our society has more recently embraced an ideal that rejects racism as immoral. When an individual experiences conflict between racist ideas and the societal ethic that condemns those ideas, the mind excludes his racism from consciousness.

The theory of cognitive psychology states that the culture—including, for example, the media and an individual's parents, peers, and authority figures—transmits certain beliefs and preferences. Because these beliefs are so much a part of the culture, they are not experienced as explicit lessons. Instead, they seem part of the individual's rational ordering of her perceptions of the world. The individual is unaware, for example, that the ubiquitous presence of a cultural stereotype has influenced her perception that blacks are lazy or unintelligent. Because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understandings: Even if a child is not told that blacks are inferior, he learns that lesson by observing the behavior of others. These tacit understandings, because they have never been articulated, are unlikely to be experienced at a conscious level.

In short, requiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race dependent ignores much of what we understand about how the human mind works. It also disregards both the irrationality of racism and the profound effect that the history of American race relations has exerted on the individual and collective unconscious.

In some settings, it may well be appropriate for the legal system to disregard the influence of the unconscious on individual or collective behavior. But where the goal is the eradication of invidious racial discrimination, the law must recognize racism's primary source. The Equal Protection Clause, a principal source of civil rights law, requires the elimination of governmental decisions that take race into account without good and important reasons. Therefore, equal protection doctrine must find a way to come to grips with unconscious racism.

In pursuit of that goal, this chapter proposes a new test to trigger judicial recognition of race-based behavior. It posits a connection between unconscious racism and the existence of cultural symbols that have racial meaning. It suggests that the "cultural meaning" of an act is the best available analogue for, and evidence of, a collective unconscious that we cannot observe directly. This test would thus evaluate governmental conduct to determine whether it conveys a symbolic message to which the culture attaches racial significance. A finding that the culture thinks of an allegedly discriminatory governmental action in racial terms would also constitute a finding regarding the beliefs and motivations of the governmental actors: The actors are themselves part of the culture and presumably could not have acted without being influenced by racial considerations, even if they are unaware of their racist beliefs. Therefore, the court would apply strict scrutiny.

This proposal is relatively modest. It does not abandon the judicial search for unconstitutional motives; nor does it argue that all governmental action with discriminatory impact should receive strict scrutiny. Instead, it urges a more complete understanding of the nature of human motivation. By identifying those cases where race unconsciously influences governmental action, this new test leaves untouched non-race-dependent decisions that disproportionately burden blacks only because they are overrepresented in the decision's targets.

This effort to inform the discriminatory intent requirement with the learning of contemporary psychology is important for at least three reasons. First, the present doctrine, by requiring proof that the defendant was aware of his animus against blacks, severely limits the number of individual cases in which the courts will acknowledge and remedy racial discrimination.

Second, the intent requirement's assignment of individualized fault or responsibility for the existence of racial discrimination distorts our perceptions about the causes of discrimination and leads us to think about racism in a way that worsens the disease rather than combats it. By insisting that a blameworthy perpetrator be found before the existence of racial discrimination can be acknowledged, the Court creates an imaginary world where discrimination does not exist unless it was consciously intended. And by acting as if this imaginary world were real and insisting that we participate in this fantasy, the Court and the law it promulgates subtly shape our perceptions of society. The decision to deny relief no longer finds its basis only in raw political power or economic self-interest; it is now justifiable on moral grounds. If there is no discrimination, there is no need for a remedy; if blacks are being treated fairly yet remain at the bottom of the socioeconomic ladder, only their own inferiority can explain their subordinate position.

Finally, the intent doctrine's focus on the narrowest and most unrealistic understanding of individual fault has also engendered much of the resistance to and resentment of

affirmative action programs and other race-conscious remedies for past and continuing discrimination.[5] If there can be no discrimination without an identifiable criminal, then "innocent" individuals will resent the burden of remedying an injury for which the law says they are not responsible. Understanding the cultural source of our racism obviates the need for fault, as traditionally conceived, without denying our collective responsibility for racism's eradication. We cannot be individually blamed for unconsciously harboring attitudes that are inescapable in a culture permeated with racism. And without the necessity for blame, our resistance to accepting the need and responsibility for remedy may decrease.

Racism: A Public Health Problem

Not every student of the human mind has agreed with Sigmund Freud's description of the unconscious, but few today would quarrel with the assertion that mental processes of which we have no awareness affect our actions and the ideas of which we are aware. A considerable, and by now well-respected, body of knowledge and empirical research describe the workings of the human psyche and the unconscious. Common sense tells us that we all act unwittingly on occasion. We have experienced slips of the tongue and said things we fully intended not to say, and we have had dreams in which we experienced such feelings as fear, desire, and anger that we did not know we had.

The law has, for the most part, refused to acknowledge what we have learned about the unconscious. Psychiatrists and psychologists are called to court to discuss the mental state of the criminal defendant or the suspected incompetent or to report on the mental pathology produced by an alleged tort, a neglectful parent, or the deprivation of a civil right. But in most other legal matters, students of the unconscious are excluded, and we pretend that what they have learned is unknown. Race-remedies law should not blind itself to what we know about the unconscious. Racism is in large part a product of the unconscious. It is a set of beliefs whereby we irrationally attach significance to something called race. On occasion racism does have its origins in the rational and premeditated acts of seekers after property and power. But racism in America is much more complex than either the conscious conspiracy of a power elite or the simple delusion of a few ignorant bigots. It is a part of our common historical experience and, therefore, a part of our culture. It arises from the assumptions we have learned to make about the world, ourselves, and others as well as from the patterns of our fundamental social activities.

Racism's ubiquity underscores the importance of incorporating our knowledge of the unconscious into equal protection doctrine. The law has traditionally used psychological theory to define abnormality in order to exclude the irrational from the law's protection or sanction. But where the law's purpose is to eradicate racial discrimination, it must recognize that racism is both irrational and normal. If our entire culture is afflicted, it behooves us to take cognizance of psychological theory to frame a body of law that can address that affliction.

Psychoanalytic Theory: An Explanation of Racism's Irrationality

The division of the mind into the conscious and the unconscious is the fundamental principle of psychoanalysis. Psychoanalytic theory explains the existence of pathological

mental behavior as well as certain otherwise unexplained behavior in healthy people by postulating two powerful mental processes—the primary and the secondary—that govern how the mind works. The primary process, or id, occurs outside our awareness. It consists of desires, wishes, and instincts that strive for gratification. It follows its own laws, of which the supreme one is pleasure. The secondary process, or ego, happens under conscious control and is bound by logic and reason. We use this process to adapt to reality: The ego insists that we heed the demands of reality and conform to ethical and moral laws. On their way to gratification, the id impulses must pass through the territory of the ego, where they come in for criticism, rejection, or modification, often by some defensive measure on the part of the secondary process. Defensive mechanisms such as repression, denial, introjection, projection, reaction formation, sublimation, and reversal resolve the conflicts between the primary and secondary processes by disguising forbidden wishes and making them palatable.

These observations explain a great deal about the nature of racial prejudice. For example, when we say that racism is irrational, we mean that when people are asked to explain the basis of their racial antagonism they either express an instinctive, unexplained distaste at the thought of associating with the out-group as equals or cite reasons that are not based on established fact and are often contradicted by personal experience. In one study on racial prejudice, F. L. Hartley included in his survey three fictitious groups he called the Dariens, the Praneans, and the Wallonians. A large portion of respondents who expressed a dislike for blacks and Jews also disliked these nonexistent groups and advocated restrictive measures against them.

In psychoanalytic terms, this irrational behavior indicates poor reality testing. When people of normal intelligence behave in a way that rejects what they experience as real, it requires some explanation. Psychoanalytic theory assumes that inadequacy in reality testing fulfills a psychological function, usually the preservation of an attitude basic to the individual's makeup. If adequate reality testing threatens to undermine a functionally significant attitude, it is avoided. In such cases, the dislike of out-groups is based on rationalization—that is, on socially acceptable pseudoreasons that disguise the function that the antagonism serves for the individual.

Of course, not all inadequate reality testing is a rationalization of hidden motives. The occasion for reality testing is not always available, and all of us make prejudgments based on insufficient evidence. But when these prejudgments become rigidly stereotyped thinking that eschews reality even when facts are available, one is on notice to search for a psychological function that the rigidity of the prejudgment fulfills.

An examination of the beliefs that racially prejudiced people have about out-groups demonstrates other mechanisms observed by both Freudian and non-Freudian behavioralists. For example, studies have found that racists hold two types of stereotyped beliefs: They believe the out-group is dirty, lazy, oversexed, and without control of their instincts (a typical accusation against blacks) or pushy, ambitious, conniving, and in control of business, money, and industry (a typical accusation against Jews). These two types of accusation correspond to two of the most common types of neurotic conflict: that arising when an individual cannot master his instinctive drives in a way that fits into rational and socially approved patterns of behavior and that arising when an individual cannot live up to the demands of his own conscience. Thus, the stereotypical view of blacks implies that their id, the instinctive part of their psyche, dominates their ego,

the rationally oriented part. The stereotype of the Jew, on the other hand, accuses him of having an overdeveloped ego. In this way, the racially prejudiced person projects his own conflict into the form of racial stereotypes.

The preoccupation among racially prejudiced people with sexual matters in race relations provides further evidence of this relationship between the unconscious and racism. Taboos against interracial sexual relations, myths concerning the sexual prowess of blacks, and obsessions with racial purity coexist irrationally with a tendency to break these taboos. Again, psychoanalytic theory provides insights: According to Freud, one's sexual identity plays a crucial role in the unending effort to come to terms with oneself. Thus, the prominence of racism's sexual component highlights how racial antagonism grows in large part out of an unstable sense of identity.

Another support for the contention that racism originates in the unconscious is that racially discriminatory behavior usually improves long before corresponding attitudes toward members of the out-group begin to change. Again, this is to be expected in light of the underlying psychological processes. Behavior is more frequently under ego control than is attitude. Attitude reflects, in large part, the less conscious part of the personality, where change is more complex and difficult.

Thus far we have considered the role the unconscious plays in creating overtly racist attitudes. But what is its role when racial prejudice is less apparent—when racial bias is hidden from the prejudiced individual as well as from others? Increasingly, as our culture has rejected racism as immoral and unproductive, this hidden prejudice has become the more prevalent form of it.

Joel Kovel refers to the resulting personality type as the "aversive racist" and contrasts this type with the "dominative racist," the true bigot who openly seeks to keep blacks in a subordinate position and will resort to force to do so.[6] The aversive racist believes in white superiority, but her conscience seeks to repudiate this belief or, at least, to prevent her from acting on it. She often resolves this inner conflict by not acting at all. She tries to avoid the issue by ignoring the existence of blacks, avoiding contact with them, or at most being polite, correct, and cold whenever she must deal with them. Aversive racists range from individuals who lapse into demonstrative racism when threatened—as when blacks get too close—to those who consider themselves liberals and, despite their sense of aversion to blacks (of which they are often unaware), do their best within the confines of the existing societal structure to ameliorate blacks' condition.

A Cognitive Approach to Unconscious Racism

Cognitive psychologists offer a contrasting model for understanding the origin and unconscious nature of racial prejudice. Cognitivists see the process of categorization as one common source of racial and other stereotypes. All humans tend to categorize to make sense of experience. Too many events occur daily for us to deal successfully with each one on an individual basis; we must categorize to cope. When a category (for example, the category of black person or white person) correlates with a continuous dimension (for example, the range of human intelligence or the propensity to violence), one tends to exaggerate the differences between categories on that dimension and to minimize the differences within each.

The more important a particular classification of people into a group is to an individual, the more likely she is to distinguish sharply the characteristics of people who belong to the different groups. Here, cognitivists integrate the observations of personality theorists and social psychologists with their own. If an individual is hostile toward a group of people, she has an emotional investment in preserving the differentiations between her own group and the others' group. Thus, the preservation of inaccurate judgments about the out-group is self-rewarding. This is particularly so when prejudiced judgments occur in a social setting that accepts and encourages negative attitudes toward the out-group. In these cases, the group judgment reinforces and helps maintain the individual judgment about the out-group's lack of worth.

The content of the social categories to which people find themselves assigned is generated over a long period of time within a culture and transmitted to individual members of society by a process cognitivists call assimilation. Assimilation entails learning and internalizing preferences and evaluations. Individuals learn cultural attitudes and beliefs about race very early in life, at a time when it is difficult to separate the perceptions of one's teacher (usually a parent) from one's own. In other words, one learns about race at a time when one is highly sensitive to the social settings in which one lives.

Jean Piaget, in his work on the development of moral judgment in children, described the transition from the stage when children judge pronouncements by their source rather than their content to the stage when children begin to cooperate with equals and to take the role of the other. This ability to see the same data from more than one point of view is the basis of intellectual and moral development. According to Piaget, this transition cannot take place when a child is exposed to only one source of information.[7] These pretransition conditions, when the child remains in awe of the source of truth, tend to be precisely those under which children learn socially sanctioned truths about race. Lessons learned at this early developmental stage are not questioned; they are learned as facts rather than as points of view.

Furthermore, because children learn lessons about race at this early stage, most of the lessons are tacit rather than explicit. Children learn not so much through an intellectual understanding of what their parents tell them about race as through an emotional identification with who their parents are and what they see and feel their parents do. Small children will adopt their parents' beliefs because they experience them as their own. If we do learn lessons about race in this way, we are not likely to be aware that the lessons have even taken place. If we are unaware that we have been taught to be afraid of blacks or to think of them as lazy or stupid, then we may not be conscious of our internalization of those feelings and beliefs.

All these processes, most of which occur outside the actor's consciousness, are mutually reinforcing. Furthermore, little in our environment counteracts them; indeed, our culture often supports and rewards individuals for making hostile misjudgments that exaggerate the differences between themselves and members of a racial out-group. Cultural prejudice also removes the possibility of checking judgments against outside reality, further inhibiting the chance that the holder of a prejudiced belief will perceive his mistake and correct it. Thus, through personal and cultural experience the individual comes to associate characteristics such as intelligence, laziness, honesty, or dirtiness with classifications of people. In ambiguous social situations, it will always be easier

to find evidence supporting an individual's assumed group characteristics than to find contradictory evidence. Furthermore, whenever one is confronted with the need to interpret the behavior of members of a particular group en masse, one will find little opportunity to observe behavior that conflicts with the group's assumed characteristics.

Case studies have demonstrated that an individual who holds stereotyped beliefs about a target will remember and interpret past events in the target's life history in ways that bolster and support his stereotyped beliefs and will perceive the target's actual behavior as reconfirming and validating the stereotyped beliefs. While the individual may be aware of the selectively perceived facts that support his categorization or simplified understanding, he will not be aware of the process that has caused him to deselect the facts that do not conform with his rationalization. Thus, racially prejudiced behavior that is actually the product of learned cultural preferences is experienced as a reflection of rational deduction from objective observation. The decision maker who is unaware of the selective perception that has produced her stereotype will not view it as such. She will believe that her actions are motivated not by racial prejudice but by her attraction or aversion to the attributes she has "observed" in the groups she has favored or disfavored.

Unconscious Racism in Everyday Life

Whatever our preferred theoretical analysis, considerable commonsense evidence from our everyday experience confirms that we all harbor prejudiced attitudes that are kept from our consciousness.

When, for example, a well-known sports broadcaster found himself carried away by the excitement of a brilliant play by an Afro-American professional football player and referred to the player as a "little monkey" during a nationally televised broadcast, we witnessed the prototypical parapraxis, or slip of the tongue. This sportscaster views himself as progressive on issues of race. Many of his most important professional associates are black, and he would no doubt profess that more than a few are close friends. After the incident, he initially claimed no memory of it and then, when confronted with videotaped evidence, apologized and said that no racial slur was *intended*. We have no reason to doubt the sincerity of his assertion. Why would he intentionally risk antagonizing his audience and damaging his reputation and career? But his inadvertent slip of the tongue was not random. It is evidence of the continuing presence of a derogatory racial stereotype that he has repressed from consciousness and that has momentarily slipped past his ego's censors. Likewise, when a political candidate's wife appeared before a public gathering and said that she wished he could be there to "see all these beautiful white people," one can hardly imagine that it was her self-conscious intent to proclaim publicly her preference for the company of Caucasians.

Incidents of this kind are not uncommon, even if the miscues of only the powerful and famous are likely to come to the attention of the press. But because the unconscious also influences selective perceptions, whites are unlikely to hear many of the inadvertent racial slights issued daily in their presence.

Another manifestation of unconscious racism is akin to the slip of the tongue. One might call it a slip of the mind: While one says what one intends, one fails to grasp the racist implications of one's benignly motivated words or behavior. For example, in the

late 1950s and early 1960s, when integration and assimilation were unquestioned ideals among those who consciously rejected the ideology of racism, white liberals often expressed their acceptance of and friendship with blacks by telling them that they "did not think of them as Negroes." Their conscious intent was complimentary. The speaker was saying, "I think of you as normal human beings, just like me." But he was not conscious of the underlying implication of his words. What did this mean about most Negroes? Were they not normal human beings? If the white liberal were asked if this was his implication, he would doubtless have protested that his words were being misconstrued and that he intended only to state that he did not think of anyone in racial terms. But to say that one does not think of a Negro as a Negro is to say that one thinks of him as something else. The white liberal's unconscious thought, his slip of the mind, is "I think of you as different from other Negroes, as more like white people."

A crucial factor in the process that produces unconscious racism is the tacitly transmitted cultural stereotype. If an individual has never known a black doctor or lawyer or is exposed to blacks only through a mass media where they are portrayed in the stereotyped roles of comedian, criminal, musician, or athlete, he is likely to deduce that blacks as a group are naturally inclined toward certain behavior and unfit for certain roles. But the lesson is not explicit; it is learned, internalized, and used without an awareness of its source. Thus, an individual may select a white job applicant over an equally qualified black and honestly believe that this decision was based on observed intangibles unrelated to race. The employer perceives the white candidate as more articulate, more collegial, more thoughtful, or more charismatic. He is unaware of the learned stereotype that influenced his decision. Moreover, he has probably also learned an explicit lesson of which he is very much aware: Good, law-abiding people do not judge others on the basis of race. Even the most thorough investigation of conscious motive will not uncover the race-based stereotype that has influenced his decision.

This same process operates in the case of more far-reaching policy decisions that come to judicial attention because of their discriminatory impact. For example, when an employer or academic administrator discovers that a written examination rejects blacks at a disproportionate rate, she can draw several possible conclusions: that blacks are less qualified than others, that the test is an inaccurate measure of ability, or that the testers have chosen the wrong skills or attributes to measure. When decision makers reach the first conclusion, a predisposition to select those data that conform with a racial stereotype may well have influenced them. Because this stereotype has been tacitly transmitted and unconsciously learned, they will be unaware of its influence on their decision.

If the purpose of the law's search for racial animus or discriminatory intent is to identify a morally culpable perpetrator, the existing intent requirement fails to achieve that purpose. There will be no evidence of self-conscious racism when the actors have internalized the relatively new American cultural morality that holds racism wrong or have learned racist attitudes and beliefs through tacit rather than explicit lessons. The actor himself will be unaware that his actions, or the racially neutral feelings and ideas that accompany them, have racist origins.

I believe the law should be equally concerned when the mind's censor successfully disguises a socially repugnant impulse like racism if that motive produces behavior that has a discriminatory result as injurious as if it flowed from a consciously held motive.

NOTES

1. 426 U.S. 229 (1976).

2. Kenneth Karst, *The Costs of Motive-Centered Inquiry*, 15 San Diego L. Rev. 1163 (1978); see Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. Rev. 36 (1977).

3. See, e.g., Eisenberg, *supra* note 2, at 57.

4. "Immorality" and "criminality" are thought of in terms of blameworthiness and an evil intent or frame of mind. For the view that racism is also a "public health problem," see Chester Pierce, *Psychiatric Problems of Black Minority*, in 2 American Handbook of Psychiatry 512, 513 (G. Caplan ed., 2d ed. 1974).

5. When the intent requirement produces a finding of no constitutional injury, onlookers can easily generalize this finding to mean that no actual injury has occurred. Subsequently, when an institution introduces a race-conscious affirmative action program, the resentment of the white individual who is displaced increases because she has seen no injury that requires a cure. She perceives the race-conscious remedy as "reverse discrimination," favoring blacks who have been no more disadvantaged than she. See, e.g., Nathan Glazer, Affirmative Discrimination: Ethnic Inequality and Public Policy (1975).

6. Joel Kovel, White Racism: A Psychohistory 54–55 (1970). Kovel sees the decline of dominative racism and the ascent of aversive racism as products of the rationalization of the industrial state. He argues that the state has attacked dominative racism because it has become more threatening than useful as a regulator of culture. The industrial nation-state can no longer afford the disruption of dominative racism.

7. Roger Holmes, *Freud, Piaget and Democratic Leadership*, 16 Brit. J. Soc. 123, 135 (1965).

32. Images of the Outsider in American Law and Culture

Can Free Expression Remedy Systemic Social Ills?

RICHARD DELGADO AND JEAN STEFANCIC

Conventional First Amendment doctrine is beginning to show signs of strain. Outsider groups and women argue that free speech law inadequately protects them against certain types of harm.[1] Further, on a theoretical level, some scholars are questioning whether free expression can perform the lofty functions of community building and consensus formation that society assigns to it.[2]

We believe that in both situations the source of the difficulty is the same: failure to take account of the ways language and expression work. The results of this failure are more glaring in some areas than others. Much as Newtonian physics enabled us to explain the phenomena of daily life but required modification to address the larger scale, First Amendment theory will need revision to deal with issues lying at its farthest reaches. Just as the new physics ushered in considerations of perspective and positionality, First Amendment thinking will need to incorporate these notions as well.

Our thesis is that conventional First Amendment doctrine is most helpful in connection with small, clearly bounded disputes. Free speech and debate can help resolve controversies over whether a school disciplinary or local zoning policy is adequate, over whether a new sales tax is likely to increase or decrease net revenues, or over whether one candidate for political office is a better choice than another. Speech is less able, however, to deal with systemic social ills, such as racism or sexism, that are widespread and deeply woven into the fabric of society. Free speech, in short, is least helpful where we need it most.

We choose racism and racial depiction as our principal illustration. Several museums have featured displays of racial memorabilia from the past. One exhibit recently toured the United States; *Time* reviewed the opening of another. Filmmaker Marlon Riggs produced an award-winning one-hour documentary, *Ethnic Notions*, with a similar focus. Each of these collections depicts a shocking parade of Sambos, mammies, coons, uncles—bestial or happy-go-lucky, watermelon-eating—African Americans. They show advertising logos and household commodities in the shape of blacks with grotesquely

A version of this chapter previously appeared as Richard Delgado and Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 Cornell L. Rev. 1258 (1992). Originally published in the *Cornell Law Review*.

exaggerated facial features. They include minstrel shows and film clips depicting blacks as so incompetent, shuffling, and dim-witted that it is hard to see how they survived to adulthood. Other images depict primitive, terrifying, larger-than-life black men in threatening garb and postures, often with apparent designs on white women.

Seeing these haunting images today, one is tempted to ask how their authors—cartoonists, writers, filmmakers, and graphic designers (individuals, certainly, of higher-than-average education[3])—could create such appalling images. And why did no one protest? The collections mentioned focus on African Americans, but the two of us, motivated by curiosity, examined the history of ethnic depiction for each of the four main minority subgroups of color—Mexicans, African Americans, Asians, and Native Americans—in the United States. In each case we found the same sad story: Each group is depicted, in virtually every epoch, in terms that can only be described as demeaning or worse. In addition, we found striking parallels among the stigma pictures that society disseminated of the four groups. The stock characters may have different names and appear at different times, but they bear remarkable likenesses to each other and seem to serve similar purposes for the majority culture. We review this history in the first part of this chapter.

Our answer to the "How could they?" question is, in brief, that those who composed and disseminated these images simply did not see them as grotesque. Their consciences were clear—their blithe creations did not trouble them. It is only today, decades later, that these images strike us as indefensible and shocking. Our much-vaunted system of free expression, with its marketplace of ideas, cannot correct serious systemic ills such as racism or sexism simply because we do not see them as such at the time. No one can formulate an effective contemporaneous message to challenge the vicious depiction; this happens only much later, after consciousness shifts and society adopts a different narrative. Our own era is no different. This is the dominant, overpowering lesson we draw from reviewing two centuries of ethnic depiction.

We call the belief that we can somehow control our consciousness despite limitations of time and positionality the *empathic* fallacy. In literature, the *pathetic* fallacy holds that nature is like us, that it is endowed with feelings, moods, and goals we can understand. The poet, feeling sad, implores the world to weep with him or her. The *empathic* fallacy, its correlate, consists of believing that we can enlarge our sympathies through linguistic means alone: By exposing ourselves to ennobling narratives, we broaden our experience, deepen our empathy, and achieve new levels of sensitivity and fellow feeling—we can, in short, think, talk, read, and write our way out of bigotry and narrow-mindedness, out of our limitations of experience and perspective. As we illustrate, however, we can do this only to a very limited extent. Indeed, our system of free speech not only fails to correct the repression and abuse subjugated groups must face but often deepens their predicament.

Images of the Outsider

A small but excellent literature chronicles the depiction in popular culture of each of the major minority subgroups of color—African Americans, Mexicans, Native Americans, and Asians.

The depiction of ethnic groups of color is littered with negative images, although the content of those images changes over time. In some periods, society needed to

suppress a group, as with blacks during Reconstruction. Society coined an image to suit that purpose—that of primitive, powerful, larger-than-life blacks, terrifying and barely under control. At other times, for example, during slavery, society needed reassurance that blacks were docile, cheerful, and content with their lot. Images of sullen, rebellious blacks dissatisfied with their condition would have made white society uneasy. Accordingly, images of simple, happy blacks, content to do the master's work, were disseminated.

In every era, then, ethnic imagery comes bearing an enormous amount of social weight. Nevertheless, we sense that we are in control, that things need not be that way. We believe we can use speech, jujitsu fashion, on behalf of oppressed peoples.[4] We believe that speech can serve as a tool of destabilization. It is virtually a prime tenet of liberal jurisprudence that by talk, dialogue, exhortation, and so on, we present each other with passionate, appealing messages that will counter the evil ones of racism and sexism and thereby advance society to greater levels of fairness and humanity.[5]

Consider, for example, the current debate about campus speech codes. In response to a rising tide of racist incidents, many campuses have enacted, or are considering enacting, student conduct codes that forbid certain types of face-to-face insult. These codes invariably draw fire from free-speech absolutists and many campus administrators on the ground that they would interfere with free speech. Campuses, they argue, ought to be bastions of free speech. Racism and prejudice are matters of ignorance and fear, for which the appropriate remedy is more speech. Suppression merely drives racism underground, where it will fester and emerge later in even more hateful forms. Speech is the best corrective for error; regulation risks the specter of censorship and state control. Efforts to regulate pornography, Ku Klux Klan marches, and other types of race-baiting often meet similar responses.

But modernist and postmodern insights about language and the social construction of reality show that reliance on countervailing speech that will, in theory, wrestle with bad or vicious speech is often misplaced. This is so for two interrelated reasons: The account rests, first, on simplistic and erroneous notions of narrativity and change and, second, on a misunderstanding of the relation between the subject, or self, and new narratives.

The First Reason: Time Warp—Why We (Can) Only Condemn the Old Narrative

Our review of two hundred years of ethnic depiction in the United States showed that we simply do not see many forms of discrimination, bias, and prejudice as wrong at the time. The racism of other times and places does stand out, does strike us as glaringly and appallingly wrong. But this happens only decades or centuries later; we acquiesce in today's version with little realization that it is wrong, that a later generation will ask, "How could they?" about *us.* We condemn the racism of only another place (South Africa) or time. But that of our own place and time strikes us, if at all, as unexceptionable, trivial, or well within literary license. Every form of creative work (we tell ourselves) relies on stock characters. What's so wrong with a novel that employs a black who . . . , or a Mexican who . . . ? Besides, the argument goes, those groups are disproportionately employed as domestics, are responsible for a high proportion of our crime, are they not? And some actually talk this way; why, just last week, I overheard . . .

This time-warp aspect of racism makes speech an ineffective tool to counter it. Racism is woven into the warp and woof of the way we see and organize the world[6]—it is one of the many preconceptions we bring to experience and use to construct and make sense of our social world.[7] Racism forms part of the dominant narrative, the group of received understandings and basic principles that form the baseline from which we reason. How could these be in question? Recent scholarship shows that the dominant narrative changes very slowly and resists alteration.[8] We interpret new stories in light of the old. Ones that deviate too markedly from our preexisting stock are dismissed as extreme, coercive, political, and wrong. The only stories about race we are prepared to condemn, then, are the old ones giving voice to the racism of an earlier age, ones that society has already begun to reject. We can condemn Justice Brown for writing as he did in *Plessy v. Ferguson* but not university administrators who refuse remedies for campus racism, failing to notice the remarkable parallels between the two.[9]

The Second Reason: Our Narratives, Our Selves

Racial change is slow, then, because the story of race is part of the dominant narrative we use to interpret experience. The narrative teaches that race matters, that people are different, with the differences lying always in a predictable direction.[10] It holds that certain cultures, unfortunately, have less ambition than others, that the majority group is largely innocent of racial wrongdoing, and that the current distribution of comfort and well-being is roughly what merit and fairness dictate. Within that general framework, only certain matters are open for discussion: How different? In what ways? With how many exceptions? And what measures are due to deal with this unfortunate situation and at what cost to whites?[11] This is so because the narrative leaves only certain things intelligible; other arguments and texts would seem alien.

A second and related insight from modern scholarship focuses not on the role of narratives in confining change to manageable proportions but on the relationship between our selves and those narratives. The reigning First Amendment metaphor—the marketplace of ideas—implies a separation between subjects who do the choosing and the ideas or messages that vie for their attention.[12] Subjects are "in here," the messages "out there." The preexisting subjects choose the idea that seems most valid and true—somewhat in the manner of a diner deciding what to eat at a buffet.

But scholars are beginning to realize that this mechanistic view of an autonomous subject choosing among separate, external ideas is simplistic. In an important sense, we *are* our current stock of narratives, and they us. We subscribe to a stock of explanatory scripts, plots, narratives, and understandings that enable us to make sense of—to construct—our social world. Because we live in that world, it begins to shape and determine *us*: who we are, what we see, and how we select, reject, interpret, and order subsequent reality.[13]

These observations imply that our ability to escape the confines of our own preconceptions is quite limited. The contrary belief—that through speech and remonstrance alone we can endlessly reform ourselves and each other—we call the *empathic fallacy.* It and its companion, the pathetic fallacy, are both based on *hubris*, the belief that we can be more than we are. The empathic fallacy holds that through speech and remonstrance we can surmount our limitations of time, place, and culture, can transcend our

own situatedness. But our examination of the cultural record and postmodern understandings of language and personhood both point to the same conclusion: The notion of ideas competing with each other, with truth and goodness emerging victorious from the competition, has proven seriously deficient when applied to evils, like racism, that are deeply inscribed in the culture. We have constructed the social world so that racism seems normal, part of the status quo, in need of little correction. It is not until much later that what we believed begins to seem incredibly, monstrously wrong. How could we have believed *that*?

True, every few decades an occasional genius will rise up and offer a work that recognizes and denounces the racism of the day. Unfortunately, they are ignored—they have no audience. Witness, for example, the recent "discovery" of long-forgotten black writers such as Charles Chesnutt or Zora Neale Hurston, or the slave narratives. Consider that Nadine Gordimer won the Nobel Prize after nearly forty years of writing about the evils of apartheid; Harriet Beecher Stowe's book sold well but only after years of abolitionist sentiment and agitation had sensitized her public to the possibility that slavery was wrong. One should, of course, speak out against social evils. But we should not accord speech greater efficacy than it has.

How the System of Free Expression Sometimes Makes Matters Worse

Speech and free expression are not only poorly adapted to remedy racism but often make matters worse; far from being stalwart friends, they can impede the cause of racial reform. First, they encourage writers, filmmakers, and other creative people to feel amoral, nonresponsible in what they do. Because there is a marketplace of ideas, the rationalization goes, another filmmaker is free to make an antiracist movie that will cancel out any minor stereotyping in the one I am making. My movie may have other redeeming qualities; besides, it is good entertainment and everyone in the industry uses stock characters like the black maid or the bumbling Asian tourist. How can one create film without stock characters?

Second, when insurgent groups attempt to use speech as an instrument of reform, courts almost invariably construe First Amendment doctrine against them. As Charles Lawrence pointed out, civil rights activists in the 1960s made the greatest strides when they acted in defiance of the First Amendment as then understood.[14] They marched, were arrested and convicted; sat in, were arrested and convicted; distributed leaflets, were arrested and convicted. Many years later, after much gallant lawyering and the expenditure of untold hours of effort, the conviction might be reversed on appeal if the original action had been sufficiently prayerful, mannerly, and not too interlaced with an action component. This history of the civil rights movement does not bear out the usual assumption that the First Amendment is of great value for racial reformers.[15]

Current First Amendment law is similarly skewed. Examination of the many exceptions to First Amendment protection discloses that the large majority favor the interests of the powerful. If one says something disparaging of a wealthy and well-regarded individual, one discovers that one's words were not free after all; the wealthy individual has a type of property interest in his or her community image, damage to which is compensable even though words were the sole instrument of the harm. Similarly, if one infringes the copyright or trademark of a well-known writer or industrialist, again it turns out

that one's action is punishable. Further, if one disseminates an official secret valuable to a powerful branch of the military or a defense contractor, that speech is punishable. If one speaks disrespectfully to a judge, police officer, teacher, military official, or other powerful authority figure, again one discovers that one's words were not free; this is also the case with words used to defraud, form a conspiracy, or breach the peace or untruthful words given under oath during a civil or criminal proceeding.

Yet the suggestion that we create new exception to protect lowly and vulnerable members of our society, such as isolated young black undergraduates attending dominantly white campuses, is often met with consternation: The First Amendment must be a seamless web; minorities, if they knew their own self-interest, should appreciate this even more than others.[16] This one-sidedness of free-speech doctrine makes the First Amendment much more valuable to the majority than to the minority.

The system of free expression also has a powerful after-the-fact apologetic function. Elite groups use the supposed existence of a marketplace of ideas to justify their own superior position.[17] Imagine a society in which all As were rich and happy, all Bs were moderately comfortable, and all Cs were poor, stigmatized, and reviled. Imagine also that this society scrupulously believes in a free marketplace of ideas. Might not the As benefit greatly from such a system? On looking about them and observing the inequality in the distribution of wealth, longevity, happiness, and safety between themselves and the others, they might feel guilt. Perhaps their own superior position is undeserved or at least requires explanation. But the existence of an ostensibly free marketplace of ideas renders that effort unnecessary. Rationalization is easy: Our ideas, our culture competed with their more easygoing ones and won. It was a fair fight. Our position must be deserved; the distribution of social goods must be roughly what fairness, merit, and equity call for. It is up to them to change, not us.

A free market of racial depiction resists change for two final reasons. First, the dominant pictures, images, narratives, plots, roles, and stories ascribed to, and constituting, the public perception of minorities are always dominantly negative. Through an unfortunate psychological mechanism, incessant bombardment by negative images inscribes those images on the souls and minds of minority persons. Minorities internalize the stories they read, see, and hear every day. Persons of color can easily become demoralized, blame themselves, and not speak up vigorously. The expense of speech also precludes the stigmatized from participating effectively in the marketplace of ideas.[18] They are often poor—indeed, one theory of racism holds that maintenance of economic inequality is its prime function[19]—and hence unlikely to command the means to bring countervailing messages to the eyes and ears of others.

Second, even when minorities do speak they have little credibility. Who would listen to, who would credit, a speaker or writer one associates with watermelon eating, buffoonery, menial work, intellectual inadequacy, laziness, and lasciviousness and who is demanding resources beyond his or her deserved share?

Our very imagery of outsiders shows that, contrary to the usual view, society does not really want them to speak out effectively in their own behalf and, in fact, cannot visualize them doing so. Ask yourself: How do outsiders speak in the dominant narratives? Poorly, inarticulately, with broken syntax, short sentences, grunts, and unsophisticated ideas. Try to recall a single popular narrative of an eloquent, self-assured black,

for example, orator or speaker. In the real world, of course, they exist in profusion. But when we stumble upon them, we are surprised: "What a welcome 'exception'!"

Words, then, can wound. But the fine thing about the current situation is that one gets to enjoy a superior position and feel virtuous at the same time. By supporting the system of free expression no matter what the cost, one is upholding principle. One can belong to impeccably liberal organizations and believe one is doing the right thing even while taking actions that are demonstrably injurious to the least privileged, most defenseless segments of our society.[20] In time, one's actions will seem wrong and will be condemned as such, but paradigms change slowly. The world one helps to create—one in which denigrating depiction is good or at least acceptable, in which minorities are buffoons, clowns, maids, or Willie Hortons and only rarely fully individuated human beings with sensitivities, talents, personalities, and frailties—will survive into the future. One gets to create culture at outsiders' expense. And one gets to sleep well at night, too.

Racism is not a mistake, not a matter of episodic, irrational behavior carried out by vicious-willed individuals, not a throwback to a long-gone era. It is ritual assertion of supremacy, like animals sneering and posturing to maintain their places in the hierarchy of the colony. It is performed largely unconsciously, just as the animals' behavior is. Racism seems right, customary, and inoffensive to those engaged in it, while bringing psychic and pecuniary advantages. The notion that more speech, more talking, more preaching, or more lecturing can counter this system of oppression is appealing, lofty, romantic—and wrong.

What, Then, Should Be Done? If Not Speech, What?

What can be done? One possibility we must take seriously is that *nothing* can be done—that race- and perhaps sex-based subjugation are so deeply embedded in our society, so useful for the powerful, that nothing can dislodge it. No less gallant a warrior than Derrick Bell has expounded his view of racial realism: Things will never get better; powerful forces maintain the current system of white-over-black supremacy. Just as the legal realists urged society to cast aside comforting myths about the uniformity, predictability, and scientific nature of legal reasoning, legal scholars must do something similar today with respect to race. Reformers must labor for what they believe right with no certainty that their programs will ever prove successful. Holding out the hope that reform will one day bear fruit is unnecessary, unwise, and calculated to induce only despair, burnout, and paralysis.

We agree with much of what Bell says. Yet we offer four suggestions for a program of racial reform growing out of our research and analysis. We do this while underscoring the limitations of our own prescriptions, including the near impossibility of getting a society to take seriously something whose urgency it seems constitutionally unable to appreciate. First, society should act decisively in cases of racism that we do see, treating them as proxies for the ones we know remain unseen. Second, past mistreatment will generally prove a more reliable basis for remedial action (such as affirmative action or reparations) than future- or present-oriented considerations; the racism of the past is the only kind that we recognize, the only kind we condemn. Third, whenever possible

we should employ and empower minority speakers of color and expose ourselves to their messages. Their reality, while not infallible and certainly not the only one, is the one we must heed if we wish to avoid history's judgment. It is likely to be the one society will adopt in thirty years. Scholars should approach with skepticism the writings of those neoconservatives, including some of color, who make a practice of telling society that racism is ended.[21] In the sense we have described, there *is* an "essential" unitary minority viewpoint;[22] the others are wrong.[23]

Finally, we should deepen suspicion of remedies for deep-seated social evils that rely on speech and exhortation. The First Amendment is an instrument of variable efficacy, more useful in some settings than others. Overextending it provokes the anger of oppressed groups and casts doubt on speech's value in settings where it is, in fact, useful. With deeply inscribed cultural practices that most can neither see as evil nor mobilize to reform, we should forthrightly institute changes in the structure of society that will enable persons of color—particularly the young—to avoid the worst assaults of racism. As with the controversy over campus racism, we should not let a spurious motto that speech be "everywhere free" stand in the way of outlawing speech that is demonstrably harmful, that is compounding the problem.

Because of the way the dominant narrative works, we should prepare for the near certainty that these suggestions will be criticized as unprincipled, unfair to innocent whites, and wrong. Understanding how the dialectic works, and how the scripts and counterscripts work their dismal paralysis, may perhaps inspire us to continue even though the path is long and the night dark.

NOTES

1. See, e.g., Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 Harv. CR.-CL. L. Rev. 133 (1982); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431; Catharine A. MacKinnon, *Not a Moral Issue*, 2 Yale L. & Pol'y Rev. 321 (1984); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989).

2. See, e.g., Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 Yale L.J. 1609 (1988); Richard Delgado, *Zero-Based Racial Politics and an Infinity-Based Response: Will Endless Talking Cure America's Racial Ills?*, 80 Geo. L.J. 1879 (1992); Robert Justine Lipkin, *Kibitzers, Fuzzies, and Apes Without Tails: Pragmatism and the Art of Conversation in Legal Theory*, 66 Tul. L. Rev. 69 (1991).

3. Cf. Robert Jay Lifton, The Nazi Doctors (1986) (pointing out that German administrators and physicians who carried out atrocities were highly educated); 1–3 Elie Wiesel, Against Silence (1985) (same).

4. For the view that speech may serve this counterhegemonic function, see Stephen M. Feldman, *Whose Common Good? Racism in the Political Community*, 80 Geo. L.J. 1835 (1992); Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 Stan. L. Rev. 509 (1984).

5. For classic works on dialogism or the Republican revival, see Robert M. Cover, *Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983); Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4 (1986); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689 (1984).

6. Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (1987) (noting that racism is ubiquitous and discouragingly difficult to eradicate).

7. See Symposium, *Legal Storytelling*, 87 Mich. L. Rev. 2073 (1989) (including articles by Milner Ball, Derrick Bell, Richard Delgado, Mari Matsuda, and Patricia Williams on race and narrative).

8. See generally Bell, *supra* note 6 (arguing that racial progress is slow and majority society is rarely receptive to pleas for justice). For another view of the prospects for reform, see Richard Delgado, *Derrick Bell and the Ideology of Law Reform: Will We Ever Be Saved?*, 97 Yale L.J. 923 (1988) (reform is slow because (1) mind-sets of whites and blacks are radically different and (2) majoritarian positions are firmly rooted in white self-interest).

9. In *Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896), the Court failed to see any difference between requiring blacks to sit in a separate railroad car and a similar imposition on whites. For Brown, if blacks found that requirement demeaning, it was only because they chose to put that construction on it; the cars were equal, and the races had similar accommodations. See also Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959) (making similar criticism of *Brown v. Board of Education*: whites forced to associate with blacks were mistreated just as seriously as blacks denied the right to associate with whites—both were denied freedom of action).

In the campus-speech controversy, some argue that the right of a racist to hurl an ethnic insult must be balanced against the right of a person of color not to receive it. Who is to say which right (to speak or not to be spoken to) is superior? Denying one right strengthens the other but only at the expense of the first.

10. For a discussion of the hold that racism exercises on our psyches, see Charles A. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987) (Chapter 31 is a version of this article).

11. On the view that the cost of racial remedies is always placed on blacks or low-income whites, see Derrick Bell, Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 Calif. L. Rev. 3 (1979).

12. On the reigning marketplace conception of free speech, see Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Alexander Meik-Lejohn, Free Speech and Its Relation to Self-Government (1948); John Milton, Areopagitica (Michael Davis ed., 1965) (classic early statement). See also Stanley Ingber, *The Marketplace of Ideas: A Legitimating Myth*, 1984 Duke L.J. 1 ("market" shown to favor entrenched structure and ideology).

13. See Milner Ball, Lying Down Together: Law, Metaphor, and Theology 135 (1985); 1–2 Paul Ricoeur, Time and Narrative (1984–1985). For modernist and postmodern expositions of this view, see, e.g., Peter L. Berger & Thomas Luckman, Social Construction of Reality (1967); Nelson Goodman, Ways of Worldmaking (1978).

14. Lawrence, *supra* note 1, at 466–67 (pointing out that courts construed First Amendment law narrowly, so as to uphold convictions of peaceful civil rights protestors; citing cases).

15. *Id.*

16. See Lee C. Bollinger, The Tolerant Society (1986) (racist speech must be protected—part of the price "we" pay for living in a free society).

17. On "triumphalism"—the view that conquerors always construct history so that they appear to have won fairly through superior thought and culture rather than by force of arms—see Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. Pa. L. Rev. 933 (1991); Martin, *College Curriculum Scrutinized in "Politically Correct" Spotlight*, Denver Post, Jan. 25, 1992. For the view that many Enlightenment figures were genteel or not-so-genteel cultural supremacists, see Bell, *supra* note 6, at 26–51 (pointing out that the Constitution's framers calculatedly sold out the interests of African Americans in establishing a union of free propertied white males).

18. See Buckley v. Valeo, 424 U.S. 1, 17–19 (1976).

19. This economic determinist view is associated with Derrick Bell and earlier with Charles Beard.

20. The American Civil Liberties Union (ACLU), for example, follows a policy of challenging virtually every campus speech code as soon as it is enacted. See, e.g., Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989); U.W.M. Post, Inc. v. Regents, Univ. of Wis., 774 F. Supp. 1163 (E.D. Wis. 1991); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 Duke L.J. 484 (author was the ACLU national president).

21. E.g., Richard Rodriguez, Hunger of Memory (1982); see also Stephen Carter, Reflections of an Affirmative Action Baby (1991) (reciting less extreme statement of same position); Thomas

Sowell, Civil Rights: Rhetoric or Reality? (1984); Shelby Steele, The Content of Our Character: A New Vision of Race in America (1990).

22. Essential, that is, to our own salvation.

23. On the debate about essentialism and whether the minority community contains one or many voices, see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581 (1990) (also Chapter 34, this volume).

33. Race and the U.S.-Mexican Border

Tracing the Trajectories of Conquest

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> Since we are about to admit this Territory [New Mexico] as a state of the Union, the disposition of its citizens to retain their racial solidity, and in doing so to continue the teaching of their tongue, must be broken up.
> **—Senate Committee on Territorial Affairs, Report No. 61-454**

The conquest of Mexico between 1846 and 1848 has largely disappeared from public consciousness as a significant historical event with contemporary consequences. Yet this conquest resulted in the annexation by the United States of approximately half of former Mexico, constituting most of the current southwestern United States. Let us consider the roles that race and racism played in justifying the conquest and some of the current consequences of the conquest.

One of the defining features of any conquest is the subordination of the conquered. The history of the conquered Mexicans of the Southwest demonstrates this purposeful subordination. Through careful redrafting of the Treaty of Guadalupe Hidalgo, the U.S. Congress reserved to itself discretion over when to admit the conquered territories as states. Congress waited until Mexicans were politically disempowered racial minorities within each territory before admitting the conquered territories as states with political representation. This happened earliest in the cases of Texas (annexed in 1845) and California, and latest in New Mexico, which was denied statehood until 1912.

The minimization of the political power of Mexicans as Mexicans emerges, then, as a prominent feature of the conquest and applies to all Latino peoples subject to U.S. conquest and continues today, in at least three broad areas. First, nearly four million U.S. citizens resident in Puerto Rico live without voting rights or political representation in the federal government yet are subject to federal law, violating democratic theory. Second, the intentional, long-term exploitation of undocumented Latino immigrant labor maximizes agricultural profits while minimizing the potential political power of the immigrants. Last, attempts to curtail the use of Spanish through official English laws and other restrictions symbolize the subordination of Spanish speakers and result in less access to and use of the democratic process.

A version of this chapter previously appeared as Juan F. Perea, *A Brief History of Race and the U.S.-Mexican Border: Tracing the Trajectories of Conquest*, 51 UCLA L. Rev. 283 (2003). Originally published in the *UCLA Law Review*.

These are some of the "trajectories of conquest." The study of this history helps explain why Latino political power always seems less significant than population numbers and demographic projections suggest it should be.

Introduction

According to a Senate committee report from 1910, the cohesion of Mexican, Spanish-speaking U.S. citizens of the New Mexican territory and their ability to retain and pass on their Spanish language, must "be broken up."[1] Why was the Senate so concerned about the race and language of Mexican Americans? Why did admission to statehood mean breaking Mexican American identity? And what identity would replace the former Mexican identity of the territory?

Tentative answers to these questions appear from a study of the history of the border. Race shaped the creation of the border with Mexico in highly significant ways. Southern desire for the expansion of slave territory was crucial to the annexation of Texas and the subsequent disposition of the conquered territories. Racism played an important role in justifying the war against Mexico and in limiting the political power of Mexicans within the United States. White supremacy was a central component of the ideology of Manifest Destiny, which justified the conquest of Mexico as a divine Anglo-Saxon racial right. The mixed races of Mexicans posed an affront to Anglo ideals of racial purity. Some white politicians believed they posed a grave threat to democracy itself. Ultimately, these racial factors played a decisive role in determining the amount and location of Mexican territory that the United States would keep as the spoils of war.

Consider an action inextricably tied to conquest: the denial of political power to conquered people. It may seem obvious that this denial inheres in conquest. After all, conquered people rarely have a say in matters of their own conquest. It is less obvious how, in a democracy, the denial of political power is reproduced in subsequent generations. The sociologist Robert Blauner described three conditions associated with colonized minorities in the United States:

> The first condition . . . is that of forced entry into the larger society or metropolitan domain. The second is subjection to various forms of unfree labor that greatly restrict the physical and social mobility of the group and its participation in the political arena. The third is a cultural policy of the colonizer that constrains, transforms, or destroys original values, orientations, and ways of life.[2]

Blauner's three conditions form a useful framework within which to consider the conquest and subsequent subordination of Mexican and Mexican American people in the United States. They also help explain the current legacies of this conquest affecting many Latinos as well as Mexicans.

Territorial Expansion

The manifestation of expansionist desires for Mexican lands began early. Acting through important national figures, the United States persistently sought to obtain Mexican territory. In 1767, even before U.S. nationhood, Benjamin Franklin apparently expressed

desire for Mexican lands.[3] After the Louisiana Purchase, Thomas Jefferson sought, unsuccessfully, to claim the Rio Grande as the southern boundary of Louisiana. In 1826, President John Quincy Adams offered $1 million for Texas, then a northern province of Mexico. Mexico rejected the offer. Subsequently, President Andrew Jackson, an early advocate of Texas's annexation, attempted to purchase Texas for as much as $5 million.

When Texas won its independence in 1835, Mexico protested vigorously and repeatedly the United States' ambitions to annex the region and incorporate it as a state. Also in 1835, President Andrew Jackson offered to buy San Francisco Bay from Mexico. In 1845, President James K. Polk sent an emissary to try to persuade Californians to follow Texas's example and to secede from Mexico. Polk also sent his representative, John Slidell, to Mexico City in an attempt to purchase California and New Mexico for between $15 and $40 million. Mexico refused to sell its territory or even to deal with Slidell.

What could not be had by purchase was taken by force. Polk sent a military force into an area understood to be Mexican, the border area between the Nueces and Rio Grande Rivers, to provoke hostilities. Shortly thereafter, Polk got what he wanted when Mexican soldiers attacked and killed American troops in the border area under Mexican sovereignty. Declaring that "Mexico has passed the boundary of the United States, has invaded our territory and shed American blood upon the American soil," Polk promptly requested from Congress an unusual resolution recognizing that a state of war already existed "by the act of the Republic of Mexico."[4] Debate on this resolution was severely limited, with dissenting voices given little chance to be heard. Ironically, and revealingly, Polk and his cabinet had agreed to ask Congress to declare war against Mexico before news of the bloodshed reached Washington. Most contemporary historians agree that President Polk provoked the United States' war against Mexico as a pretext for accomplishing his expansionist purposes.[5]

Race and the War Against Mexico

Slavery and the Southern wish for expansion of the number of slave states played a prominent role in the annexation of Texas, the first seizure of Mexican territory by the U.S. government. Anglo-Americans first began arriving in Mexico's northernmost provinces in the early 1820s. They were, perhaps, some of the first illegal aliens. In 1821, before Mexican independence, Spanish authorities allowed American Moses Austin to establish a colony within Texas. Moses Austin was later succeeded by his son, Stephen, who, along with other early settlers, brought his slaves with him.

Mexico's declaration of independence from Spain in 1821 cast doubt on the future of slavery in Texas. Because of the sparse population of its northern provinces, the Mexican government had passed legislation encouraging and legalizing the migration of white North Americans into Texas. Although Mexican leaders generally disapproved of slavery and sought to limit slave trading in Texas, they never did anything to effectively abolish it. Furthermore, Mexican laws restricting slavery went unenforced, and American slave owners found ways to evade them. When Mexicans became concerned about the expansionist desires of Americans and their disrespect for Mexican law and traditions, they passed additional legislation seeking to forbid further immigration by Americans. Yet this too proved ineffective because Americans ignored the laws and continued immigrating illegally into Mexico.

Over time, Mexico's prohibition against slavery became a major irritant between the Mexican government and American immigrants. Many Americans immigrating into Texas were slave-owning Southerners whose slave ownership was illegal under Mexican law. Slave owners attempted to circumvent the law by "freeing" their slaves while simultaneously forcing them to become indentured servants for life. Accustomed to U.S. protections for slave ownership, Americans viewed the abolition of slavery as a deprivation of their individual liberties and of their private property. Although at times critical of slavery, Stephen Austin was a forceful advocate of it in Texas and "more than any other individual, was responsible for gaining the approval of Mexican authorities for introducing [slavery] there."[6]

When Anglo-Americans together with Mexican Tejanos fought a war of independence from Mexico in 1835, Stephen Austin described it in racial terms: "A war of extermination is raging in Texas—a war of barbarism and of despotic principles, waged by the mongrel Spanish-Indian and negro race, against civilization and the Anglo-American race." The famous battle of the Alamo was part of the Texas war for independence and typically characterized by North American whites as a battle for freedom. This interpretation is deeply ironic. Whites who were fighting for Texas independence were also fighting for the freedom to own slaves, which was prohibited under Mexican law.

Texas's first constitution after gaining independence from Mexico explicitly protected the right to own slaves. When, a few years later, the territory gained U.S. statehood, it entered as a slave state.

John Quincy Adams understood the efforts to annex Texas as "designed primarily for the extension of the area of slavery and the magnification of the power of the slaveocracy in the councils of the nation."[7] The antislavery North saw the annexation of Texas as a national disaster. The expansion of slavery had led to the annexation of formerly Mexican territory and thereby set a precedent that would facilitate the subsequent war of conquest against Mexico.

White Racism Against Mexicans as a Rationale for the War of Conquest

The United States sought Mexican lands for a long time. In addition to slavery's role in the United States' desire for Texas, race played a second role in the creation of the border. The racism of white Americans created the rationale to justify the seizure of the lands from allegedly inferior Mexicans. Mexicans were perceived by white Americans as a mixed-race, mongrel people distinctly inferior to the presumed racially pure whites. According to the historian David Weber, "American visitors to the Mexican frontier were nearly unanimous in commenting on the dark skin of Mexican mestizos, who, it was generally agreed, had inherited the worst qualities of Spaniards and Indians to produce a 'race' still more despicable than that of either parent."[8] As Rufus Sage, a newspaperman and Rocky Mountain trapper, put it:

> There are no people on the continent of America, whether civilized or uncivilized, with one or two exceptions, more miserable in condition or despicable in morals than the mongrel race inhabiting New Mexico. . . .

> To manage them successfully, they must needs be held in continual restraint, and kept in their place by force, if necessary,—else they will become haughty and insolent.
>
> As servants, they are excellent, when properly trained, but are worse than useless if left to themselves.[9]

Perceived as some incomprehensible mixture of black, Indian, and Spanish races, Mexicans, by their very existence, violated white American taboos against racial mixing. The presumed racial inferiority of Mexican people fed the ideology of Manifest Destiny, which asserted that it was the destiny of white Anglo-Saxons to occupy the entire continent without regard for the presence of presumed inferior races.[10]

Race and the Drawing of the Border

In addition to shaping the decision to conquer Mexico, race influenced the amount of formerly Mexican territory that the United States decided to retain. By the end of the war, the United States occupied much of Mexico, both its northern provinces, which had long been sought by American expansionists, and many interior provinces, including Mexico City. Even under military occupation by the United States, Mexico refused to negotiate the cession of its territory. President Polk thus considered the possibility of conquering and annexing all of the country. But adding Mexican lands to the United States meant adding racially undesirable Mexicans to the population. The prospect of bringing mixed-race Mexicans into the Anglo-Saxon republic of the United States ignited fears of the degradation of white supremacy as well as the loss of American democracy. Senator John Calhoun, a prominent southern Democrat, opposed annexation because of these racial implications:

> [I]t is without example or precedent, either to hold Mexico as a province, or to incorporate her into our Union. No example of such a line of policy can be found. We have conquered many of the neighboring tribes of Indians, but we have never thought of holding them in subjection—never of incorporating them into our Union. They have either been left as an independent people amongst us, or been driven into the forests.
>
> I know further, sir, that we have never dreamt of incorporating into our Union any but the Caucasian race—the free white race. To incorporate Mexico, would be the very first instance of the kind of incorporating an Indian race; for more than half the Mexicans are Indians, and the other is composed chiefly of mixed tribes. I protest against such a union as that! Ours, sir, is the Government of a white race. The greatest misfortunes of Spanish America are to be traced to the fatal error of placing these colored races on an equality with the white race. That error destroyed the social arrangement which formed the basis of society. . . . And yet it is professed and talked about to erect these Mexicans into a Territorial Government and place them on an equality with the people of the United States. I protest utterly against such a project.
>
> Are we to associate with ourselves as equal, companions, and fellow citizens, the Indians and mixed race of Mexico? Sir, I should consider such a thing as fatal to our institutions.[11]

Calhoun could countenance retaining only those Mexican lands that contained no Mexicans:

> [O]ur army has ever since held all that it is desirable to hold—that portion whose population is sparse, and on that account the more desirable to be held. For I hold it in reference to this war a fundamental principle, that when we receive territorial indemnity, it shall be unoccupied territory.[12]

The final boundary lines approved in the Treaty of Guadalupe Hidalgo required Mexico to cede to the United States only its northernmost, sparsely populated provinces of New Mexico and California. These provinces constituted roughly one-third of Mexico. Including the formerly annexed Texas, Mexico lost the northernmost half of its territory as a result of U.S. aggression. President Polk had desired all of Mexico. Ultimately, however, he went along with the limited territorial annexation. In his diary, Polk expressed concern about taking land populated by many Mexicans: "I expressed a doubt as to the policy or practicability of obtaining a country containing so large a number of the Mexican population."[13] The racial concerns of Senator Calhoun and others were thus assuaged and the press congratulated Polk for acquiring land "encumbered by only 100,000 Mexicans."[14]

Race and the Treaty of Guadalupe Hidalgo

The white politicians who modified and ratified the Treaty of Guadalupe Hidalgo were concerned about the threat of Mexican participation in the U.S. democratic process. Accordingly, they modified certain provisions of the draft treaty to minimize that participation.

Under Article VIII Mexicans in the conquered territories had the right to remain in the United States and become citizens. But the form of citizenship granted to the Mexicans remaining in the conquered territories was just the federal version and was much less significant than might appear at first glance. All-important state citizenship—the source of political representation and potential voting rights—was not conferred by the treaty's provisions.

Moreover, Article IX of the treaty delayed the incorporation of the territories as full states. Under the original draft language of Article IX, the conquered Mexican territories, and Mexicans still residing within the territories,

> shall be incorporated into the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights of citizens of the United States. In the meantime, they shall be maintained and protected in the enjoyment of their liberty, their property, and the civil rights now vested in them according to the Mexican laws.

This draft language, based on the Treaty for the Cession of Louisiana, promised admission of those territories to full statehood "as soon as possible." However, the Senate amended this language so that the final ratified version of Article IX read:

> The Mexicans . . . shall be incorporated into the Union of the United States and be admitted, at the proper time (to be judged of by the Congress of the United

States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution.[15]

Rather than admit Mexicans into the Union "as soon as possible," the Senate made their admission discretionary, "at the proper time," in Congress's judgment. The original language of the draft treaty raised the "horrifying" prospect of Mexicans enjoying citizenship on an equal basis with whites "as soon as possible." The revised and final language, however, gave Congress discretion to admit states containing Mexicans whenever Congress deemed it "proper."

The revised treaty language proved sufficient for Senate ratification. Even Senator Calhoun, who earlier had protested loudly regarding the Mexican threat to white rule in the United States, supported the revised treaty. Public concern over the possibility of legal equality between whites and Mexicans was also allayed by the final treaty language.

It was race, in turn, that became a principal determinant of the "proper time" for admission. Congress deemed the admission of former Mexican territories "proper" only when the immigration of whites to the territories created a majority white population. Accordingly, Mexicans would never attain political influence as Mexicans but only as minority members of predominantly white-populated states. Because New Mexico was populated by a majority of Spanish-speaking Mexicans and Mexican Americans, Congress used its discretion under the revised Article IX to deny it statehood for sixty-two years. Except for Puerto Rico, this is the longest period in which a U.S. territory remained unincorporated.

Race and Statehood

The important role of race in the exercise of congressional discretion to grant or withhold statehood is apparent in examining Congress's decisions to approve or deny statehood to the territories taken from Mexico. The speedy annexation of Texas in 1845 was allegedly accomplished to protect white settlers from the threat posed by Mexico.

While Texas and California gained statehood promptly because of white political control in each of the states, New Mexico languished for sixty-two years as a federal territory. Among the principal reasons for denying statehood to New Mexico were that racially mixed, dark-skinned Mexicans lived there and that they spoke Spanish.[16] New Mexicans submitted several formal petitions for statehood. In 1850, New Mexicans held a constitutional convention and drafted a constitution with strong antislavery provisions. The 1850 state constitution enjoyed overwhelming popular support, suggesting strong popular desire for statehood. Because the admission of new slave or free states would alter the balance of power in Congress, debates over new states at this time focused on the issue of whether slavery would be permitted in the state or territory. Under the Compromise of 1850, California won admission as a free state, but New Mexico was recognized only as a federal territory. Its status with respect to slavery was to be decided at a later time.

It appears that New Mexico did not become a state until a bare majority of its population was English speaking, which apparently first occurred in 1910. Around this time, congressional concerns over the use of Spanish in the territory were expressed in the New Mexico Enabling Act of 1910. This act required that public education "shall always be conducted in English" and that the "ability to read, write, speak and understand the

English language without an interpreter shall be a necessary qualification for all state officers and members of the state legislature." Discussing the perceived necessity for these language-restrictive provisions, Albert Beveridge wrote that "since we are about to admit this Territory [New Mexico] as a state of the Union, the disposition of its citizens to retain their racial solidity, and in doing so to continue the teaching of their tongue, must be broken up."[17] Beveridge's words echo the racial concern that led to the discretionary and delaying language of the Treaty of Guadalupe Hidalgo. These words also suggest a powerful view of statehood as a kind of ultimate Americanization, requiring the obliteration of racial and linguistic differences from Anglo norms.

The Colonial Status of Puerto Rico

> The first condition . . . is that of forced entry into the larger society or metropolitan domain.
>
> —**Robert Blauner,** ***Racial Oppression in America***

The current status of Puerto Rico as an unincorporated territory is closely related to the precedent of the racialized allocation of political power reflected in the Treaty of Guadalupe Hidalgo. As mentioned, Congress revised Article IX of the treaty to guarantee that body the discretion to incorporate the conquered Mexican territories at "the proper time." In the 1898 Treaty of Paris, which settled the Spanish-American War and transferred dominion over Puerto Rico to the United States from Spain, Congress followed and extended the precedent set in its treaty with Mexico. Consequently, Congress reserved for itself complete control over the political and civil rights of Puerto Ricans. According to Article IX of the Treaty of Paris, "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."[18] This was the first time that a territory had been acquired by treaty with neither an implicit nor an explicit promise of admission to statehood.

Subsequently, in the *Insular Cases* and *Balzac v. Porto Rico*, the U.S. Supreme Court relied on the language of the Treaty of Paris to confirm Congress's dominion over Puerto Rico. In these cases, the Court held that, on the basis of Article IX, Puerto Ricans were not entitled to constitutional protection but only to such rights as Congress chose to grant them. In addition, the Court described Puerto Rico's constitutional status as an "unincorporated territory." In part, the Court's reasoning was based on concerns about the race and inferior culture of Puerto Ricans.

Such racial concerns were also prominent in subsequent debates over the Jones Act, which granted statutory U.S. citizenship to Puerto Ricans. As in the case of Mexicans, serious objections were raised about the fitness of mixed-race, part-African Puerto Ricans for citizenship. In addition, congressmen were concerned about the capacity for self-governance of people from tropical climates, the assumption being that democracy was only for white people raised in cold, Nordic climes. Indeed, statutory citizenship for Puerto Ricans was a way of showing that they were under U.S. control rather than for purposes of inclusion.

Like the Treaty of Guadalupe Hidalgo, the Treaty of Paris aimed to minimize the political participation of Puerto Ricans. To this day, Puerto Ricans remain essentially powerless in U.S. politics. Because Puerto Rico is not a state, it has no voting representation

in Congress. Approximately 3.8 million U.S. citizens who reside on the island are ineligible to vote for the president and the vice president of the United States. Yet despite their lack of representation in the formulation of federal law, they are subject to all the federal executive and legislative power that is not locally inapplicable. In addition, Congress has plenary power over Puerto Ricans under the Territorial Clause of the Constitution, which is subject only to rational basis review. These conditions violate a fundamental norm of democratic theory: that citizens should have a voice in the enactment of laws binding them. The unjust contemporary condition of Puerto Ricans is closely related to the race-based allocation of political power evident in the Treaty of Guadalupe Hidalgo.

NOTES

1. Commission on Territories, An Act Enabling the People of New Mexico and Arizona to Form a Constitution and State Government, etc., S. Rep. No. 61-454, at 26 (2d Sess. 1910).

2. See Robert Blauner, Racial Oppression in America 53 (1972).

3. Rodolfo Acuña, Occupied America: A History of Chicanos 6 (3d ed. 1988).

4. John H. Schroeder, Mr. Polk's War: American Opposition and Dissent, 1846–1848, at 10–11, 13 (1973).

5. Foreigners in Their Native Land, 96 (David J. Weber ed., 1973); James M. McPherson, Battle Cry of Freedom: The Civil War Era 47–50 (1988); Schroeder, *supra* note 4, at 3–4; Acuña, *supra* note 3, at 12–13; Frederick Merk, Manifest Destiny and Mission in American History 61–88 (1963).

6. Randolph B. Campbell, An Empire for Slavery: The Peculiar Institution in Texas, 1821–1865, at 16, 32 (1989).

7. Merk, *supra* note 5, at 181.

8. Foreigners in Their Native Land, *supra* note 5, at 59–60. See generally Raymund A. Paredes, *The Mexican Image in American Travel Literature*, 1831–1869, 52 N.M. Hist. Rev. 5 (1977).

9. 2 Rufus B. Sage: His Letters and Papers, 1836–1847, at 82–87 (LeRoy R. Hafen & Ann W. Hafen eds., 1956), reprinted in Foreigners in Their Native Land, *supra* note 5, at 71–75.

10. Reginald Horsman, Race and Manifest Destiny: The Origins of American Racial Anglo-Saxonism 208 (1981).

11. Cong. Globe, 30th Cong., 1st Sess. 98 (1848).

12. *Id.* at 96.

13. James K. Polk, The Diary of a President, 1845–1849: Covering the Mexican War, the Acquisition of Oregon, and the Conquest of California and the Southwest 291 (Allan Nevins ed., 1952).

14. Merk, *supra* note 5, at 189.

15. 5 Treaties and Other International Acts of the United States of America 41, 219, 241 (Hunter Miller ed., 1937).

16. See, e.g., Robert W. Larson, *Statehood for New Mexico, 1888–1912*, 37 N.M. Hist. Rev. 161, 169, 181 (1962).

17. S. Rep. No. 61-454, *supra* note 1, at 26.

18. Treaty of Paris, Dec. 10, 1898, U.S.-Spain, art. IX, reprinted in 11 Treaties and Other International Agreements of the United States of America 1776–1949, at 615, 619 (Charles I. Bevans ed., 1974).

From the Editors

Issues and Comments

Are law and litigation a trap for the serious reformer—structures designed more to maintain the current system of class advantage than to challenge it? If the main tools of legal thought, as several of the authors argue, are calculated to produce at most incremental change, how is Derrick Bell—or critical race theory, for that matter—possible? Is the very structure of human thought by which we attempt to understand the experience of the Other—namely, metaphor and analogy to something within our own experience—doomed to fail? Or can we somehow escape the "empathic fallacy," as Richard Delgado and Jean Stefancic put it, so as to understand and react fully to the plight of human beings unlike us in color and class condition?

Can a lawyer represent a person of radically different background and class from her or his own? Bell implies that the answer is no, and Charles Lawrence suggests that antidiscrimination law's blind spots with respect to unconscious discrimination may be part of the reason. Juan Perea suggests that with Latinos the civil rights community has been slow to develop tools capable of addressing the issues that are uppermost to them.

For further analysis of our emotional and intellectual shortcomings and blindfolds in dealing with race, see Part II (on counterstories) and Parts VII and VIII (on how perspective and group loyalties confine our ability to imagine and identify with others). See, as well, the Suggested Readings, immediately following, especially the selections on critical race theory in education and critiques of economic inequality and globalization.

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PART VII

RACE, SEX, CLASS, AND THEIR INTERSECTIONS

ONE RECENT DEVELOPMENT in critical race theory has been the examination of race, sex, and class and how they interact in a system of oppression. Scholars are asking whether these elements are separate disadvantaging factors and whether one of them is primary. They are asking whether black men and women stand on the same footing in confronting racism, whether black and white women are affected by patriarchy, unfair laws, and the danger of rape in the same way. A few of these scholars examine sexual orientation and the relation of gays and lesbians of color to the broader minority community; for more on this subject, see Part IX.

The four chapters of Part VII illustrate many of these issues. In the first, Angela Harris explains gender essentialism and how many black women take issue with the all-encompassing aspects of the white-dominated feminist movement. Professor Paulette Caldwell next recounts an employment discrimination case stemming from a black woman worker who wished to wear her hair in braids. She uses it as a springboard for discussing employment discrimination law's inadequacies in dealing with discrimination aimed at black women on account of their black womanhood or of some other aspect of their personal identity or appearance.

Feminist scholar Catharine MacKinnon next argues that the feminist movement has not practiced essentialism but instead concentrated on issues of dominance and oppression that all women face as women. Leticia Saucedo concludes with a study of how a system of employers' preferences for submissive workers who are easy to manipulate creates a brown-collar workplace with abysmal pay and working conditions.

34. Race and Essentialism in Feminist Legal Theory

ANGELA P. HARRIS

In "Funes the Memorious," Jorge Luis Borges tells of Ireneo Funes, who was a rather ordinary young man (notable only for his precise sense of time) until age nineteen, when he was thrown by a half-tamed horse and left paralyzed but possessed of perfect perception and a perfect memory.

After his transformation, Funes

> knew by heart the forms of the southern clouds at dawn on the 30th of April, 1882, and could compare them in his memory with the mottled streaks on a book in Spanish binding he had only seen once and with the outlines of the foam raised by an oar in the Rio Negro the night before the Quebracho uprising. These memories were not simple ones; each visual image was linked to muscular sensations, thermal sensations, etc. He could reconstruct all his dreams, all his half-dreams. Two or three times he had reconstructed a whole day; he never hesitated, but each reconstruction had required a whole day.[1]

Funes tells the narrator that after his transformation he invented his own numbering system. "In place of seven thousand thirteen, he would say (for example) *Máximo Pérez*; in place of seven thousand fourteen, *The Railroad*; other numbers were Luis Melian Lafinur, Olimar, sulphur, the reins, the whale, the gas, the caldron, Napoleon, Agustin de Vedia."[2] The narrator tries to explain to Funes "that this rhapsody of incoherent terms was precisely the opposite of a system of numbers. I told him that saying 365 meant saying three hundreds, six tens, five ones, an analysis which is not found in the 'numbers' *The Negro Timoteo* or *meat blanket.* Funes did not understand me or refused to understand me."[3]

In his conversation with Funes, the narrator realizes that Funes's life of infinite unique experiences leaves Funes no ability to categorize: "With no effort, he had learned English, French, Portuguese and Latin. I suspect, however, that he was not very capable

A version of this chapter previously appeared as Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581 (1990). Originally published in the *Stanford Law Review*.

of thought. To think is to forget differences, generalize, make abstractions. In the teeming world of Funes, there were only details, almost immediate in their presence."[4] For Funes, language is only a unique and private system of classification, elegant and solipsistic. The notion that language, made abstract, can serve to create and reinforce a community is incomprehensible to him.

We the People

Describing the voice that speaks the first sentence of the Declaration of Independence, James Boyd White remarks:

> It is not a person's voice, not even that of a committee, but the "unanimous" voice of "thirteen united States" and of their "people." It addresses a universal audience—nothing less than "mankind" itself, located neither in space nor in time—and the voice is universal too, for it purports to know about the "Course of human events" (all human events?) and to be able to discern what "becomes necessary" as a result of changing circumstances.[5]

The Preamble of the U.S. Constitution, White argues, can also be heard to speak in this unified and universal voice. This voice claims to speak

> for an entire and united nation and to do so directly and personally, not in the third person or by merely delegated authority. . . . The instrument thus appears to issue from a single imaginary author, consisting of all the people of the United States, including the reader, merged into a single identity in this act of self-constitution. "The People" are at once the author and the audience of this instrument.[6]

Despite its claims, however, this voice speaks not for everyone but for a political faction trying to constitute itself as a unit of many disparate voices; its power lasts only as long as the contradictory voices remain silenced.

In a sense, the "I" of Funes, who knows only particulars, and the "we" of "We the People," who know only generalities, are the same. Both voices are monologues; both depend on the silence of others. The difference is only that the first voice knows of no others, while the second has silenced them.

The first voice, the voice of Funes, is the voice toward which literature sometimes seems driven. Law, however, has not been much tempted by the sound of the first voice. Lawyers are all too aware that legal language is not a purely self-referential game, because "legal interpretive acts signal and occasion the imposition of violence upon others."[7] In their concern to avoid the social and moral irresponsibility of the first voice, legal thinkers have veered in the opposite direction, toward the safety of the second voice, which speaks from the position of objectivity rather than subjectivity, neutrality rather than bias. This voice, like the voice of "We the People," is ultimately authoritarian and coercive in its attempt to speak for everyone.

We are not born with a self but rather are composed of a welter of partial, sometimes contradictory, or even antithetical selves. A unified identity, if such can ever exist, is a product of will, not a common destiny or natural birthright. Thus, consciousness is "never

fixed, never attained once and for all";[8] it is not a final outcome or a biological given but a process, a constant contradictory state of becoming, in which both social institutions and individual wills are deeply implicated. A multiple consciousness is home both to the first and the second voices and to all the voices in between. Mari Matsuda, while arguing that, in the legal realm, "[h]olding on to a multiple consciousness will allow us to operate both within the abstractions of standard jurisprudential discourse, *and* within the details of our own special knowledge,"[9] acknowledges that "this constant shifting of consciousness produces sometimes madness, sometimes genius, sometimes both."[10]

Race and Essentialism in Feminist Legal Theory

In feminist legal theory, the move away from univocal toward multivocal theories of women's experience and feminism has been slower than in other areas. In feminist legal theory, the pull of the second voice, the voice of abstract categorization, is still powerfully strong: "We the People" seems in danger of being replaced by "We the Women." And in feminist legal theory, as in the dominant culture, it is mostly white, straight, and socioeconomically privileged people who claim to speak for all of us.[11] Not surprisingly, the story they tell about "women," despite its claim to universality, seems to black women to be peculiar to women who are white, straight, and socioeconomically privileged—a phenomenon Adrienne Rich terms "white solipsism."[12]

Elizabeth Spelman notes:

> [T]he real problem has been how feminist theory has confused the condition of one group of women with the condition of all.
>
> . . . A measure of the depth of white middle-class privilege is that the apparently straightforward and logical points and axioms at the heart of much of feminist theory guarantee the direction of its attention to the concerns of white middle-class women.[13]

The notion that there is a monolithic "women's experience" that can be described independent of other facets of experience like race, class, and sexual orientation I refer to in this chapter as gender essentialism. A corollary to gender essentialism is racial essentialism—the belief that there is a monolithic black experience or Chicano experience. The source of gender and racial essentialism (and all other essentialisms, for the list of categories could be infinitely multiplied) is the second voice, the voice that claims to speak for all. The result of essentialism is to reduce the lives of people who experience multiple forms of oppression to addition problems: racism + sexism = straight black women's experience, or racism + sexism + homophobia = black lesbian experience. Thus, in an essentialist world, black women's experience will always be forcibly fragmented before being subjected to analysis, as those who are "only interested in race" and those who are "only interested in gender" take their separate slices of our lives.

Moreover, feminist essentialism paves the way for unconscious racism. Spelman puts it this way:

> [T]hose who produce the "story of woman" want to make sure they appear in it. The best way to ensure that is to be the storyteller and hence to be in a position

> to decide which of all the many facts about women's lives ought to go into the story, which ought to be left out. Essentialism works well in behalf of these aims, aims that subvert the very process by which women might come to see where and how they wish to make common cause. For essentialism invites me to take what I understand to be true of me "as a woman" for some golden nugget of womanness all women have as women; and it makes the participation of other women inessential to the production of the story. How lovely: the many turn out to be one, and the one that they are is me.[14]

In a racist society like this one, the storytellers are usually white, and so "woman" turns out to be "white woman."

Why, in the face of challenges from "different" women and from feminist method itself, is feminist essentialism so persistent and pervasive? I think the reasons are several. Essentialism is intellectually convenient and to a certain extent cognitively ingrained. Essentialism also carries with it important emotional and political payoffs. Finally, essentialism often appears (especially to white women) as the only alternative to chaos, mindless pluralism (the Funes trap), and the end of the feminist movement. In my view, however, as long as feminists, like theorists in the dominant culture, continue to search for gender and racial essences, black women will never be anything more than a crossroads between two kinds of domination or at the bottom of a hierarchy of oppressions; we will always be required to choose pieces of ourselves to present as wholeness.

Modified Women and Unmodified Feminism: Black Women in Dominance Theory

Catharine MacKinnon[15] describes her dominance theory, like the Marxism with which she likes to compare it, as "total": "[T]hey are both theories of the totality, of the whole thing, theories of a fundamental and critical underpinning of the whole they envision."[16] Both her dominance theory (which she identifies as simply feminism) and Marxism "focus on that which is most one's own, that which most makes one the being the theory addresses, as that which is most taken away by what the theory criticizes. In each theory you are made who you are by that which is taken away from you by the social relations the theory criticizes."[17] In Marxism, the "that" is work; in feminism, it is sexuality.

MacKinnon defines sexuality as "that social process which creates, organizes, expresses, and directs desire, creating the social beings we know as women and men, as their relations create society."[18] Moreover, "the organized expropriation of the sexuality of some for the use of others defines the sex, woman. Heterosexuality is its structure, gender and family its congealed forms, sex roles its qualities generalized to social persona, reproduction a consequence, and control its issue."[19] Dominance theory, the analysis of this organized expropriation, is a theory of power and its unequal distribution.

In MacKinnon's view, "The idea of gender difference helps keep the reality of male dominance in place."[20] That is, the concept of gender difference is an ideology that masks the fact that genders are socially constructed, not natural, and coercively enforced, not freely consented to. Moreover, "the social relation between the sexes is organized so that men may dominate and women must submit and this relation is sexual—in fact, is sex."[21]

For MacKinnon, male dominance is not only "perhaps the most pervasive and tenacious system of power in history, but . . . it is metaphysically nearly perfect."[22] The masculine point of view is point of viewlessness; the force of male dominance "is exercised as consent, its authority as participation, its supremacy as the paradigm of order, its control as the definition of legitimacy."[23] In such a world, the very existence of feminism is something of a paradox. "Feminism claims the voice of women's silence, the sexuality of our eroticized desexualization, the fullness of 'lack,' the centrality of our marginality and exclusion, the public nature of privacy, the presence of our absence."[24] The wonder is how feminism can exist in the face of its theoretical impossibility.

In MacKinnon's view, men have their foot on women's necks, regardless of race or class or of mode of production: "Feminists do not argue that it means the same to women to be on the bottom in a feudal regime, a capitalist regime, and a socialist regime; the commonality argued is that, despite real changes, bottom is bottom."[25] As a political matter, moreover, MacKinnon is quick to insist that there is only one true, unmodified feminism: it analyzes women *as women*, not as subsets of some other group and not as gender-neutral beings.

Despite its power, MacKinnon's dominance theory is flawed by its essentialism. MacKinnon assumes, as does the dominant culture, that there is an essential woman beneath the realities of differences between women—that in describing the experiences of women, issues of race, class, and sexual orientation can therefore be safely ignored or relegated to footnotes. In her search for what is essential womanhood, however, MacKinnon rediscovers white womanhood and introduces it as universal truth. In dominance theory, black women are white women, only more so.

Essentialism in feminist theory has two characteristics that ensure that black women's voices will be ignored. First, in the pursuit of the essential feminine, Woman leached of all color and irrelevant social circumstance, issues of race are bracketed as belonging to a separate and distinct discourse—a process that leaves black women's selves fragmented beyond recognition. Second, feminist essentialists find that in removing issues of race they have actually managed to remove only black women—meaning that white women now stand as the epitome of Woman. Both processes can be seen at work in dominance theory.

Dominance Theory and the Bracketing of Race

MacKinnon repeatedly seems to recognize the inadequacy of theories that deal with gender while ignoring race, but having recognized the problem, she repeatedly shies away from its implications. Thus, she at times justifies her essentialism by pointing to the essentialism of the dominant discourse: "My suggestion is that what we have in common is not that our conditions have no particularity in ways that matter. But we are all measured by a male standard for women, a standard that is not ours."[26] At other times she deals with the challenge of black women by placing it in footnotes. For example, she places in a footnote without further comment the suggestive, if cryptic, observation that a definition of feminism "of coalesced interest and resistance" has tended to both exclude and make invisible "the diverse ways that many women—notably Blacks and working-class women—have *moved* against their determinants."[27] In another footnote

generally addressed to the problem of relating Marxism to issues of gender and race, she notes that "[a]ny relationship *between* sex and race tends to be left entirely out of account, since they are considered parallel 'strata,'"[28] but this thought simply trails off into a string of citations to black feminist and social feminist writings.

Finally, MacKinnon postpones the demand of black women until the arrival of a "general theory of social inequality"; recognizing that "gender in this country appears partly to comprise the meaning of, as well as bisect, race and class, even as race and class specificities make up, as well as crosscut, gender,"[29] she nevertheless is prepared to maintain her color-blind approach to women's experience until that general theory arrives (presumably that is someone else's work).

The results of MacKinnon's refusal to move beyond essentialism are apparent in the most tentative essay in "Whose Culture? A Case Note on *Martinez v. Santa Clara Pueblo*."[30] Julia Martinez sued her Native American tribe, the Santa Clara Pueblo, in federal court, arguing that a tribal ordinance was invalid under a provision of the Indian Civil Rights Act guaranteeing equal protection of the laws. The ordinance provided that if women married outside the pueblo, the children of that union were not full tribal members but if men married outside the tribe, their children were full tribal members. Martinez married a Navajo man, and her children were not allowed to vote or inherit her rights in communal land. The U.S. Supreme Court held that this question was a matter of Indian sovereignty to be resolved by the tribe.[31]

MacKinnon starts her discussion with an admission: "I find *Martinez* a difficult case on a lot of levels, and I don't usually find cases difficult."[32] She concludes that the pueblo ordinance was wrong because it "did nothing to address or counteract the reasons why Native women were vulnerable to white male land imperialism through marriage—it gave in to them, by punishing the *woman*, the Native person."[33] Yet she reaches her conclusion, as she admits, without knowledge other than "word of mouth" of the history of the ordinance and its place in Santa Clara Pueblo culture.

MacKinnon has Julia Martinez ask her tribe, "Why do you make me choose between my equality as woman and my cultural identity?"[34] But she, no less than the tribe, eventually requires Martinez to choose; the correct choice is, of course, that Martinez's female identity is more important than her tribal identity. MacKinnon states:

> [T]he aspiration of women to be no less than men—not to be punished where a man is glorified, not to be considered damaged or disloyal where a man is rewarded or left in peace, not to lead a derivative life, but to do everything and be anybody at all—is an aspiration indigenous to women across place and across time.[35]

What MacKinnon does not recognize, however, is that though the aspiration may be everywhere the same, its expression must depend on the social-historical circumstances. In this case, should Julia Martinez be content with struggling for change from within, or should the white government have stepped in on her behalf? What was the meaning of the ordinance within pueblo discourse, as opposed to a transhistorical and transcultural feminist discourse? How did it come about and under what circumstances? What was the status of women within the tribe, both historically and at the time of the ordinance and at the present time, and was Martinez's claim heard and understood by the tribal

authorities or simply ignored or derided? What were the pueblo traditions about children of mixed parentage, and how were those traditions changing? In a jurisprudence based on multiple consciousness, rather than the unitary consciousness of MacKinnon's dominance theory, these questions would have to be answered before the ordinance could be considered on its merits and even before the Court's decision to stay out could be evaluated. MacKinnon does not answer these questions but leaves the essay hanging with the idea that the male supremacist ideology of some Native American tribes may be adopted from white culture and therefore invalid.[36] MacKinnon's tentativeness may be a result of her not wanting to appear to be a white cultural imperialist speaking for a Native American tribe, but to take up Julia Martinez's claim at all is to take that risk. Without a theory that can shift focus from gender to race and other facets of identity and back again, MacKinnon's essay is ultimately crippled. Martinez is made to choose her gender over her race, and her experience is distorted in the process.

Dominance Theory and White Women as All Women

The second consequence of feminist essentialism is that the racism that was acknowledged only in brackets quietly emerges in the feminist theory itself—both a cause and an effect of creating "Woman" from white woman. In MacKinnon's work, the result is that black women become white women, only more so.

In a passage in an article in *Signs*, MacKinnon borrows a quote from Toni Cade Bambara describing a black woman, with too many children and no means for caring for them, as "grown ugly and dangerous from being nobody for so long" and then explains:

> By using her phrase in altered context, I do not want to distort her meaning but to extend it. Throughout this essay, I have tried to see if women's condition is shared, even when contexts or magnitudes differ. (Thus, it is very different to be "nobody" as a Black woman than as a white lady, but neither is "somebody" by male standards.) This is the approach to race and ethnicity attempted throughout. I aspire to include all women in the term "women" in some way, without violating the particularity of any woman's experience. Whenever this fails, the statement is simply wrong and will have to be qualified or the aspiration (or the theory) abandoned.[37]

I call this the nuance theory approach to the problem of essentialism: By being sensitive to the notion that different women have different experiences, generalizations can be offered about "all women" while qualifying statements, often in footnotes, supplement the general account with the subtle nuances of experience that different women add to the mix. Nuance theory thus assumes the commonality of all women; differences are a matter of context or magnitude—that is, nuance.

The problem with nuance theory is that by defining black women as different, white women quietly become the norm, or pure, essential Woman. Just as MacKinnon would argue that being female is more than a context or a magnitude of human experience, being black is more than a context or magnitude of all (white) women's experience. But not in dominance theory.

For instance, MacKinnon describes how a system of male supremacy has constructed "woman":

> Contemporary industrial society's version of her is docile, soft, passive, nurturant, vulnerable, weak, narcissistic, childlike, incompetent, masochistic, and domestic, made for child care, home care, and husband care. . . . Women who resist or fail, including those who never did fit—for example, black and lower-class women who cannot survive if they are soft and weak and incompetent, assertively self-respecting women, women with ambitions of male dimensions—are considered less female, lesser women.[38]

In a peculiar symmetry with this ideology, in which black women are something less than women, in MacKinnon's work black women become something more than women. In MacKinnon's writing, the word "black," applied to women, is an intensifier: If things are bad for everybody (meaning white women), then they're even worse for black women. Silent and suffering, we are trotted onto the page (mostly in footnotes) as the ultimate example of how bad things are.

Thus, in speaking of the beauty standards set for (white) women, MacKinnon remarks, "Black women are further from being able concretely to achieve the standard that no woman can ever achieve, or it would lose its point."[39] The frustration of black women at being unable to look like an all-American woman is in this way just a more dramatic example of all (white) women's frustration and oppression. When a black woman speaks on this subject, however, it becomes clear that a black woman's pain at not being considered fully feminine is different qualitatively, not merely quantitatively, from the pain MacKinnon describes. It is qualitatively different because the ideology of beauty concerns not only gender but race. Consider Toni Morrison's analysis of the influence of standards of white beauty on black people in *The Bluest Eye*.[40] Claudia MacTeer, a young black girl, muses, "Adults, older girls, shops, magazines, newspapers, window signs—all the world had agreed that a blue-eyed, yellow-haired, pink-skinned doll was what every girl child treasured." Similarly, in the black community, "high yellow" folks represent the closest black people can come to beauty, and darker people are always "lesser. Nicer, brighter, but still lesser." Beauty is whiteness itself, and middle-class black girls

> go to land-grant colleges, normal schools, and learn how to do the white man's work with refinement: home economics to prepare his food; teacher education to instruct black children in obedience; music to soothe the weary master and entertain his blunted soul. Here they learn the rest of the lesson begun in those soft houses with porch swings and pots of bleeding heart: how to behave. The careful development of thrift, patience, high morals, and good manners. In short, how to get rid of the funkiness. The dreadful funkiness of passion, the funkiness of nature, the funkiness of the wide range of human emotions.
>
> Wherever it erupts, this Funk, they wipe it away; where it crusts, they dissolve it; wherever it drips, flowers, or clings, they find it and fight it until it dies. They fight this battle all the way to the grave. The laugh that is a little too loud; the enunciation a little too round; the gesture a little too generous. They hold their behind in for fear of a sway too free; when they wear lipstick, they never

> cover the entire mouth for fear of lips too thick, and they worry, worry, worry about the edges of their hair.[41]

Thus, Pecola Breedlove, born black and ugly, spends her lonely and abused childhood praying for blue eyes. Her story ends in despair and the fragmentation of her mind into two isolated speaking voices, not because she's even further away from ideal beauty than white women are, but because Beauty *itself* is white, and she is not and can never be, despite the pair of blue eyes she eventually believes she has. There is a difference between the hope that the next makeup kit or haircut or diet will bring you salvation and the knowledge that nothing can. The relation of black women to the ideal of white beauty is not a more intense form of white women's frustration: It is something other, a complex mingling of racial and gender hatred from without, self-hatred from within.

MacKinnon's essentialist, color-blind approach also distorts the analysis of rape that constitutes the heart of her article "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence." By ignoring the voices of black female theoreticians of rape, she produces an ahistorical account that fails to capture the experience of black women.

MacKinnon sees sexuality as "a social sphere of male power of which forced sex is paradigmatic."[42] As with beauty standards, black women are victimized by rape just as white women are, only more so: "Racism in the United States, by singling out Black men for allegations of rape of white women, has helped obscure the fact that it is men who rape women, disproportionately women of color."[43] In this peculiar fashion MacKinnon simultaneously recognizes and shelves racism, finally reaffirming that the divide between men and women is more fundamental and that women of color are simply "women plus." MacKinnon goes on to develop a powerful analysis of rape as the subordination of women to men, with only one more mention of color: "[R]ape comes to mean a strange (read Black) man knowing a woman does not want sex and going ahead anyway."[44]

This analysis, though rhetorically powerful, is an analysis of what rape means to white women masquerading as a general account; it has nothing to do with the experience of black women. For black women, rape is a far more complex experience and an experience as deeply rooted in color as in gender.

For example, the paradigm experience of rape for black women has historically involved the white employer in the kitchen or bedroom as much as the strange black man in the bushes. During slavery, the sexual abuse of black women by white men was commonplace. Even after emancipation, the majority of working black women were domestic servants for white families, a job that made them uniquely vulnerable to sexual harassment and rape.

Moreover, as a legal matter, the experience of rape did not even exist for black women. During slavery, the rape of a black woman by any man, white or black, was simply not a crime.[45] Even after the Civil War, rape laws were seldom used to protect black women against either white or black men, since black women were considered promiscuous by nature. In contrast to the partial or at least formal protection white women had against sexual brutalization, black women frequently had no legal protection whatsoever. Rape, in this sense, was something that happened only to white women; what happened to black women was simply life.

Finally, for black people, male and female, rape signified the terrorism of black men by white men, aided and abetted, passively (by silence) or actively (by crying rape), by white women. Black women have recognized this aspect of rape since the nineteenth century. For example, social activist Ida B. Wells analyzed rape as an example of the inseparability of race and gender oppression in *Southern Horrors: Lynch Law in All Its Phases*, published in 1892. Wells saw that both the law of rape and Southern miscegenation laws were part of a patriarchal system through which white men maintained their control over the bodies of all black people: "[W]hite men used their ownership of the body of the white female as a terrain on which to lynch the black male."[46] Moreover, Wells argued, though many white women encouraged interracial sexual relationships, white women, protected by the patriarchal idealization of white womanhood, were able to remain silent, unhappily or not, as black men were murdered by mobs. Similarly, Anna Julia Cooper, another nineteenth-century theorist, "saw that the manipulative power of the South was embodied in the southern patriarch, but she describes its concern with 'blood,' inheritance, and heritage in entirely female terms and as a preoccupation that was transmitted from the South to the North and perpetuated by white women."[47]

Nor has this aspect of rape become purely a historical curiosity. Susan Estrich reports that between 1930 and 1967, 89 percent of the men executed for rape in the United States were black;[48] a 1968 study of rape sentencing in Maryland showed that in all fifty-five cases where the death penalty was imposed the victim had been white, and that between 1960 and 1967, 47 percent of all black men convicted of criminal assaults on black women were immediately released on probation.[49] The case of Joann Little is testimony to the continuing sensitivity of black women to this aspect of rape. As Angela Davis tells the story:

> Brought to trial on murder charges, the young Black woman was accused of killing a white guard in a North Carolina jail where she was the only woman inmate. When Joann Little took the stand, she told how the guard had raped her in her cell and how she had killed him in self-defense with the ice pick he had used to threaten her. Throughout the country, her cause was passionately supported by individuals and organizations in the Black community and within the young women's movement, and her acquittal was hailed as an important victory made possible by this mass campaign. In the immediate aftermath of her acquittal, Ms. Little issued several moving appeals on behalf of a Black man named Delbert Tibbs, who awaited execution in Florida because he had been falsely convicted of raping a white woman.
>
> Many Black women answered Joann Little's appeal to support the cause of Delbert Tibbs. But few white women—and certainly few organized groups within the anti-rape movement—followed her suggestion that they agitate for the freedom of this Black man who had been blatantly victimized by Southern racism.[50]

The rift between white and black women over the issue of rape is highlighted by the contemporary feminist analyses of rape that have explicitly relied on racist ideology to minimize white women's complicity in racial terrorism.[51]

Thus, the experience of rape for black women includes not only a vulnerability to rape and a lack of legal protection radically different from that experienced by white

women but also a unique ambivalence. Black women have simultaneously acknowledged their own victimization and the victimization of black men by a system that has consistently ignored violence against women while perpetrating it against men. The complexity and depth of this experience is not captured, or even acknowledged, by MacKinnon's account.

MacKinnon's essentialist approach re-creates the paradigmatic woman in the image of the white woman, in the name of unmodified feminism. As in the dominant discourse, black women are relegated to the margins, ignored or extolled as "just like us, only more so." But "Black women are not white women with color."[52] Moreover, feminist essentialism represents not just an insult to black women but a broken promise—the promise to listen to women's stories, the promise of feminist method.

NOTES

1. Jorge Luis Borges, Labyrinths: Selected Stories and Other Writings 59, 63–64 (D. Yates & J. Irby eds., 1964).

2. *Id.* at 64.

3. *Id.* at 65.

4. *Id.* at 66.

5. James Boyd White, When Words Lose Their Meaning 232 (1984).

6. *Id.* at 240.

7. Robert M. Cover, *Violence and the Word*, 95 Yale L.J. 1601, 1601 (1986); see also Robert Weisberg, *The Law-Literature Enterprise*, 1 Yale J.L. & Human. 1, 45 (1988) (describing how students of legal interpretation are initially drawn to literary interpretation because of its greater freedom and then almost immediately search for a way to reintroduce constraints).

8. Teresa de Lauretis, *Feminist Studies/Critical Studies: Issues, Terms, and Contexts*, in Feminist Studies/Critical Studies 1, 8 (T. de Lauretis ed., 1986).

9. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 Women's Rts. L. Rep. 7, 9 (1989) (also Chapter 4, this volume).

10. *Id.* at 8.

11. See, e.g., Catharine A. MacKinnon, *On Collaboration*, in Feminism Unmodified 198, 204 (1987) ("I am here to speak for those, particularly women and children, upon whose silence the law, including the law of the First Amendment, has been built") [hereinafter Feminism Unmodified].

12. Rich defines "white solipsism" as the tendency to "think, imagine, and speak as if whiteness described the world." Adrienne Rich, *Disloyal to Civilization: Feminism, Racism, Gynephobia*, in On Lies, Secrets, and Silence 275, 299 (1979).

13. Elizabeth V. Spelman, Inessential Woman: Problems of Exclusion in Feminist Thought 3, 4 (1988).

14. *Id.* at 159.

15. In my discussion I focus on Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 Signs 515 (1982) [hereinafter MacKinnon, Signs I], and Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 Signs 635 (1983) [hereinafter MacKinnon, Signs II], but I make reference to the essays in MacKinnon, Feminism Unmodified, *supra* note 11, as well.

16. MacKinnon, *Desire and Power*, in Feminism Unmodified, *supra* note 11, at 46, 49.

17. *Id.* at 48.

18. MacKinnon, Signs I, *supra* note 15, at 516 (footnote omitted).

19. *Id.*

20. MacKinnon, *Desire and Power*, *supra* note 16, at 3.

21. *Id.* Thus, MacKinnon disagrees both with feminists who argue that women and men are really the same and should therefore be treated the same under the law and with feminists who argue that the law should take into account women's differences. Feminists who argue that men and women are

"the same" fail to take into account the unequal power relations that underlie the very construction of the two genders. Feminists who want the law to recognize the "differences" between the genders buy into the account of women's "natural difference" and therefore (inadvertently) perpetuate dominance under the name of inherent difference. See *id.* at 32–40, 71–77.

22. MacKinnon, Signs II, *supra* note 15, at 638.

23. *Id.* at 639.

24. *Id.*

25. MacKinnon, Signs I, *supra* note 15, at 523.

26. MacKinnon, *On Exceptionality: Women as Women in Law*, in *Feminism Unmodified*, *supra* note 11, at 70, 76.

27. MacKinnon, Signs I, *supra* note 15, at 518 & n.3.

28. *Id.* at 537 n.54.

29. MacKinnon, *supra* note 11, at 2–3.

30. MacKinnon, *Whose Culture? A Case Note on* Martinez v. Santa Clara Pueblo, in Feminism Unmodified, *supra* note 11, at 63.

31. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71–72 (1978).

32. MacKinnon, *supra* note 30, at 66.

33. *Id.* at 68.

34. *Id.* at 67.

35. *Id.* at 68.

36. *Id.* at 69.

37. MacKinnon, Signs I, *supra* note 15, at 520 n.7.

38. *Id.* at 530. Yet having acknowledged that black women have never been "women," MacKinnon continues in the article to discuss "women," making it plain that the "women" she is discussing are white.

39. *Id.* at 540 n.59. Similarly, in Feminism Unmodified, MacKinnon reminds us that the risk of death and mutilation in the course of a botched abortion is disproportionately borne by women of color but only in the context of asserting that "[n]one of us can afford this risk." MacKinnon, *Not by Law Alone: From a Debate with Phyllis Schlafly*, in Feminism Unmodified, *supra* note 11, at 21, 25.

40. Toni Morrison, The Bluest Eye (1970).

41. *Id.* at 64.

42. MacKinnon, Signs II, *supra* note 15, at 646.

43. *Id.* at 646 n.22; see also MacKinnon, *A Rally Against Rape*, in Feminism Unmodified, *supra* note 11, at 81, 82 (black women are raped four times as often as white women); Diana Russell, Sexual Exploitation 185 (1984) (black women, who compose 10 percent of all women, accounted for 60 percent of rapes reported in 1967).

Describing Susan Brownmiller, Against Our Will: Men, Women, and Rape (1976), MacKinnon writes, "Brownmiller examines rape in riots, wars, pogroms, and revolutions; rape by police, parents, prison guards; and rape motivated by racism-seldom rape in normal circumstances, in everyday life, in ordinary relationships, by men as men." MacKinnon, Signs II, *supra* note 15, at 646.

44. MacKinnon, Signs II, *supra* note 15, at 653; cf. Susan Estrich, Real Rape 3 (1987) (remarking, while telling the story of her own rape, "His being black, I fear, probably makes my account more believable to some people, as it certainly did with the police"). Indeed. Estrich hastens to assure us, though, that "the most important thing is that he was a stranger." *Id.*

45. See Jennifer Wriggins, *Rape, Racism, and the Law*, 6 Harv. Women's L.J. 103, 118 (1983).

46. Quoted in Hazel V. Carby, "*On the Threshold of Woman's Era": Lynching, Empire, and Sexuality in Black Feminist Theory*, in "Race," Writing, and Difference, 301, 309 (Henry L. Gates, Jr., ed., 1985).

47. Carby, *supra*, at 306 (discussing Anna Julia Cooper, *A Voice from the South* (1892)). Carby continues:

> By linking imperialism to internal colonization, Cooper thus provided black women intellectuals with the basis for an analysis of how patriarchal power establishes and sustains gendered and racialized social formations. White women were implicated in the maintenance of this wider system of oppression because they challenged only

> the parameters of their domestic confinement; by failing to reconstitute their class and caste interests, they reinforced the provincialism of their movement.

Id. at 306–07.

48. Estrich, *supra* note 44, at 107 n.2.

49. Wriggins, *supra* note 45, at 121 n.113. According to the study, "the average sentence received by Black men, exclusive of cases involving life imprisonment or death, was 4.2 years if the victim was Black, 16.4 years if the victim was white." *Id*. I do not know whether a white man has ever been sentenced to death for the rape of a black woman, although I could make an educated guess as to the answer.

50. Angela Davis, Women, Race, and Class 174 (1981).

51. For example, Susan Brownmiller describes the black defendants in publicized Southern rape trials as "pathetic, semiliterate fellows," Brownmiller, *supra* note 43, at 237, and the white female accusers as innocent pawns of white men, see, e.g., *id*. at 233 ("confused and fearful, they fell into line"). See also Davis, *supra* note 50, at 196–99.

52. Barbara Omolade, *Black Women and Feminism*, in The Future of Difference 247, 248 (H. Eisenstein & A. Jardine eds., 1980).

35. A Hair Piece

Perspectives on the Intersection of Race and Gender

PAULETTE M. CALDWELL

I want to know my hair again, to own it, to delight in it again, to recall my earliest mirrored reflection when there was no beginning and I first knew that the person who laughed at me and cried with me and stuck out her tongue at me was me. I want to know my hair again, the way I knew it before I knew that my hair is me, before I lost the right to me, before I knew that the burden of beauty—or lack of it—for an entire race of people could be tied up with my hair and me.

I want to know my hair again, the way I knew it before I knew Sambo and Dick, Buckwheat and Jane, Prissy and Miz Scarlett. Before I knew that my hair could be wrong—the wrong color, the wrong texture, the wrong amount of curl or straight. Before hot combs and thick grease and smelly-burning lye, all guaranteed to transform me, to silken the coarse, resistant wool that represents me. I want to know once more the time before I denatured, denuded, denigrated, and denied my hair and me, before I knew enough to worry about edges and kitchens and burrows and knots, when I was still a friend of water—the rain's dancing drops of water, a swimming hole's splashing water, a hot, muggy day's misty invisible water, my own salty, sweaty, perspiring water.

When will I cherish my hair again, the way my grandmother cherished it, when fascinated by its beauty, with hands carrying centuries-old secrets of adornment and craftswomanship, she plaited it, twisted it, cornrowed it, finger-curled it, olive-oiled it, on the growing moon cut and shaped it, and wove it like fine strands of gold inlaid with semiprecious stones, coral and ivory, telling with my hair a lost-found story of the people she carried inside her?

Mostly, I want to love my hair the way I loved hers, when as granddaughter among grandsons I stood on a chair in her room—her kitchen-bed-living-dining room—and she let me know her hair, when I combed and patted it from the crown of her head to the place where her neck folded into her shoulders, caressing steel-gray strands that framed her forehead before falling into the soft, white, cottony temples at the border of her cheekbones.

A version of this chapter previously appeared as Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 Duke L.J. 365. Originally published in the *Duke Law Journal*.

On Being the Subject of a Law School Hypothetical

The case of *Rogers v. American Airlines*[1] upheld the right of employers to prohibit the wearing of braided hairstyles in the workplace. The plaintiff, a black woman, argued that American Airlines' policy discriminated against her specifically as a black woman. In effect, she based her claim on the interactive effects of racial and gender discrimination. The court chose, however, to base its decision principally on distinctions between biological and cultural conceptions of race. More importantly, it treated the plaintiff's claims of race and gender discrimination in the alternative and independent of each other, thus denying any interactive relationship between the two.

Although *Rogers* is the only reported decision that upholds the categorical exclusion of braided hairstyles,[2] the prohibition of such styles in the workforce is both widespread and long standing. Protests surrounding recent cases in Washington, D.C., sparked national media attention. Nearly fifty women picketed a Hyatt Hotel, and black political leaders threatened to boycott hotels that prohibit black women from wearing braids. Several employees initiated legal action by filing complaints with federal or local fair employment practices agencies; most cases were settled shortly thereafter. No court has yet issued an opinion that controverts *Rogers*.

I discovered *Rogers* while reading a newspaper article describing the actual or threatened firing of several black women in metropolitan Washington, D.C., solely for wearing braided hairstyles. The article referred to *Rogers* but focused on the case of Cheryl Tatum, who was fired from her job as a restaurant cashier in a Hyatt Hotel under a company policy that prohibited "extreme and unusual hairstyles."[3]

The newspaper description of the Hyatt's grooming policy conjured up an image of a ludicrous and outlandishly coiffed Cheryl Tatum, one clearly bent on exceeding the bounds of workplace taste and discipline. But the picture that accompanied the article revealed a young, attractive black woman whose hair fell neatly to her shoulders in an all-American, common, everyday pageboy style, distinguished only by the presence of tiny braids in lieu of single strands of hair.

Whether motivated by politics, ethnic pride, health, or vanity, I was outraged by the idea that an employer could regulate or force me to explain something as personal and private as the way I groom my hair. I resented the implication that I could not be trusted to choose standards appropriate for the workplace and that my right to work could be conditioned on my disassociation with my race, gender, and culture. Mostly, I marveled with sadness that something as simple as a black woman's hair continues to threaten the social, political, and economic fabric of American life.

My anger eventually subsided, and I thought little more about *Rogers* until a student in my course in employment discrimination law asked me after class to explain the decision. I promised to take up the case when we arrived at that point in the semester where the issues raised by *Rogers* fit most naturally in the development of antidiscrimination law.

Several weeks passed, and the student asked about *Rogers* again and again (always privately, after class), yet I always put off answering her until some point later in the semester. After all, hair is such a little thing. Finally, while participating in a class discussion on a completely unrelated topic, the persistent one's comments wandered into the forbidden area of braided-hair cases. As soon as the student realized she had publicly

introduced the subject of braided hair, she stopped in mid-sentence and covered her mouth in embarrassment, as if she had spoken out of turn. I was finally forced to confront what the student had obviously sensed in her embarrassment.

I had avoided private and public discussions about braided hair not because the student had asked her questions at the wrong point in the semester. Nor had I avoided the subject because cases involving employer-mandated hair and grooming standards do not illustrate as well as other cases the presence of deeply ingrained myths, negative images, and stereotypes that operate to define the social and economic position of blacks and women. I had carefully evaded the subject of a black woman's hair because I appeared at each class meeting wearing a neatly braided pageboy, and I resented being the unwitting object of one in thousands of law school hypotheticals.

Why Would Anyone Want to Wear Their Hair That Way?

Discussing braided hairstyles with students did not threaten me in places where I had become most assured. I was personally at ease in my professionalism after a decade of law practice and nearly as many years as a law professor. I had lost—or become more successful in denying—any discomfort that I once may have experienced in discussing issues of race and gender in the too few occasions in the legal profession devoted to their exploration. I had even begun to smart less when confronted with my inability to change being the only, or one of inevitably too few, blacks on the faculty of a traditionally white law school. But I was not prepared to adopt an abstract, dispassionate, objective stance to an issue that so obviously affected me personally, and I was not prepared to suffer publicly, through intense and passionate advocacy, the pain and outrage that I experience each time a black woman is dismissed, belittled, and ignored simply because she challenges our objectification.

Should I be put to the task of choosing a logical, credible, legitimate, legally sympathetic justification out of the many reasons that might have motivated me and other black women to braid our own hair? Perhaps we do so out of concern for the health of our hair, which many of us risk losing permanently after years of chemical straighteners or perhaps because we fear that the entry of chemical toxins into our bloodstreams through our scalps will damage our unborn or breastfeeding children. Some of us choose the positive expression of ethnic pride not only for ourselves but also for our children, many of whom learn, despite all our teachings to the contrary, to reject association with black people and black culture in search of a keener nose or bluer eye. Many of us wear braids in the exercise of private, personal prerogatives taken for granted by women who are not black.

Responding to student requests for explanations of cases is a regular part of the profession of law teaching. I was not required, therefore, to express or justify the reasons for my personal decision to braid my hair in order to discuss the application of employment discrimination laws to braided hairstyles. But by legitimizing the notion that the wearing of any and all braided hairstyles in the workplace is unbusinesslike, *Rogers* delegitimized me and my professionalism. I could not think of an answer that would be certain to observe traditional boundaries in academic discourse between the personal and the professional.

The persistent student's embarrassed questioning and my obfuscation spoke of a woman-centered silence: She, a white woman, had asked me, a black woman, to justify my hair.[4] She compelled me to account for the presence of legal justifications for my simultaneously "perverse visibility and convenient invisibility."[5] She forced me and the rest of the class to acknowledge the souls of women who live by the circumscriptions of competing beliefs about white and black womanhood and in the interstices of racism and sexism.

Our silence broken, the class moved beyond hierarchy to a place of honest collaboration. Turning to *Rogers*, we explored the question of our ability to comprehend through the medium of experience how a black woman's hair is related to the perpetuation of social, political, and economic domination of subordinated racial and gender groups; we asked why issues of experience, culture, and identity are not the subject of explicit legal reasoning.

To Choose Myself: Interlocking Figurations in the Construction of Race and Gender

SUNDAY. School is out, my exams are graded, and I have unbraided my hair a few days before my appointment at the beauty parlor to have it braided again. After a year in braids, my hair is healthy again: long and thick and cottony soft. I decide not to french roll it or twist it or pull it into a ponytail or bun or cover it with a scarf. Instead, I comb it out and leave it natural, in a full and big "Angela Davis" Afro style. I feel full and big and regal. I walk the three blocks from my apartment to the subway. I see a white male colleague walking in the opposite direction and I wave to him from across the street. He stops, squints his eyes against the glare of the sun, and stares, trying to figure out who has greeted him. He recognizes me and starts to cross over to my side of the street. I keep walking, fearing the possibility of his curiosity and needing to be relieved of the strain of explanation.

MONDAY. My hair is still unbraided, but I blow it out with a hair dryer and pull it into a ponytail tied at the nape of my neck before I go to the law school. I enter the building and run into four white female colleagues on their way out to a white female lunch. Before I can say hello, one of them blurts out, "It is *weird!" Another drowns out the first: "You look so young, like a teenager!" The third invites me to join them for lunch, while the fourth stands silently, observing my hair. I mumble some excuse about lunch and interject, almost apologetically, that I plan to get my hair braided again the next day. When I arrive at my office suite and run into the white male I had greeted on Sunday, I realize immediately that he has told the bunch on the way to lunch about our encounter the day before. He mutters something about how different I look today and then asks me whether the day before I had been on my way to a ceremony. He and the others are generally nice colleagues, so I half-smile but say nothing in response. I feel a lot less full and big and regal.*

TUESDAY. I walk to the garage under my apartment building, again wearing a big, full "Angela Davis" Afro. Another white male colleague passes me by, not recognizing me. I greet him, and he smiles broadly, saying that he has never seen me look more beautiful. I smile back, continue the chitchat for a moment more, and try not to think about whether he is being disingenuous. I slowly get into my car, buckle up, relax, and turn on the radio. It will take me about forty-five minutes to drive uptown to the beauty parlor, park my

car, and get something to eat before beginning the long hours of sitting and braiding. I feel good, knowing that the braider will be ecstatic when she sees the results of her healing handiwork. I keep my movements small, easy, and slow, relishing a rare, short morning of being free.

My initial outrage notwithstanding, *Rogers* is an unremarkable decision. Courts generally protect employer-mandated hair and dress codes, often according the greatest deference to ones that classify individuals on the basis of socially conditioned rather than biological differences. All in all, such cases are generally considered only marginally significant in the battle to secure equal employment rights.

But *Rogers* is regrettably unremarkable in an important respect. It rests on suppositions that are deeply imbedded in American culture—assumptions so entrenched and so necessary to the maintenance of interlocking, interdependent structures of domination that their mythological bases and political functions have become invisible, especially to those to whom their existence is most detrimental. *Rogers* proceeds from the premise that, although racism and sexism share much in common, they are nonetheless fundamentally unrelated phenomena—a proposition proved false by history and contemporary reality. Racism and sexism are interlocking, mutually reinforcing components of a system of dominance rooted in patriarchy. No significant and lasting progress in combating either can be made until this interdependence is acknowledged and until the perspectives gained from considering their interaction are reflected in legal theory and public policy.

Cases arising under employment discrimination statutes illustrate both the operation in law and the effect on the development of legal theory of the assumptions of race-sex correspondence and difference. These cases also demonstrate the absence of any consideration of either race-sex interaction or the stereotyping of black womanhood. Focusing on cases that involve black female plaintiffs, at least three categories emerge.

In one category, courts have considered whether black women may represent themselves or other race or gender discriminatees. Some cases deny black women the right to claim discrimination as a subgroup distinct from black men and white women.[6] Others deny black women the right to represent a class that includes white women in a suit based on sex discrimination, on the ground that race distinguishes them.[7] Still other cases prohibit black women from representing a class in a race discrimination suit that includes black men, on the ground of gender differences.[8] These cases demonstrate the failure of courts to account for race-sex intersection and are premised on the assumption that discrimination is based on either race or gender but never both.

A second category of cases concerns the interaction of race and gender in determining the limits of an employer's ability to condition work on reproductive and marital choices associated with black women.[9] Several courts have upheld the firing of black women for becoming pregnant while unmarried if their work involves association with children—especially black teenage girls. These decisions rest on entrenched fears of and distorted images about black female sexuality, stigmatize single black mothers (and by extension their children), and reinforce "culture of poverty" notions that blame poverty on poor people themselves. They also reinforce the notion that the problems of black families are attributable to the deviant and dominant roles of black women and the idea that racial progress depends on black female subordination.

A third category concerns black women's physical images. These cases involve a variety of mechanisms to exclude black women from jobs that involve contact with the public—a tendency particularly evident in traditionally female jobs in which employers place a premium on female attractiveness—including a subtle, and often not so subtle, emphasis on female sexuality. The latter two categories sometimes involve, in addition to the intersection of race and gender, questions that concern the interaction of race, gender, and culture.

The failure to consider the implications of race-sex interaction is only partially explained, if at all, by the historical or contemporary development of separate political movements against racism and sexism. Rather, this failure arises from the inability of political activists, policy makers, and legal theorists to grapple with the existence and political functions of the complex of myths, negative images, and stereotypes regarding black womanhood. These stereotypes, and the culture of prejudice that sustains them, exist to define the social position of black women as subordinate on the basis of gender to all men, regardless of color, and on the basis of race to all other women. These negative images also are indispensable to the maintenance of an interlocking system of oppression based on race and gender that operates to the detriment of all women and all blacks. Stereotypical notions about white women and black men are developed by not only comparing them to white men but also setting them apart from black women.

The *Rogers* Opinion

The *Rogers* decision is a classic example of a case concerning the physical image of black women. Renee Rogers, whose work for American Airlines involved extensive passenger contact, charged that American's prohibition of braided hairstyles in certain job classifications discriminated against her as a woman in general and as a black woman in particular.[10] The court did not attempt to limit the plaintiff's case by forcing her to proceed on either race or gender grounds, and it did not create a false hierarchy between the two bases by treating one as grounded in statutory law and the other as a plus factor that would explain the application of law to a subgroup not technically recognized as a protected group by law. The court also appeared to recognize that the plaintiff's claim was not based on the cumulative effects of race and gender.

However, the court treated the race and sex claims in the alternative only. This approach reflects the assumption that racism and sexism always operate independently even when the claimant is a member of both a subordinated race and a subordinated gender group. The court refused to acknowledge that American's policy need not affect all women or all blacks to affect black women discriminatorily. By treating race and sex as alternative bases on which a claim might rest, the court concluded that the plaintiff failed to state a claim of discrimination on either ground. The court's treatment of the issues made this result inevitable—as did its exclusive reliance on the factors that it insisted were dispositive of cases involving employee grooming or other image preferences.

The distinct history of black women dictates that the analysis of discrimination be appropriately tailored in interactive claims to provide black women with the same protection available to other individuals and groups protected by antidiscrimination law. The *Rogers* court's approach permitted it to avoid the essence of overlapping

discrimination against black women and kept it from applying the basic elements of antidiscrimination analysis: a focus on group history, identification of recurring patterns of oppression that serve over time to define the social and economic position of the group, analysis of the current position of the group in relation to other groups in society, and analysis of the employment practice in question to determine whether and, if so, how it perpetuates individual and group subordination.

The court gave three principal reasons for dismissing the plaintiff's claim. First, in considering the sex discrimination aspects of the claim, the court disagreed with the plaintiff's argument that, in effect, the application of the company's grooming policy to exclude the category of braided hairstyles from the workplace reached only women. Rather, the court stressed that American's policy was evenhanded and applied to men and women alike.[11] Second, the court emphasized that American's grooming policy did not regulate or classify employees on the basis of an immutable gender characteristic.[12] Finally, American's policy did not bear on the exercise of a fundamental right.[13] The plaintiff's racial discrimination claim was analyzed separately but dismissed on the same grounds: neutral application of American's antibraid policy to all races and absence of any impact of the policy on an immutable racial characteristic or of any effect on the exercise of a fundamental right.

The court's treatment of culture and cultural associations in the racial context bears close examination. It carefully distinguished between the phenotypic and cultural aspects of race. First, it rejected the plaintiff's analogy between all-braided and Afro, or natural, hairstyles. Stopping short of concluding that Afro hairstyles might be protected under all circumstances, the court held that "an all-braided hairstyle is a different matter. It is not the product of natural hair growth but of artifice."[14] Second, in response to the plaintiff's argument that, like Afro hairstyles, the wearing of braids reflected her choice for ethnic and cultural identification, the court again distinguished between the immutable aspects of race and characteristics that are "socioculturally associated with a particular race or nationality."[15] However, given the variability of so-called immutable racial characteristics such as skin color and hair texture, it is difficult to understand racism as other than a complex of historical, sociocultural associations with race.

The court conceived of race and the legal protection against racism almost exclusively in biological terms. Natural hairstyles—or at least some of them, such as Afros—are permitted because hair texture is immutable, a matter over which individuals have no choice. Braids, however, are the products of artifice—a cultural practice—and are therefore mutable (i.e., the result of choice). Because the plaintiff could have altered the all-braided hairstyle in the exercise of her own volition, American was legally authorized to force that choice on her.

In support of its view that the plaintiff had failed to establish a factual basis for her claim that American's policy had a disparate impact on black women, thus destroying any basis for the purported neutral application of the policy, the court pointed to American's assertion that the plaintiff had adopted the prohibited hairstyle only shortly after it had been popularized by Bo Derek, a white actress, in the film *10*.[16] Notwithstanding the factual inaccuracy of American's claim and notwithstanding the implication that there is no relationship between braided hair and the culture of black women, the court assumed that black and white women are equally motivated (i.e., by the movies) to adopt braided hairstyles.

Wherever they exist in the world, black women braid their hair. They have done so in the United States for more than four centuries. African in origin, the practice of braiding is as American—black American—as sweet potato pie. A braided hairstyle was first worn in a nationally televised media event in the United States—and in that sense popularized—by a black actress, Cicely Tyson, nearly a decade before the movie *10*.[17] More importantly, Cicely Tyson's choice to popularize (i.e., to "go public" with) braids, like her choice of acting roles, was a political act made on her own behalf and on behalf of all black women.[18]

The very use of the term "popularized" to describe Bo Derek's wearing of braids—in the sense of rendering suitable to the majority—specifically subordinates and makes invisible all the black women who for centuries have worn braids in places where they and their hair were not overt threats to the American aesthetic. The great majority of such women worked exclusively in jobs where their racial subordination was clear. They were never permitted in any affirmative sense of the word any choice so closely related to personal dignity as the choice—or a range of choices—regarding the grooming of their hair. By virtue of their subordination—their clearly defined place in the society—their choices were simply ignored.

The court's reference to Bo Derek presents us with two conflicting images, both of which subordinate black women and black culture. On the one hand, braids are separated from black culture and, by implication, are said to arise from whites. Not only do blacks contribute nothing to the nation's or the world's culture, they copy the fads of whites. On the other hand, whites make fads of black culture, which, by virtue of their popularization, become—like all pop—disposable, vulgar, and without lasting value. Braided hairstyles are thus trivialized and protests over them made ludicrous.

To narrow the concept of race further—and, therefore, racism and the scope of legal protection against it—the *Rogers* court likened the plaintiff's claim to ethnic identity in the wearing of braids to identity claims based on the use of languages other than English. The court sought refuge in *Garcia v. Gloor*, a decision that upheld the general right of employers to prohibit the speaking of any language other than English in the workplace without requiring employers to articulate a business justification for the prohibition.[19] By excising the cultural component of racial or ethnic identity, the court reinforces the view of a homogeneous, unicultural society and pits blacks and other groups against each other in a battle over minimal deviations from cultural norms. Black women cannot wear their hair in braids because Hispanics cannot speak Spanish at work. The court cedes to private employers the power of family patriarchs to enforce a numbing sameness, based exclusively on the employers' whim, without the obligation to provide a connection to work performance or business need and thus deprives employees of the right to be judged on ability rather than on image or sound.

Healing the Shame

Eliminating the behavioral consequences of certain stereotypes is a core function of antidiscrimination law. This function can never be adequately performed as long as courts and legal theorists create narrow, inflexible definitions of harm and categories of protection that fail to reflect the actual experience of discrimination. Considering the interactive relationship between racism and sexism from the experiential standpoint and

knowledge base of black women can lead to the development of legal theories grounded in reality and to the consideration by all women of the extent to which racism limits their choices as women and by black and other men of color of the extent to which sexism defines their experiences as men of subordinated races.

Creating a society that can be judged favorably by the way it treats the women of its darkest race need not be the work of black women alone, and black women will not be the exclusive or primary beneficiaries of such a society. Such work can be engaged in by all who are willing to take seriously the everyday acts engaged in by black women and others to resist racism and sexism and to use these acts as the basis to develop legal theories designed to end race and gender subordination.

Resistance can take the form of momentous acts of organized, planned, and disciplined protests, or it may consist of small, everyday actions of seeming insignificance that can nevertheless validate the actor's sense of dignity and worth—such as refusing to give up a seat on the basis of inferiority on a bus or covering oneself in shame. It can arise out of the smallest conviction, such as knowing that an old woman can transmit an entire culture simply by touching a child. Sometimes it can come from nothing more than a refusal to leave a grandmother behind.

NOTES

1. 527 F. Supp. 229 (S.D.N.Y. 1981).

2. *Rogers* relied on Carswell v. Peachford Hosp., 27 Fair Empl. Prac. Cas. (BNA) 698 (N.D. Ga. 1981) (1981 WL 224). In *Carswell*, the employer discharged the plaintiff for wearing beads woven into a braided hairstyle. The prohibition applied to jewelry and other items and was justified by safety precautions for employees working in a hospital for psychiatric and substance-abusing patients. Significantly, the court noted that the hospital did not categorically prohibit the wearing of either braided or Afro hairstyles.

3. According to Cheryl Tatum, the Hyatt's personnel manager, a woman, said, "I can't understand why you would want to wear your hair like that anyway. What would our guests think if we allowed you all to wear your hair like that?" Employers often rely on customer preference to justify the imposition of certain requirements on employees or to restrict, on the grounds of race or sex, the persons who can occupy certain jobs. This justification typically amounts to nothing more than the expression of the preferences of the employer or a subterfuge for the exploitation of the images of employees for economic advantage. See L. Binder, *Sex Discrimination in the Airline Industry: Title VII Flying High*, 59 Calif. L. Rev. 1091 (1971).

4. I know that the student intended no harm toward me. She, too, was disturbed by *Rogers.* She had come to law school later in life than many of her classmates and was already experiencing the prejudices of the labor market related to the intersection of gender and age. She seemed to sense that something in the underlying racism and sexism in *Rogers* would ultimately affect her in a personal way.

5. McKay, *Black Woman Professor—White University*, 6 Women's Stud. Int'l. F. 143, 144 (1983).

6. See, e.g., DeGraffenreid v. General Motors Assembly Div., 413 F. Supp. 142, 145 (E.D. Mo. 1976) (Title VII did not create a new subcategory of black women with standing independent of black males).

7. See, e.g., Moore v. Hughes Helicopter, Inc., 708 F.2d 475, 480 (9th Cir. 1983) (certified class includes only black females, because plaintiff black female inadequately represents white females' interests).

8. See, e.g., Payne v. Travenol, 673 F.2d 798, 810–12 (5th Cir. 1982) (interests of black female plaintiffs substantially conflict with interests of black males, since females sought to prove that males were promoted at females' expense notwithstanding the court's finding of extensive racial discrimination).

9. See Chambers v. Girls Club of Omaha, 834 F.2d 697 (8th Cir. 1987).

10. *Rogers*, 527 F. Supp. at 231. Rogers sued under the Thirteenth Amendment, 42 U.S.C. §1981 (1988), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e (1988). The court disposed of

the Thirteenth Amendment claim on the ground that the amendment prohibits practices that constitute badges and incidents of slavery. Unless the plaintiff could show that she did not have the option to leave her job, her claim could not be maintained. *Rogers*, 527 F. Supp. at 231. The court also noted that the Title VII and section 1981 claims were indistinguishable in the circumstances of the case and were, therefore, treated together. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 232.

15. *Id.*

16. *Id.*

17. Tyson is most noted for her roles in the film *Sounder* (20th Century Fox 1972) and in the television special *The Autobiography of Miss Jane Pitman* (CBS television broadcast, Jan. 1974).

18. Her work is political in the sense that she selects roles that celebrate the strength and dignity of black women and avoids roles that do not.

19. Garcia v. Gloor, 618 F.2d 264, 267–69 (5th Cir. 1980); cf. Gutierrez v. Municipal Court, 838 F.2d 1031, 1040–41 (9th Cir.), vacated, 409 U.S. 1016 (1988).

36. From Practice to Theory, or What Is a White Woman Anyway?

CATHARINE A. MACKINNON

> And ain't I a woman?
> —**Sojourner Truth, quoted in *Black Women in Nineteenth-Century American Life***[1]

> Black feminists speak as women because we are women.
> —**Audre Lorde, *Sister Outsider***[2]

In recent critiques of feminist work for failing to take account of race or class, race and class are regarded as unproblematically real and not in need of justification or theoretical construction.[3] Only gender is not real and needs to be justified.[4] Although many women have demanded that discussions of race or class take gender into account, typically these demands do not take the form that, outside explicit recognition of gender, race or class do not exist. That there is a diversity to the experience of men and women of color, and of working-class women and men regardless of race, is not said to mean that race or class are not meaningful concepts. I have heard no one say that there can be no meaningful discussion of "people of color" without gender specificity. Thus the phrase "people of color and white women" has come to replace the previous "women and minorities," which women of color rightly perceived as not including them twice, and embodying a white standard for sex and a male standard for race. But I hear no talk of "all women and men of color," for instance. It is worth thinking about that when women of color refer to "people who look like me," it is understood that they mean people of color, not women, in spite of the fact that both race and sex are visual assignments, both possess clarity as well as ambiguity, and both are marks of oppression, hence community.

In this connection, it has recently come to my attention that the white woman is the issue here, so I decided I better find out what one is. This creature is not poor, not battered, not raped (not really), not molested as a child, not pregnant as a teenager, not prostituted, not coerced into pornography, not a welfare mother, and not economically exploited. She doesn't work. She is either the white man's image of her—effete, pampered, privileged, protected, flighty, and self-indulgent—or the black man's image of her—all that, plus the "pretty white girl" (meaning ugly as sin but regarded as the ultimate in beauty because she is white). She is Miss Anne of the kitchen, she puts Frederick Douglass to the lash, she cries rape when Emmett Till looks at her sideways, she manipulates

A version of this chapter previously appeared as Catharine A. MacKinnon, *From Practice to Theory, or What Is a White Woman Anyway?*, 4 Yale J.L. & Feminism 13 (1991). Originally published in the *Yale Journal of Law and Feminism*.

white men's very real power with the lifting of her very well-manicured little finger. She makes an appearance in Baraka's "rape the white girl,"[5] as Cleaver's real thing after target practice on black women,[6] as Helmut Newton's glossy upscale hard-edged, distanced vamp,[7] and as the Central Park Jogger, the classy white madonna who got herself raped and beaten nearly to death. She flings her hair, feels beautiful all the time, complains about the colored help, tips badly, can't do anything, doesn't do anything, doesn't know anything, and alternates fantasizing about fucking black men with accusing them of raping her. As Ntozake Shange points out, all Western civilization depends on her.[8] On top of all of this, out of impudence, imitativeness, pique, and a simple lack of anything meaningful to do, she thinks she needs to be liberated. Her feminist incarnation is all of the above, and guilty about every single bit of it, having by dint of repetition refined saying "I'm sorry" to a high form of art. She can't even make up her own songs.

There is, of course, much too much of this, this "woman, modified," this woman discounted by white, meaning she would be oppressed but for her privilege. But this image seldom comes face to face with the rest of her reality: the fact that the majority of the poor are white women and their children (at least half of whom are female); that white women are systematically battered in their homes, murdered by intimates and serial killers alike, molested as children, and actually raped (mostly by white men); and that even black men, on average, make more than they do.[9] If one did not know this, one could be taken in by white men's image of white women: that the pedestal is real, rather than a cage in which to confine and trivialize them and segregate them from the rest of life, a vehicle for sexualized infantilization, a virginal setup for rape by men who enjoy violating the pure, and a myth with which to try to control black women. (See, if you would lie down and be quiet and not move, we would revere you, too.) One would think that the white men's myth that they protect white women was real, rather than a racist cover to guarantee their exclusive and unimpeded sexual access—meaning they can rape her at will, and do, a posture made good in the marital rape exclusion and the largely useless rape law generally. One would think that the only white women in brothels in the South during the Civil War were in *Gone with the Wind*.[10] This is not to say there is no such thing as skin privilege but rather that it has never insulated white women from the brutality and misogyny of men, mostly but not exclusively white men, or from its effective legalization. In other words, the "white girls" of this theory miss quite a lot of the reality of white women in the practice of male supremacy.

Beneath the trivialization of the white woman's subordination implicit in the dismissive sneer "straight white economically privileged women" (a phrase that has become one word, the accuracy of some of its terms being rarely documented even in law journals) lies the notion that there is no such thing as the oppression of women as such. If white women's oppression is an illusion of privilege and a rip-off and reduction of the civil rights movement, we are being told that there is no such thing as a woman, that our practice produces no theory, and that there is no such thing as discrimination on the basis of sex. What I am saying is that to argue that oppression "as a woman" negates rather than encompasses recognition of the oppression of women on other bases is to say that there is no such thing as the practice of sex inequality.

Let's take this the other way around. As I mentioned, both Mechelle Vinson and Lillian Garland (plaintiffs in landmark sex-discrimination cases) are African American women. Wasn't Mechelle Vinson sexually harassed as a woman? Wasn't Lillian Garland

pregnant as a woman? They thought so. The whole point of their cases was to get their injuries understood as "based on sex"—that is, because they are women. The perpetrators, and the policies under which they were disadvantaged, saw them as women. What is being a woman if it does not include being oppressed as one? When the Reconstruction Amendments "gave blacks the vote," and black women still could not vote, weren't they kept from voting "as women"? When African American women are raped two times as often as white women, aren't they raped as women? That does not mean their race is irrelevant, and it does not mean that their injuries can be understood outside a racial context. Rather, it means that "sex" is *made up* of the reality of the experiences of all women, including theirs. It is a composite unit rather than a divided unitary whole, such that each woman, in her way, is all women. So, when white women are sexually harassed or lose their jobs because they are pregnant, aren't they women too?

The treatment of women in pornography shows this approach in graphic relief. One way or another, all women are in pornography. African American women are featured in bondage, struggling, in cages, as animals, insatiable. As Andrea Dworkin has shown, the sexualized hostility directed against them makes their skin into a sex organ, focusing the aggression and contempt directed principally at other women's genitals.[11] Asian women are passive, inert, as if dead, tortured unspeakably. Latinas are hot mommas. Fill in the rest from every demeaning and hostile racial stereotype you know; it is sex here. This is not done to men, not in heterosexual pornography. What is done to white women is a kind of floor; it is the best anyone is treated and it runs from *Playboy* through sadomasochism to snuff. What is done to white women can be done to any woman, and then some. This does not make white women the essence of womanhood. It is a reality to observe that this is what can be done and is done to the most privileged of women. This is what privilege as a woman gets you: most valued as dead meat.

I am saying each woman is in pornography as the embodiment of her particularities. This is not in tension with being there "as a woman"; *it is what being there as a woman means*. Her specificity makes up what gender is. White, for instance, is not a residual category. It is not a standard against which the rest are "different." There is no generic "woman" in pornography. White is not unmarked; it is a specific sexual taste. Being defined and used in this way defines what being a woman means in practice. Robin Morgan once said, "[P]ornography is the theory, rape is the practice."[12] This is true, but Andrea Dworkin's revision is more true: "Pornography is the theory, pornography is the practice."[13] This approach to "What is a woman?" is reminiscent of Sartre's answer to the question "What is a Jew?" Start with the anti-Semite.[14]

In my view, the subtext to the critique of oppression "as a woman," the critique that holds that there is no such thing, is dis-identification with women. One of its consequences is the destruction of the basis for a jurisprudence of sex equality. An argument advanced in many critiques by women of color has been that theories of women must include all women, and when they do, theory will change. On one level, this is necessarily true. On another, it ignores the formative contributions of women of color to feminist theory since its inception. I also sense, though, that many women, not only women of color and not only academics, do not want to be "just women," not only because something important is left out but also because that means being in a category with "her," the useless white woman whose first reaction when the going gets rough is to cry. I sense here that people feel more dignity in being part of any group that includes men than in being part of a

group that includes that ultimate reduction of the notion of oppression, that instigator of lynch mobs, that ludicrous whiner, that equality coattails rider, the white woman. It seems that if your oppression is also done to a man, you are more likely to be recognized as oppressed, as opposed to inferior. Once a group is seen as putatively human, a process helped by including men in it, an oppressed man in that group falls from a human standard.[15] A woman is just a woman—the ontological victim—so not victimized at all.

Unlike other women, the white woman who is not poor or working class or lesbian or Jewish or disabled or old or young *does not share her oppression with any man*. That does not make her condition any more definitive of the meaning of "women" than the condition of any other woman is. But trivializing her oppression, because it is not even potentially racist or class-based or heterosexist or anti-Semitic, does define the meaning of being "antiwoman" with a special clarity. How the white woman is imagined and constructed and treated becomes a particularly sensitive indicator of the degree to which women, as such, are despised.

If we build a theory out of women's practice, composed of the diversity of all women's experiences, we do not have the problem that some feminist theory has been rightly criticized for. When we have it is when we make theory out of abstractions and accept the images forced on us by male dominance. I said all that so I could say this: The assumption that all women are the same is part of the bedrock of sexism that the women's movement is predicated on challenging. That some academics find it difficult to theorize without reproducing it simply means that they continue to do to women what theory, predicated on the practice of male dominance, has always done to women. It is their notion of what theory is, and its relation to its world, that needs to change.

If our theory of what is "based on sex" makes gender out of actual social practices distinctively directed against women as women identify them, the problem that the critique of so-called "essentialism" exists to rectify ceases to exist. And this bridge, the one from practice to theory, is not built on anyone's back.

NOTES

1. Black Women in Nineteenth-Century American Life: Their Words, Their Thoughts, Their Feelings 235 (Bert J. Loewenberg & Ruth Bogin eds., 1976).

2. Audre Lorde, Sister Outsider 60 (1984). The whole quotation is "Black feminists speak as women because we are women and do not need others to speak for us."

3. I am thinking in particular of Elizabeth Spelman, Inessential Woman (1988), and Marlee Kline, *Race, Racism and Feminist Legal Theory*, 12 Harv. Women's L.J. 115 (1989), although this analysis also applies to others who have made the same argument. Among its other problems, much of this work tends to make invisible the women of color who were and are instrumental in defining and creating feminism as a movement of women in the world, as well as a movement of mind.

4. This is by contrast with the massive feminist literature on the problem of class, which I discuss and summarize as a foundational problem for feminist theory in Toward a Feminist Theory of the State (1989).

5. LeRoi Jones, *Black Dada Nihilismus*, in The Dead Lecturer 61, 63 (1964).

6. "I became a rapist. To refine my technique and *modus operandi*, I started out by practicing on black girls in the ghetto . . . and when I considered myself smooth enough, I crossed the tracks and sought out white prey." Eldridge Cleaver, Soul on Ice 14 (1968). "[R]aping the white girl" as an activity for black men is described as one of "the funky facts of life," in a racist context in which the white girl's white-girlness is sexualized—that is, made a site of lust, hatred, and hostility—for the black man through the history of lynching. *Id.* at 14–15.

7. Helmut Newton, White Women (1976).

8. Ntozake Shange, Three Pieces 48 (1981).

9. In 1989, the median income of white women was approximately one-fourth less than that of black men; in 1990 it was one-fifth less. U.S. Bureau of the Census, Current Population Rep., Ser. P-60, No. 174, Money Income of Households, Families, and Persons in the United States: 1990, at 104–05 (tbl.24) (1991).

10. This is an insight of Dorothy Teer.

11. Andrea Dworkin, Pornography: Men Possessing Women 215–16 (1981).

12. Robin Morgan, Going Too Far 169 (1978).

13. Personal communication with Andrea Dworkin. See also Andrea Dworkin, Mercy 232, 304–07 (1991).

14. "Thus, to know what the contemporary Jew is, we must ask the Christian conscience. And we must ask, not 'What is a Jew?' but '*What have you made of the Jews?*'"

15. I sense a similar dynamic at work in the attraction among some lesbians of identification with "gay rights" rather than "women's rights," with the result of obscuring the roots in male dominance of the oppression of both lesbians and gay men.

37. The Employer Preference for the Subservient Worker and the Making of the Brown-Collar Workplace

LETICIA M. SAUCEDO

The myth of the immigrant worker taking the job nobody else wants resonates in our public culture. Practices such as network hiring, job structuring, targeting subservience, and avoiding native-born workers are all couched in terms of worker choice. But as will be seen, employers, through their preference for subservient workers, create jobs that native-born workers will not take. Moreover, they take advantage of the social conditions that make brown-collar workers subservient by setting workplace conditions and pay rates. These conditions combine to create a particularly vulnerable workforce and demonstrate why brown-collar workers need the protections of antidiscrimination laws.

Brown-Collar Workers in the Segregated Workplace

A brown-collar worker is a newly arrived Latino who works in jobs or occupations in which Latinos are overrepresented. Increasingly concentrated in industries such as construction, hospitality, and service, brown-collar workers experience wage penalties, occupational segregation, and pay degradation. The term "brown-collar worker" describes an increasingly large sector of the American labor pool and is the fastest-growing segment of the labor force today. Latino employment increased by one million workers in a recent year, much of the increase driven by immigrant labor. Because the current Latino immigration stream has lasted longer than previous, European immigration cycles, and because Latinos advance slowly, earlier-arrived and native-born Latino workers continue to work side by side. These sets of Latino workers—newly arrived, earlier-arrived, and native-born workers who fit the profile of the vulnerable worker—together suffer the fate of the brown-collar worker. From the employer's point of view, they are all part of the brown-collar supply of labor.

A version of this chapter previously appeared as Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 Ohio St. L.J. 961 (2006). Originally published in the *Ohio State Law Journal*.

Conditions That Contribute to the Brown-Collar Worker's Subservience

One of the defining characteristics of many brown-collar workers is their relatively recent arrival. Several elements of newly arrived status, including perceived immigration status, lack of knowledge about workplace rights, political disenfranchisement, "push" factors, language deficiencies, and fear of job loss or deportation, combine to create an especially vulnerable workforce.

Newly arrived Latino workers know less about their workplace culture or workplace rights than native-born workers. Less educated than their native-born counterparts, they often do not know they can complain about violations of their rights. They are not aware, as their native-born counterparts are, that their workplace rights are greater than they seem. In fact, because of their newly arrived status, they tend to believe the opposite. High levels of unemployment, poor living conditions, and political instability in their home country create push factors for Latino workers who enter the United States seeking stable working conditions, which they believe will be better in the United States than at home. The need to support families in their home countries motivates them to work in even adverse conditions.

Newly arrived workers fear more than job loss. They fear deportation, either their own or that of their family members. It is almost impossible for most newly arrived workers to obtain legal status under current immigration law, which restricts the number of unskilled worker visas to ten thousand. The only alternative for obtaining a visa requires family sponsorship by a close relative. Even then, immigration law deems someone who entered or worked in the United States without authorization inadmissible and ineligible for adjustment to legal permanent resident status. Changes in immigration law have imposed harsh consequences on immigrant workers who enter illegally and who are unlawfully present. All these components of the immigration system create an atmosphere of fear among undocumented workers, as well as documented workers who have undocumented family members and friends.

Newly arrived workers fear rocking the boat at work, because recent court rulings have fueled the perception that immigrant workers have limited rights. For example, the Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB* threatened the effectiveness of undocumented-worker-organizing efforts by limiting the remedies available to such workers suffering from employers' unfair labor practices. The case opened the way for challenges to undocumented worker rights in other areas of employment and labor law, including the Fair Labor Standards Act, state worker compensation and wage statutes, and Title VII.

Newly arrived workers are also disenfranchised informally. Language deficiencies keep them from moving freely across jobs. Many of the jobs that newly arrived Latinos find do not require English language skills, although many job-advancement opportunities tend to require them. As outsiders, newly arrived workers do not become active participants in local affairs, nor do they tend to exercise collective political will. Because they have no political rights in this country until they become citizens, they cannot exercise voting rights. Disenfranchisement and inability to participate in civic affairs fuel the treatment of newly arrived workers as the "other," both in the community and in the workplace.

These characteristics are bound up in the brown-collar worker's identity. For employers categorizing their workforce, these characteristics, especially subservience, are linked to national origin and form part of the identity imposed on workers. As one employer noted, "The Latinos in our locations, most are recent arrivals. Most are tenuously here, and here on fragile documents. I see them as very subservient."[1]

Even documented workers fear for their own continuing status. Current immigration law penalizes legally admitted immigrants, through criminal and noncriminal grounds for deportation. Conviction of a domestic violence crime, violation of a protection order, or even driving while under the influence of alcohol makes a documented immigrant deportable. The increasingly restrictive character of immigration law and the current debates surrounding it chill the workplace activism of documented immigrants, who do not want to draw unnecessary attention to themselves.

Wage Differentials

Brown-collar workers experience wage differentials as a result of their segregated status. Wage differentials correlate positively with the percentage of brown-collar workers in a job or occupation. Wages for Latino workers have continued to fall relative to wages in non-Latino occupations.

Occupational Mobility

As the Pew Hispanic Center put it, "An occupational bifurcation has resulted whereby more and more Hispanic workers are in occupations with lower socioeconomic status, while fewer non-Hispanic workers hold these jobs. At the same time, more non-Hispanic workers have occupations with higher occupational status while fewer Hispanic workers have these occupations."[2]

The Latino immigrant experience is characterized by a very slow incorporation and, at times, nonexistent movement up economic and social ladders. More importantly, the higher the percentage of brown-collar workers, the more all Latinos, regardless of their status or place of birth, experience segregation in the worksite. Over time, they suffer wage disparities and wage suppression at a higher rate than their nonsegregated counterparts.

The Legal Dilemma: Dismantling the Myth of the Unwanted Job and Targeting Employer Preferences for the Subservient Worker

Employers targeting brown-collar workers use national origin as a proxy for subservience. This practice deserves legal scrutiny, as do the mechanisms or structures that employers use to carry out their preferences. The myth that no one but immigrants will take brown-collar jobs obscures employer intentionality in targeting immigrants for brown-collar jobs or occupations. The brown-collar workplace is not, in fact, part of a natural process of immigrant incorporation into the economy. Current legal doctrine and theory are ineffective, however, especially in the face of the myth that brown-collar workers choose these jobs and that decisions about which jobs to take lie solely with the employee.

The myth masks the power that employers have to create the jobs that no one else will take and target brown-collar workers for those jobs. Employers can choose the ethnic composition of their workforces when they, among other things, set pay rates and working conditions, rely on word-of-mouth hiring practices, and seek subservience for particular positions. They preselect who will be interested in a job when they adopt such policies as allowing languages other than English to be spoken on the job in some positions and not in others. This job-structuring process creates a set of jobs or occupations that employers reserve for brown-collar workers. Typically, an employer hires brown-collar workers because of a reluctance to hire native-born Anglo or minority workers.

One rationale for targeting brown-collar workers is that they are perceived as willing to work harder for less pay than their native-born counterparts. The simple reality, however, is that no one—not even the immigrants who fill them—really wants these jobs, at least in the form they are offered. The jobs have so deteriorated in pay and conditions after becoming immigrants' jobs that they no longer resemble the jobs held by predecessor employees.

Moreover, brown-collar workers are constrained in their choices by employer job structuring on the one hand and an immigration legal system that refuses to recognize their existence on the other. To the extent that employers are active participants in setting up the structures that take advantage of workers' constrained choices, their practices should receive legal scrutiny.

An immigrant success story portrays the immigrant as starting at the bottom of the economic ladder and moving up steadily over time. It allows for the popular perception that brown-collar workers will assimilate and move up the economic ladder if they only desire to do so. In other words, should immigrants choose to invest in their own human capital, they will not suffer harmful workplace conditions for long. As with the corollary myth of the unwanted job, however, the immigrant success story does not consider the degree to which brown-collar workers' choices are constrained by social and legal policies. And it does not acknowledge how employers take advantage of those constraints to develop a segmented market that inhibits job-advancement opportunities.

Professor Debra Malamud acknowledges the difficulty in challenging brown-collar workplaces precisely because they conform to the narrative of the employer as an innocent participant in a natural process. In this narrative, the ethnic niche is a normal and natural consequence of immigrant incorporation into American society. Rather than an oppressive environment, the brown-collar workplace is seen as a nurturing training ground that develops skills and human capital for those who enter it.

Given the power of the myth's narrative, current disparate-impact and disparate-treatment frameworks may be too weak to dismantle the brown-collar structure simply because no one perceives it as a structure. If the myth prevails, individual employers will not be held responsible for the historically inevitable employment patterns surrounding immigrant workforces. Judicial decision makers who accept the view that brown-collar workplaces are inevitable will conclude that employees who stay in unwanted jobs suffer from societal discrimination or lack of human capital and not from the effect of deliberate employer practices.

Employer Intentionality: Targeting the Brown-Collar Worker

Brown-collar workers suffer from the mirror image of the type of discrimination that keeps potential employees out of targeted jobs. In other words, they get the jobs nobody else wants because the employer targeted them for those jobs and made the jobs so onerous that no one but the choiceless would fill them. Because of Title VII's focus on employment opportunities, traditional practice and theory have focused on the exclusionary aspect, reserving a cause of action for plaintiffs who were denied job opportunities. The myth that no one else will take brown-collar jobs hides the inclusionary aspect of discrimination and makes it more difficult for a brown-collar plaintiff to challenge the terms and conditions of the job the employer offered. The inclusionary character of discrimination occurs when a protected group is perceived as better equipped for the least desirable jobs and an individual from that group is treated accordingly. Discrimination thus occurs in the interplay between network hiring, targeting subservience, and job structuring.

Network Hiring

Employers conduct word-of-mouth hiring through social networks within immigrant communities. For Latino immigrant workers, insider referrals account for the bulk of informal job-matching possibilities. Sometimes employers directly recruit outside the country for these jobs, relying on labor recruiters, or intermediaries, so as to shield themselves from questions about immigration status. They also seek workers through day-labor pools. These methods are all variations of word-of-mouth, or network, recruiting. These forms of recruitment, in turn, produce a steady stream of subservient workers for the "unwanted" job.

Structuring the Job: The Creation of the "Unwanted" Job and the Segregated Workplace

Employers also predetermine the ethnic composition of their workforce by setting pay rates and conditions for certain jobs. This form of job structuring attracts certain workers and deters others from seeking the jobs. Up skilling and down skilling of jobs and the movement toward contingent job structures are examples of practices that perpetuate segregated workplaces. The de-skilling, or down skilling, of jobs creates opportunities at the entry level but few advancement opportunities for brown-collar workers. The process evolves naturally because employers create job descriptions based on who they think will take the jobs. De-skilling facilitates the hiring of unskilled workers for jobs that once required a variety of skills. An employment model with short advancement ladders and dead-end jobs reduces opportunities over the long term, especially at the lower end of the skills spectrum.

Targeting Subservience

Employer preferences for the subservient worker are not, by themselves, discriminatory. The hiring process turns discriminatory when the employer uses race or national origin

as a proxy for choosing the subservient worker. This is true even if the employer has not consciously equated subservience with an ethnic category.

Employers target the newly arrived Latino population for the least desirable, often lowest-paid jobs in the workplace, precisely because they perceive and anticipate the subservience of Latino immigrants. Employer perceptions shape workers' pay, working conditions, assignments, and status within a company. Because employers tend not to distinguish between newly arrived and other immigrants at the bottom of the economic ladder, national origin maintains its power as a proxy for subservience.

Employers intentionally target brown-collar workers for certain jobs because of their subservient character—this is the inclusionary impact of discrimination. Once an employer begins to target a particular ethnic group, the company relies on network hiring to fill positions. These three mechanisms—targeting, structuring, and network hiring—combine to maintain racially and ethnically stratified worksites.

Avoiding Hiring Native-Born Workers for the Unwanted Job

On the other side of the equation, employers avoid hiring native-born workers, especially African Americans, for these jobs. This, of course, is the exclusionary impact of discrimination. Employers provide all kinds of reasons for avoiding native-born workers, although foremost among them is the perception that native-born workers are more willing to exercise their workplace rights to the detriment of the company. The following excerpt of an employer interview illustrates this perception:

> As a small businessman, my main fear is having a worker who is bent on filing formal complaints or lawsuits. It would surely drive me out of business. As I see it, Asians and Mexicans are generally not like that. If they have a problem, they try and solve it personally, or they just go to another company. But whites and blacks, they like to stand up for their rights, even if it means they can drive me out of business and all of the other workers lose their jobs. For blacks, I'm afraid that they will not just involve lawyers but bring outsiders, like the NAACP or the Black Panther's Party or whatever they have now. Then I'm really dead.[3]

The Current Legal Framework and Its Theoretical Underpinnings

In theory, Title VII is broad enough to target and eliminate employer practices that classify workers into segregated jobs. Section 703(a)(2) of Title VII states:

> It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[4]

The *EEOC Compliance Manual*, which guides the federal government's employment discrimination investigations, lists as examples of classification "assigning women and minorities to menial, dirty, confining, less desirable, less prestigious, nonsupervisory,

and lower paying jobs."[5] Notably, these are the same types of practices that create brown-collar workplaces.

Yet brown-collar workers resist pursuing claims to escape their segregated working conditions. In part, they resist because interpretation of current proof frameworks hinders successful litigation. The frameworks establish the proof methods for showing by circumstantial evidence that an employer has segregated, limited, or classified employees "because of" a prohibited reason. Meeting the "because of" element proves a difficult task for a brown-collar worker, given the prevailing narratives surrounding the willingness of brown-collar workers to take the jobs no one else wants.

When alleging that combined practices produce segregated brown-collar workplaces, brown-collar plaintiffs must prove causation. To do so, a plaintiff must "offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group."[6] Employers will argue that the brown-collar worker takes the unwanted job, and stays in it, by choice. Employers may also argue that they are simply seeking subservience, rather than targeting national origin. The plaintiff must be careful to—indeed, may not be able to—make clear causal connections between a specific employer practice and the protected category. The myth that the market determines a worker's place, and that a brown-collar worker's place is inevitably at the lower end of the economic ladder, is hard to counter.

Disparate Treatment Theory

In the absence of direct evidence, the individual plaintiff must show that he or she is a member of a protected class, is qualified for a targeted job, and that those outside the protected class were treated more favorably. Once a plaintiff establishes a prima facie case, the employer must respond with a legitimate, nondiscriminatory reason for its actions. If the employer presents a legitimate, nondiscriminatory reason for its decision, the plaintiff must then establish that the reason is a pretext for unlawful discrimination. Alternatively, a group of plaintiffs can show a pattern or practice of discrimination by demonstrating that differential treatment is the employer's standard operating procedure. This claim turns on proof that the defendant's conduct rises to the level of intentional discrimination against a protected class.

Increasingly, courts have begun to accept the premise that employers are color blind. Thus, the existence of segregated jobs continues to be judged as nothing more than a societally driven phenomenon. Debra Malamud suggests the dangers of this interpretation:

> If facially neutral business decisions that are not (or not yet) subject to Title VII challenge are perpetuating a labor market in which racial and ethnic segregation is an everyday occurrence, then labor market segregation continues to be accepted as natural and normal. The segregation caused by intentional discrimination does not stand out as clearly as it otherwise would; it just becomes another thread in the segregated fabric of American life. And segregation, which we still claim to reject in principle, becomes ever more accepted as fact.[7]

The formal elements of an intentional discrimination claim—individual or class-based—leave much room for an employer to provide alternative explanations for brown-collar segregated workplaces. The employer can argue that its preference for subservient workers has nothing to do with the employee's national origin but results from merely constricted choices stemming from his social situation.

In short, the assumptions behind why immigrants take and keep these jobs are difficult to overcome. For these reasons, the formal doctrine must be adjusted to fit the brown-collar job. Increasingly embedded in the color-blind, antidifferentiation interpretation of equal protection, the economic models ignore the social factors that make brown-collar workers subservient as long as employers treat all workers equally.

Conclusion

Brown-collar workers must not suffer without a remedy in antidiscrimination law. Although formally brown-collar workers may be able to make a case—as women have in successful subjective-criteria cases—the barriers remain high without a shift in popular thinking about how, or even whether, employers choose their workforces.

Employer preferences for subservient workers cause them to target brown-collar workers and create for them a set of unwanted jobs. Employers essentially choose the ethnic composition of jobs by their recruitment methods and by setting the pay and conditions of those jobs. The result is a group of segregated jobs and occupations with wages and work conditions that worsen steadily over time. Brown-collar workers hired into those jobs have little recourse in antidiscrimination law to improve their conditions.

Cases concerning segregated workers illustrate the power of neoclassical economic theories in decision makers' assumptions about how employers treat immigrant jobs. Title VII case law has incorporated the mainstream economic assumptions, making it difficult to attack brown-collar workplaces.

In fact, employers target subservient workers for certain jobs. Their biases help identify brown-collar workers as the subservient workers of choice. Employers play a larger role than the neoclassical theories suggest in creating the labor pool and structuring jobs in the low-wage sector. This realization allows us to challenge the myth that the resultant segregated workplaces are inevitable and natural consequences of labor market dynamics.

The problem of the brown-collar worker ultimately reflects the problem of all workers in the American economy, especially those at the lower rungs of the economic ladder. The deterioration of job conditions over time and the creation of "immigrant" jobs is not a natural occurrence. The antidiscrimination frameworks should more readily facilitate challenges to the practices that create these conditions.

NOTES

1. Roger Waldinger & Michael I. Lichter, How the Other Half Works: Immigration and the Social Organization of Labor 163 (2003). Waldinger and Lichter's interviews of employers revealed observations on preferences such as the one provided by this employer, who described how his perception of the workers' social conditions played into his decision making about whom to hire for certain jobs.

2. Maude-Toussaint Comeau et al., Occupational Attainment and Mobility of Hispanics in a Changing Economy 48–49 (2005).

3. Edward J. W. Park, *Racial Ideology and Hiring Decisions in Silicon Valley*, 22 Qualitative Soc. 223, 230 (1999).

4. 42 U.S.C. §2000e-2(a) (2000).

5. Equal Employment Opportunity Comm'n, Publ'n No. 294, EEOC Compliance Manual: Segregating, Limiting, and Classifying Employees, §618, at 618:0009 (BNA 2003).

6. Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 994 (1988).

7. Debra C. Malamud, *Affirmative Action and Ethnic Niches*, in Color Lines 313, 336 (John D. Skrentny ed., 2001).

From the Editors

Issues and Comments

Do you agree with several of the authors in this part that groups, such as all women or all blacks, are unlikely to represent adequately the interests of smaller subsets of themselves, such as black women or Latinos who are gay? Should a smaller group make strategic alliances with a larger one, even if the larger one does not represent its interests exactly? If a group—say, black women—has a practice (e.g., wearing hair in braids) that is more characteristic of its identity than of the identity of white women or black men, how should courts treat the practice when it collides with a private company's rule? Should it receive more, or less, solicitude than a rule that disadvantages men or women in general?

Can one easily imagine a union of all oppressed people, regardless of the means of their oppression, whether race, sex, class, sexual orientation, or something else? Or can we only speak of "oppressions"? Does immigration law, by excluding some from documented status, create a workforce of marginalized people?

Part VIII treats many of these same problems and issues through the opposite lens—that of essentialism and antiessentialism; in that sense, the two parts represent a coherent whole and should be read together. For a discussion on race and class, see the selections by Jennifer Hochschild and Athena Mutua in the Suggested Readings, immediately following. On race and sex intersectionality, see the classic articles by Kimberlé Crenshaw. On gays and lesbians of color, see Part IX.

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PART VIII

ESSENTIALISM AND ANTIESSENTIALISM

WHAT IS THE black community, or community of color? Does it exist? Or are there in reality many partially overlapping, partially competing subcommunities? If the latter, who speaks for this community or communities? How should minority communities view what are conventionally seen as offenders, or criminals, in their midst—including their own youth? What are we to think of situations, like the Los Angeles insurrection, that apparently saw minority groups, such as Korean merchants and inner-city African American youth, in conflict? Commentators who address these issues are concerned with the appropriate unit of analysis: Is the black (or Chicano) community one or many? Do middle- and working-class people of color have different needs and concerns? Do all oppressed people have something in common or speak in a single, distinctive voice?

Regina Austin explores the troubled relationship between the black community and its own offenders, arguing for a politics of identification that seeks to find the good, the strengths, in what is commonly seen as criminal behavior, while resisting the aspects of youthful offending that are genuinely dangerous for the broader community of which the offenders are a part.

Trina Grillo and Stephanie Wildman caution against the use of essentialist analogies by whites to equate experiences of people of color with those of whites.

Lisa Ikemoto shows that the narrative of interracial group conflict reveals more than a trace of white racism in the way society constructs such conflicts.

Angela Onwuachi-Willig and Jacob Willig-Onwuachi show how civil rights law, even though it allows them to marry, leaves mixed-race couples without a remedy in the face of housing discrimination.

38. "The Black Community," Its Lawbreakers, and a Politics of Identification

REGINA AUSTIN

Distinction Versus Identification: Reactions to the Impact of Lawbreaking on "the Black Community"

There exists out there, somewhere, "the black community." It once was a place where people both lived and worked. Now it is more of an idea, or an ideal, than a reality. It is like the mythical maroon colony of the Isle des Chevaliers (for those of you who have read Toni Morrison's *Tar Baby*) or like Brigadoon (for those of you who are culturally deprived). The black community of which I write is partly the manifestation of a nostalgic longing for a time when blacks were clearly distinguishable from whites and concern about the welfare of the poor was more natural than our hairdos. Perhaps my vision of the quintessential black community is ahistorical, transcendent, and picturesque. I will even concede that the community's infrastructure is weak, its cultural heritage is lost on too many of its young, and its contemporary politics is in disarray. I nonetheless think of it as Home and refer to it whenever I want to convey the illusion that my arguments have the backing of millions.

The black community of which I write is in a constant state of flux because it is buffeted by challenges from without and from within. (The same is true for the dominant society, but that is another story.) There are tensions at the border with the dominant society, at the frontier between liberation and oppression. There is also internal dissension over indigenous threats to security and solidarity. Difference is as much a source of contention within the community as it is the factor marking the boundary between the community and everyone else. The community's struggles are made all the more difficult because there is no bright line between its foreign affairs and its domestic relations.

Nothing illustrates the multiple threats to the ideal of the black community better than black criminal behavior and the debates it engenders. There is no shortage of controversy about the causes, consequences, and cures of black criminality. To the extent there is consensus, black appraisals of questionable behavior are often in accord with

A version of this chapter previously appeared as Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. Cal. L. Rev. 1769 (1992). Originally published in the *Southern California Law Review*.

those prevailing in the dominant society, but sometimes they are not. In any event, there is typically no unanimity within the community on these issues.

For example, some blacks contend that in general the criminal justice system is working too well (putting too many folks in prison),[1] while others maintain that it is not working well enough (leaving too many dangerous folks out on the streets). Black public officials and others have taken positions on both sides of the drug legalization issue.[2] Black neighbors are split in cities where young black men have been stopped and searched by the police on a wholesale basis because of gang activity or drug trafficking in the area. Those with opposing views are arguing about the fairness of evicting an entire family from public housing on account of the drug-related activities of a single household member, the propriety of boycotting Asian store owners who have used what some consider to be excessive force in dealing with suspected shoplifters and would-be robbers, and the wisdom of prosecuting poor black women for fetal neglect because they consumed drugs during their pregnancies.

Whether the black community defends those who break the law or seeks to bring the full force of white justice down on them depends on considerations not necessarily shared by the rest of the society. The black community evaluates behavior in terms of its impact on the overall progress of the race. Black criminals are pitied, praised, protected, emulated, or embraced if their behavior has a positive impact on the social, political, and economic well-being of black communal life. Otherwise, they are criticized, ostracized, scorned, abandoned, and betrayed. The various assessments of the social standing of black criminals within the community fall into roughly two predominant political approaches.

At times, the black community or an element thereof repudiates those who break the law and proclaims the distinctiveness and the worthiness of those who do not. This politics of distinction accounts in part for the contemporary emphasis on black exceptionalism. Role models and black firsts abound. Stress is placed on the difference that exists between the better elements of the community and the stereotypical lowlifes who richly merit the bad reputations the dominant society accords them.[3] According to the politics of distinction, little enough attention is being paid to the law-abiding people who are the lawbreakers' victims. Drive-by shootings and random street crime have replaced lynchings as a source of intimidation, and the culture of terror practiced by armed crack dealers and warring adolescents has turned them into the urban equivalents of the Ku Klux Klan.[4] Cutting the lawbreakers loose, so to speak, by dismissing them as aberrations and excluding them from the orbit of our concern to concentrate on the innocent is a wise use of political resources.

Moreover, lawless behavior by some blacks stigmatizes all and impedes collective progress. For example, on the basis of the behavior of a few, street crime is wrongly thought to be the near-exclusive domain of black males; as a result, black men of all sorts encounter an almost hysterical suspicion as they negotiate public spaces in urban environments[5] and attempt to engage in simple commercial exchanges.[6] Condemnation and expulsion from the community are just what the lawbreakers who provoke these reactions deserve.

In certain circumstances the politics of distinction, with its reliance on traditional values of hard work, respectable living, and conformity to law, is a perfectly progressive maneuver for the community to make. Deviance confirms stereotypes and plays into the hands of an enemy eager to justify discrimination. The quest for distinction can save lives and preserve communal harmony.

On the downside, however, the politics of distinction intensifies divisions within the community. It furthers the interests of a middle class uncertain of its material security and social status in white society. The persons who fare best under this approach are those who are the most exceptional (i.e., those most like successful white people). At the same time, concentrating on black exceptionalism does little to improve the material conditions of those who conform to the stereotypes. Unfortunately, there are too many young people caught up in the criminal justice system to write them all off or to provide for their reentry into the mainstream one or two at a time.[7] In addition, the politics of distinction encourages greater surveillance and harassment of those black citizens who are most vulnerable to unjustified interference because they resemble the lawbreakers in age, gender, and class. Finally, the power of the ideology of individual black advancement, of which the emphasis on role models and race pioneers is but a veneer, is unraveling in the face of collective lower-class decline. To be cynical about it, an alternative form of politics may be necessary if the bourgeoisie is to maintain even a semblance of control over the black masses.

Degenerates, drug addicts, ex-cons, and criminals are not always the community's "others." Differences that exist between black lawbreakers and the rest of us are sometimes ignored and even denied in the name of racial justice. The black community acknowledges the deviants' membership, links their behavior to the community's political agenda, and equates it with race resistance. The community chooses to identify itself with its lawbreakers and does so as an act of defiance. Such an approach might be termed the "politics of identification."

In fact, there is not one version of the politics of identification but many. They vary with the class of the identifiers, their familiarity with the modes and mores of black lawbreakers, and the impact that black lawbreaking has on the identifiers' economic, social, and political welfare. The most romanticized form of identification prompts emulation among the young and the poor; the dangers and limitations such identification holds for them are fairly well known. Still, lawbreakers do have something to contribute to black political discourse and practice. In the 1960s segments of the black middle class identified with black criminals as sources of authentic blackness. The young, new bourgeoisie extracted a style from lawbreaker culture and turned it into the trappings of a political militancy that still has currency today. I evaluate the pros and cons of this effort. I also consider black female lawbreakers, with whom there is little identification, and suggest why there ought to be more of them.

The politics of identification envisioned in this chapter is one that demands recognition of the material importance of lawbreaking to blacks of different socioeconomic strata, however damaging such recognition may be to illusions of black moral superiority. Moreover, the politics of identification described herein would have as an explicit goal the restoration of some (but not all) lawbreakers to good standing in the community by treating them like resources, providing them with opportunities for redemption, and fighting for their entitlement to a fair share of the riches of this society.

In Vogue: Bourgeois Identification as Militant Style

The urban poor are not the only segment of the community that can be seduced by the élan of black male lawbreakers. At times the black middle class has also bought into the quixotic view of the black criminal as race rebel.

During the late 1960s, black male lower-class and deviant cultures provided a source of up-to-date signs and symbols for the antiassimilationists. Leather jackets, big Afros, and talking trash were de rigueur for upwardly mobile yet nationalistic black college students. It is not clear what prompted this wave of identification. It might have been guilt about having escaped the ghetto, fear of losing the moral superiority associated with being black and oppressed, indignation over the supplicant role the Southern civil rights movement seemingly encouraged blacks to play, or a desire to extract concessions from a white society scared to death of black lawbreakers and any impersonators with similar styles of dress, speech, and carriage.[8]

This is not the place for a full-blown critique of the black nationalism movement of the 1960s.[9] Some of its aspects undoubtedly ought not be repeated if a similar surge of lawbreaker identification should overtake the middle class anytime soon. The movement was fiercely misogynistic.[10] The predominant leadership style was marked by masculine bravado and self-aggrandizement. The movement's bourgeois brand of racial animosity, or acting out, was easily indulged and domesticated with bribes. The benefits the nationalists won from the dominant society inured disproportionately to those who now make their living providing governmental services to other minority people or acting as intermediaries between the white managements of private enterprises and their minority employees and customers.[11] Ironically, these bureaucrats supply images of bourgeois success that obscure the economic inequality that produces the disgruntlement they are paid to redirect.

The movement did not maximize opportunities for lower-status blacks to speak and act on their own behalf. In adopting the lawbreakers' style and using it to advance their own interests, the middle class preempted any claim that the style was the spontaneous and well-justified reaction of less-well-off folks to specific material conditions that warranted the society's direct attention. The identification temporarily lent an aura of respectability to those who earned their deviant status by virtue of actually breaking the law. But when the movement died, or was killed, the real lawbreakers and others on the bottom of the status hierarchy found themselves outsiders again.[12]

In general, the newly materializing black militant bourgeoisie of the 1960s did not go very far in incorporating the concerns of lawbreakers into their demands or in adopting the more aggressive practices of criminals as the praxis of their movement. Others did. The Black Panthers, for example, employed black turtlenecks, leather jackets, berets, dark glasses, and shotguns as the accoutrements of militancy and attracted the attention of young northern urban blacks with their "belligerence and pride" and their outspokenness on issues of relevance to ghetto residents.[13] The Panthers specifically addressed the role white police officers played in black neighborhoods as well as the status of black criminal defendants and prisoners. They called for the release of "all black men held in federal, state, county and city prisons and jails" on the ground that "they had not received a fair and impartial trial."[14] (No mention was made of incarcerated women.) Their close observation of white cops as they arrested black citizens on the street highlighted the problem of police brutality. The Panthers' posturing and head-on clashes with the authorities, however, provoked repression and government-instigated internal warfare. This in turn caused the Panthers to squander resources on bail and attorneys that might have been better spent on Serve the People medical clinics and free breakfasts for children. Such service activities stood a better chance of mobilizing grassroots support

among ordinary blacks and overcoming neighborhood problems than did the Panthers' attempts at militaristic self-defense and socialist indoctrination.

Despite the shortcomings of the black militancy of the 1960s, identification with black lawbreakers still has something to contribute to political fashion and discourse. That blacks are once again fascinated with the outspoken nationalist leader Malcolm X illustrates this. Even the most bourgeois form of identification represents an opening, an opportunity, to press for a form of politics that could restore life to the ideal of the black community by putting the interests of lawbreakers and their kin first. Drawing on lawbreaker culture would add a bit of toughness, resilience, bluntness, and defiance to contemporary mainstream black political discourse, which evidences a marked preoccupation with civility, respectability, sentimentality, and decorum. Lawbreaker culture supports the use of direct words and direct action that more refined segments of society would find distasteful. It might also support a bit of middle-class lawbreaking.

There is nothing that requires militant black male leaders to be selfish, stupid, shortsighted, or sexist. There is certainly nothing that requires militant black leaders to be men. As sources of militant style, women lawbreakers set a somewhat different example from the men. Furthermore, it is impossible to understand what lawbreakers can contribute to the substance of a politics of identification without considering women who break the law.

Justifying Identification Where There Is None Now: Female Lawbreakers and the Lessons of Street Life

Black men do not have a monopoly on lawbreaking. Black women too are engaged in a range of aggressive, antisocial, and criminal conduct that includes prostitution, shoplifting, credit card fraud, check forgery, petty larceny, and drug dealing.[15] But unlike her male counterpart, the black female offender has little or no chance of being considered a rebel against racial, sexual, or class injustice. There is seemingly no basis in history or folklore for such an honor. The quiet rebellions slave women executed in the bedrooms of their masters and the kitchens of their mistresses are not well known today. Thus, the contemporary black female lawbreaker does not benefit from an association between herself and her defiant ancestors who resorted to arson, poisoning, and theft in the fight against white enslavement.

Aggressive and antisocial behavior on the part of black male lawbreakers is deemed compatible with mainstream masculine gender roles and is treated like race resistance, but the same sort of conduct on the part of black females is scorned as being unfeminine. Women are not supposed to engage in violent actions or leave their families to pursue a life of crime. Women who do such things may be breaking out of traditional female patterns of behavior, but their departures from the dictates of femininity are attributed to insanity or lesbianism without any basis in psychology or sociology.[16] No consideration is given to the structural conditions that make violence a significant factor in the lives of lower-class women and that suggest that their physical aggression is not pathological. Conversely, forms of deviance associated with feminine traits like passivity and dependency are dismissed as collaboration with the white or male enemy. Black male lawbreaking also backfires, but black female criminals are not given the benefit of the doubt the males enjoy, either because the hole the women dig for themselves is

more readily apparent or because their defiance of gender roles is treated as deviance of a higher order.

What most blacks are likely to know about the degradation and exploitation that black women suffer in the course of lawbreaking and interacting with other lawbreakers provides no basis for identifying with them. Take the lot of black streetwalkers, for example. Minority women are overrepresented among street prostitutes and as a result are overrepresented among prostitutes arrested and incarcerated.[17] Black and brown women are on the corner rather than in massage parlors or hotel suites in part because of the low value assigned to their sexuality. Many street prostitutes begin their careers addicted to cocaine, heroin, or both or develop addictions thereafter; drug habits damage their health, impair their appearance (and thereby their earnings), and increase their physical and mental vulnerability. Finally, streetwalkers encounter violence and harassment from pimps, johns, police officers, assorted criminals, and even other women in the same line of work.

Prostitution is but one form of criminal activity a woman in street life might be employed in at any particular time. Less is known about lawbreaking of a nonsexual nature. The exploitation, manipulation, and physical jeopardy associated with street prostitution are also experienced by female lawbreakers who are members of male-affiliated female gangs and criminal networks. These networks, which once were quite prevalent, consist of loosely affiliated households or pseudofamilies made up of a male head and one or more females, sometimes referred to as wives-in-law. In such collectives the male hustlers hustle the females. In return for giving money, assistance in criminal endeavors, affection, and loyalty to their men, the women get protection, tight controls on their sexual dalliances, and the privilege of competing with other females for attention. Try as they might to break out of traditional gender roles with aggressive criminal or antisocial behavior, the female members of traditional girl gangs and networks sink deeper into the optionlessness of low-status, low-income female existence. That hardly makes them fitting candidates for admiration or emulation.

There is accordingly much for which respectable black women can rebuke black females who participate in crime and seemingly little with which respectable women can identify. Hierarchy will not crumble, however, if the wicked do not get a shot at upending the righteous. When community depends on challenging the social, economic, and political stratification produced by traditional mainstream values, vice must have some virtue.

In the black vernacular, "the streets" are not just the territory beyond home and work, nor merely the place where deviants ply their trades. More figuratively, they are also a "source of practical experience and knowledge necessary for survival."[18] The notion of a politics of identification suggests that the streets might be the wellspring of a valuable pedagogy for a vibrant black female community if law-abiding black women had more contact with black women in street life and a better understanding of what motivates them. Black women from the street might teach straight black women a thing or two about "heroine-ism" if straight women let themselves be taught.

Identification with black street women will be difficult for many in the community but not impossible if we take the women on their own terms as we do the men. What can possibly be wrong with wanting a job that pays well, is controlled by the workers, provides a bit of a thrill, and represents a payback for injustices suffered? To be sure, street

women will not accomplish their goals on any sustained basis through lawbreaking. But that does not mean that they should abandon their aspirations, which, after all, are not so very different from those of many straight black women who battle alienation and boredom in their work lives. Street women may be correct in thinking that some kind of risk taking will provide an antidote for a fairly common misery.

Street life is public life. It entails being out there, aggressive and brazen, in a realm normally foreclosed to women. Operating on the streets takes wisdom, cunning, and conning. The ways of black women should be infused into black political activism, and young black women should be allowed to be militant political leaders, just like their male counterparts. The search for political styles and points of view should extend broadly among different groups and categories of black women, including lesbians, adolescent mothers, rebellious employees, and lawbreakers immersed in street life. In a real black community, everyone would be a resource, especially those whom the dominant society would write off as having little or nothing to contribute. That, in essence, is what a politics of identification is all about.

And finally, street women accept the justifiability of engaging in illegal conduct to rectify past injustices and to earn a living. This may prove to be the hardest lesson for straight black women to learn—and the most valuable.

Bringing It Home: A Legal Agenda for a Politics of Identification

The politics of identification delineated in this chapter recognizes that blacks from different classes have different talents and strengths to contribute to a revitalized black community. In general, this politics of identification would blend the defiance, boldness, and risk taking that fuel street life with the sacrifice, perseverance, and solidity of straight life. Taking a leaf from the lawbreakers' style manual, it would confront the status quo with a rhetoric that is hard-nosed, pragmatic, aggressive, streetwise, and spare. In recognition of the struggles of street women, it would foster a public life that is inclusive of deviants and allows females and males to play an equal role. To have an impact on the material conditions that promote black criminal behavior, it would draw its praxis from the informal economic activity of bridge people who straddle the street and straight worlds. In this way, a politics of identification would promote a critical engagement between lawbreakers and the middle class to move some of the lawbreakers beyond the self-destruction that threatens to bring the rest of us down with them.

The laws of the dominant society are not intended to distinguish between members of the black community who are truly deserving of ostracism and those who are not yet beyond help or hope. In addition, it is unlikely that the standards by which the community differentiates among lawbreakers can be codified for use by the legal system because of the informal, customary process by which the standards develop. Still, one of the goals of a legal agenda tied to a politics of identification would be to make the legal system more sensitive to the social connection that links the community and its lawbreakers and affects black assessments of black criminality.[19]

The community acknowledges that some, but not all, lawbreakers act out of a will to survive and an impulse not to be forgotten, and it admires them for this even though it concludes that their acts ought not to be emulated. In recognition of this, the legal program of a politics of identification would advocate changes in the criminal justice

system and in other institutions of the dominant society to increase the lawbreakers' chances for redemption. To "redeem" is not only to "atone" but also to "rescue," "ransom," "reclaim," "recover," and "release."[20] Thus, redemption may be actively or passively acquired. The lawbreakers need both types of redemption. They need challenging employment that will contribute to the transformation of their neighborhoods and earn them the respect of the community.[21] They also need to be freed from the material conditions that promote deviance and death. If persuasion, argument, and conflict within the law fail to prompt the dominant society to reallocate resources and reorder priorities, then a jurisprudence that aims to secure redemption for lawbreakers must acknowledge that activity outside the law, against the law, and around the law may be required.

The development of the informal economy in poor black enclaves is crucial to the lawbreakers' redemption and the revitalization of the black community. The jurisprudential component of a politics of identification would make an issue of the fact that the boundary between legal economic conduct and illegal economic conduct is contingent. It varies with the interests at stake, and the financial self-reliance or self-sufficiency of the minority poor is almost never a top priority. A legal praxis associated with a politics of identification would find its reference points in the folk law of those black people who, as a matter of survival, concretely assess what laws must be obeyed and what laws may be justifiably ignored. It would investigate the operations of the informal economy, which is really the illegitimate offspring of legal regulation. It would seek to stifle attempts to criminalize or restrict behavior merely because it competes with enterprises in the formal economy. At the same time, it would push for criminalization or regulation where informal activity destroys communal life or exploits a part of the population that cannot be protected informally. It would seek to legalize both informal activity that must be controlled to ensure its integrity and informal activity that needs the imprimatur of legitimacy to attract greater investment or enter broader markets. Basically, then, a politics of identification requires that its legal adherents work the line between the legal and the illegal, the formal and the informal, the socially (within the community) acceptable and the socially despised, and the merely different and the truly deviant.

Working the line is one thing. Living on or near the line is another. All blacks do not do that, and some folks who are not black do. Though the ubiquitous experience of racism provides the basis for group solidarity,[22] differences of gender, class, geography, and political affiliations keep blacks apart. These differences may be the best evidence that a single black community no longer exists. Only blacks who are bound by shared economic, social, and political constraints and who pursue their freedom through affective engagement with each other live in real black communities. To be a part of a real black community requires that one go Home every once in a while and interact with the folks. To keep up one's membership in such a community requires that one do something onsite. A politics of identification is not a way around this. It just suggests what one might do when one gets there.

NOTES

1. In the District of Columbia, a black defendant charged with murder was reportedly acquitted because some members of the jury were convinced that there were already enough young black men

in prison. Barton Gellman & Sari Horwitz, *Letter Stirs Debate After Acquittal*, Wash. Post, Apr. 22, 1990, at Al. On the role that racism continues to play or that blacks think it plays in the criminal justice system, see Sam Roberts, *For Some Blacks, Justice Is Not Blind to Color*, N.Y. Times, Sept. 9, 1990, at D5. See generally *Developments in the Law—Race and the Criminal Process*, 101 Harv. L. Rev. 1472 (1988) (discussing developments in race-related criminal law issues).

2. See Kurt L. Schmoke, *An Argument in Favor of Decriminalization*, 18 Hofstra L. Rev. 501 (1990); *Drug Legalization—Catastrophe for Black Americans: Hearing Before the House Select Comm. on Narcotics Abuse and Control*, 100th Cong., 2d Sess. 5–13, 19–21 (1988) (presenting the testimony of the mayor of Hartford in favor of legalization and that of the mayors of Newark and Philadelphia and the president of the National Medical Association against). See generally *A Symposium on Drug Decriminalization*, 18 Hofstra L. Rev. 457 (1990) (discussing the pros and cons of the decriminalization of illegal drugs).

3. See Elijah Anderson, Streetwise: Race, Class, and Change in an Urban Community 66–69 (1990) (recounting the derision voiced by working- and middle-class blacks toward members of the underclass).

4. See Philippe Bourgois, *In Search of Horatio Alger: Culture and Ideology in the Crack Economy*, 16 Contemp. Drug Probs. 619, 631–37 (1990). On the basis of his ethnographic research in Spanish Harlem, Bourgois maintains that "upward mobility in the underground economy requires a systematic and effective use of violence against one's colleagues, one's neighbors, and to a certain extent, against oneself." *Id.* at 632. "Individuals involved in street activity cultivate the culture of terror in order to intimidate competitors, maintain credibility, develop new contacts, cement partnerships, and, ultimately, have a good time." *Id.* at 634. See also Carl S. Taylor, Dangerous Society 66–67 (1990) (noting that gangs use violence to discipline members and earn the respect of others).

5. See Elijah Anderson, *Race and Neighborhood Transition*, in The New Urban Reality 99, 112–16, 123–24 (Paul E. Peterson ed., 1985); Lawrence Thomas, *Next Life, I'll Be White*, N.Y. Times, Aug. 13, 1990, at A15.

6. See *The Jeweler's Dilemma*, New Republic, Nov. 10, 1986, at 18; Jane Gross, *When "By Appointment" Means Keep Out*, N.Y. Times, Dec. 17, 1986, at Bl.

7. It was estimated that on any given day in mid-1989, 23 percent of black males between ages twenty and twenty-nine were in prison, in jail, or on probation or parole, compared with 10.4 percent of Hispanic males and 6.2 percent of white males. Mark Mauer, Young Black Men and the Criminal Justice System: A Growing National Problem 3 (1990). Given that young black men are continually being admitted and released from the criminal justice system, the proportion of those actually processed in the course of the year probably exceeded one-quarter of the population. *Id.* According to the Sentencing Project, in 1990 the incarceration rate for black males was 3,370 per 100,000, compared with only 681 per 100,000 in South Africa, for an American rate five times higher than that of South Africa. See Fox Butterfield, *U.S. Expands Its Lead in the Rate of Imprisonment*, N.Y. Times, Feb. 11, 1992, at A16.

8. See, e.g., Henry Louis Gates, Jr., *"Jungle Fever" Charts Black Middle-Class Angst*, N.Y. Times, June 23, 1991, at B20; Jennifer Jordan, *Cultural Nationalism in the 1960s: Politics and Poetry*, in Race, Politics, and Culture 29, 32–33 (Adolph Reed, Jr., ed., 1986).

9. For an especially critical, class-conscious analysis of black radicalism in the 1960s, see Adolph Reed, Jr., *The "Black Revolution" and the Reconstitution of Domination*, in Race, Politics, and Culture, *supra* note 8, at 61.

10. See Michele Wallace, Invisibility Blues: From Pop to Theory 18–22 (1990); Paula Giddings, When and Where I Enter: The Impact of Black Women on Race and Sex in America 314–24 (1984) (dubbing the 1960s the Masculine Decade); Harry Brill, Why Organizers Fail: The Story of a Rent Strike (1971) (examining the leadership style of the black, militant, male organizers of a rent strike).

11. National Research Council Committee on the Status of Black Americans, A Common Destiny: Blacks and American Society 169 (Gerald D. Jaynes & Robin M. Williams, Jr., eds., 1989).

12. Barrio gangs underwent a similar elevation of status during the Chicano Movement of the late 1960s and a decline thereafter. See Joan W. Moore, *Isolation and Stigmatization in the Development of an Underclass: The Case of Chicano Gangs in East Los Angeles*, 33 Soc. Probs. 1 (1985).

13. Herbert H. Haines, Black Radicals and the Civil Rights Mainstream, 1954–1970, at 56–57 (1988). Unfortunately, the Panthers' bad-nigger shtick also delighted white radicals, the media, and the brothers off the block who did not allow their Panther membership to deter them from continuing their normal criminal activity. See generally Off the Pigs! The History and Literature of the Black Panther Party (G. Louis Heath ed., 1976) (offering a negative assessment of the Panthers' activities, including their involvement in ordinary crime).

14. Reginald Major, A Panther Is a Black Cat 292 (1971) (quoting the Black Panther Party Platform and Program (Oct. 1966)).

15. Bettylou Valentine, Hustling and Other Hard Work 23, 126–27 (1978); Eleanor M. Miller, Street Woman 6, 35 (1986).

16. Karlene Faith, *Media, Myths, and Masculinization: Images of Women in Prison*, in Too Few to Count: Canadian Women in Conflict with the Law 181 (Ellen Adelberg & Claudia Currie eds., 1987).

17. See Priscilla Alexander, *Prostitution: A Difficult Issue for Feminists*, in Sex Work: Writings by Women in the Sex Industry 184, 196–97 (Frederique Delacoste & Priscilla Alexander eds., 1987); Gloria Lockett, *Leaving the Streets*, in Sex Work, *supra*, at 96–97.

18. Edith A. Folb, Runnin' Down Some Lines 256 (1980).

19. John Griffiths has sketched out a family model for the criminal process that would include black people's interest in punishment with the possibility of redemption. John Griffiths, *Ideology in Criminal Procedure, or A Third "Model" of the Criminal Process*, 79 Yale L.J. 359 (1970).

20. Webster's Third New International Dictionary 1902 (1981). In black Christian theology, for example, "redemption" refers to more than repentance and deliverance from one's sins. Olin P. Moyd, Redemption in Black Theology 15–59 (1979). In talking about redemption, black worshipers are not thinking only about heaven but also about "deliverance and rescue from [the] disabilities and constraints" of this world while they are still in it. *Id.* at 53. Redemption is "salvation from woes, salvation from bondage, salvation from oppression, salvation from death, and salvation from other states and circumstances in the here and now," *id.* at 44, "that destroy the value of human existence." *Id.* at 38. Redemption, then, entails both a payback and a payout. *Id.* at 38 (quoting Donald Daniel Leslie, *Redemption,* in Encyclopaedia Judaica (1971)).

21. Elliott Currie, *Crime, Justice, and the Social Environment*, in The Politics of Law 294, 307 (David Kairys ed., rev. ed. 1990).

22. See Diana Fuss, Essentially Speaking: Feminism, Nature, and Difference 90–93 (1989) (describing the use of essentialism in the writings of Afro-American literary critics).

39. Traces of the Master Narrative in the Story of African American–Korean American Conflict

How We Constructed "Los Angeles"

LISA C. IKEMOTO

Many who have written about Los Angeles see the dynamics of race in the terrible events that took place from April 29 to May 1, 1992. Some blamed black racism for what happened; others found fault with the behavior of Korean merchants. Others, more perceptively, blamed our society's system of white-overcolored supremacy for pitting the two outsider groups against one another, setting the stage for the conflict that exploded on those fateful days. I agree with this latter position, but my aim in this chapter is slightly different. It is to explore how we analyzed, explained, came to understand, and gave meaning to "Los Angeles." How and why did we construct the story of that conflict as we did?

During the early aftermath of the civil disorder in Los Angeles, the notion of Korean American–African American conflict emerged as a focal point in explanations for "Los Angeles." Examination of this construct reveals that Korean Americans, African Americans, and those apparently outside the conflict used concepts of race, identity, and entitlement in ways that described conflict as inevitable. Further interrogation suggests that despite the absence of obvious whiteness in a conflict described as intergroup, culturally embedded white supremacy (racism) provides the operative dynamic. I use "master narrative" to describe white supremacy's prescriptive, conflict-constructing power, which deploys exclusionary concepts of race and privilege in ways that maintain intergroup conflict. I try here to give my sense of the dynamic that lies beneath the surface of the stories that emerged. I do not assume a unilateral master hand, although at times I may use that image to evoke a sense of control felt but not seen and of contrivance. When I assert that I write with the goal of revealing the hand of the master narrative in social discourse, I mean that I point to traces of white supremacy as evidence of that narrative. And in telling of a master narrative, I may take the role of narrator and impose my own hand.

In questioning the concepts of race used to describe a Korean American–African American conflict, I note that the master narrative defines race and racial identity oppositionally. Here, a black/African American racial identity is located in opposition to an Asian/Korean American identity, a strategy that merges ethnicity, culture, gender,

A version of this chapter previously appeared as Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles*," 66 S. Cal. L. Rev. 1581 (1993). Originally published in the *Southern California Law Review.*

and class into race.[1] With respect to African Americans, the master narrative tells us that Asians are Koreans who are merchants and crime victims. The assumption that Asians are foreign intruders underlies this description. With respect to Asian Americans, the narrative tells us that African Americans are blacks who are criminals and poor. All of these identities replicate the dominant society's understandings of blackness and Asianness.

Although the conflict as constructed does not directly speak of dominant white society, it arranges the various racial identities so as to preserve the authority of whiteness and devalue difference. The differences between blacks and Asians emerge as a tale of relative nonwhiteness. When racial identity is constructed oppositionally, conflict becomes inevitable, coalition unimaginable, and both groups are publicly debilitated and exposed.

I begin by locating myself with regard to the constructed African American–Korean American conflict. As I do so, I recognize categories that are being imposed and ones that I am claiming. I am a Sansei woman, a person of color who has experienced oppression as an Asian female, not as a Korean or African American, a third-generation Asian American of Japanese descent, not a person who has lived as an immigrant, a woman writing of a story in which few have talked about gender. I grew up in a Los Angeles suburb. I was teaching in the Midwest when the uprising in Los Angeles occurred. Viewing the events from a physical distance, I felt both removed and personally traumatized.

I write aware that I do not know what really happened in "Los Angeles." I doubt it took place only in Los Angeles, and I assert that whatever occurred began long before April 1992. I am conscious that the major news outlets have mediated my picture and experience of "Los Angeles," and I wonder to what extent those who lived the uprising relied on the same media accounts to interpret their experiences. I write as one who deploys "Los Angeles" as an ironic, iconic metaphor for the stories of social disorder and racial conflict used to explain what happened there. These stories give birth to "Los Angeles" as a metaphor but are in turn swallowed by it as the events in Los Angeles become part of the master narrative.

Traces of White Supremacy

Consider the thesis: The stories of intergroup conflict came from the master narrative of white supremacy. Those Korean and African Americans who participated in the storytelling spoke and acted from the imposed experience of racism.[2] I am not saying that the Korean American or African American communities or anyone told the conflict constructing stories in a consciously strategic way.[3] Rather, I am acknowledging that we interpret our experiences by referring to familiar stories about the world.[4]

If you live within a society pervaded by racism, then racism prescribes your experience. Racism is so much a part of our experience that we cannot always recognize those moments when we participate.[5] As a corollary, if you experience racism as one marginalized by it, then you use racism to explain your relations with other groups and their members. Racism operates, in part, through stories about race. These stories both filter and construct our reality.[6]

Now consider the stories of conflict.

Claims of Entitlement

"The pie is only so big, and everybody wants a piece, and they're fighting over it."

"[J]ust twenty-three percent of the blacks said they had more opportunities than recently arrived immigrants. Twice that many whites said they had more opportunities than new immigrants."

"People here are out of jobs and yet they allow foreign people to come over and take work away from people born here in America. . . . [T]hey can come over and get loans and open up businesses, but no one will lend any money to us."

"These businesses belong to people who have exploited, abused and disrespected black people."

"I respect the different cultures . . . but they are here in America now, and they're doing business in our community."

"We didn't do anything wrong," said [Bona Lee], who came to Los Angeles from Korea two decades ago. "We worked like slaves here."

"I left Korea because America is a good country, a free country, and to get rich."

"This is not an act of aggression. This is just saying, 'Leave us alone and let us get back to business.'"

As the above substories show, one common explanation circulated during the aftermath of the uprisings that had to do with competition between Korean Americans and African Americans for a too-small piece of the economic pie. The issue became one of entitlement. In the fray, many different claims to entitlement were made. Some complained that Korean Americans had, in effect, cut in line. The premise was that African Americans have been waiting in line for a longer time and that more-recent arrivals must go to the back.

This story is more complex than it first appears. To begin, there is the image of the breadline and the use of a first-in-time principle to claim entitlement. The breadline image evokes a picture of hierarchy. At issue is whether Korean Americans or African Americans must stand farther back in line or lower in the hierarchy. The image also admits that both Korean Americans and African Americans are out-groups dependent on the will and leftovers of a dominant group. It presupposes deprivation by social and political forces beyond our control. And it assumes that the competition must occur among those forced to stand in line, not between those making the handouts and those subject to those handouts.

The use of the first-in-time principle echoes traditional property law[7] and suggests that the process of keeping out-groups in line has commodified status as well as goods.[8] In part, this story asserts that Korean Americans do not understand the plight of blacks in America and that if they did, they would wait their turn. This assertion assumes knowledge of the history of white oppression of blacks stemming from, but not limited to, the practice and laws of slavery. It also expresses the idea that more-recently arrived immigrants do not understand because they are less American. Ultimately, the first-in-time principle both denies and reifies the truth—that African Americans have been first in time but last in line since the practice of slavery began in the American colonies.[9]

A closely related entitlement claim was that Korean American merchants were not giving back to the black community. African Americans charged Korean merchants with failure to hire blacks, rudeness to black customers, and exploitative pricing. The

claim draws a boundary around the black community as the in-group, relative to the Korean outsiders who can gain admission only by purchasing it—by giving back value. Jobs and respect are the local currency. The claim also elaborates on the breadline image in a telling way. It describes the black community as the in-group with the authority to set the standards for admission, yet by claiming victimhood status for the black community, it places the black community behind Korean Americans in the breadline. This simultaneously excuses the resulting end-of-the-line position of African Americans and delegitimizes the relatively better place of Korean Americans.

Korean American merchants responded, in part, by casting themselves as actors in the American Dream—Koreans working hard to support their families, survive as immigrants, and succeed as entrepreneurs. By doing so, they bring enterprise to the poorest neighborhoods. Claiming entitlement by invoking the American Dream recharacterizes the breadline. One's place in the line is not, according to this claim, the inevitable plight of those marginalized by the dominant society; it is changeable for those who pursue the Dream. Those left standing at the end of the line deserve their fate. The American Dream counters the American Nightmare—the history of racial oppression—that the claims of black community entitlement invoke. For many, "Los Angeles" represents the death of the American Dream.

Racial Positioning

Another story of conflict, intertwined with that of competition, is concerned with racial hierarchy. And while it expressly racializes Korean American and African American identity, it also implies an important story about whiteness.

African Americans and others who complained about Korean merchants took a nativist position. The first-in-time principle describes Korean Americans not only as immigrants and therefore later in time but also as foreigners and therefore less American.[10] Nativism simultaneously calls for assimilation and assumes that Asians are less assimilable than other races. Characterizing Koreans as rude, clannish, and exploitive, with little or no effort made to learn Korean culture, calls up long-standing anti-Asian stereotypes.[11] The charge that Koreans do not understand the plight of blacks implies that real Americans would. The implication that blacks are real Americans strikes an odd note in this context since the norm-making dominant society has usually defined the real American as white.[12] Perhaps the real irony is the duality of the un-American charge. Excluding Koreans from the category of American suggests that Koreans are not also subject to racial oppression, while simultaneously racializing Korean identity. The master hand does double duty here. It collapses ethnicity into race, thus including Korean Americans within the racial conflict, and it defines ethnicity as "foreignness," to describe Korean Americans as outside the racial hierarchy.

I noted that usually the dominant society takes the nativist position. When African Americans made nativist charges, they positioned themselves as whites relative to Asians. When Korean Americans responded by placing themselves within the American Dream—a dream produced and distributed by the dominant society—they positioned themselves as white. Their belief in an American Dream and their hope to be independent business operators positioned them as white relative to blacks. The rule underlying this racial positioning is white supremacy. Racial positioning would not be coherent,

could not take place, but for racism. In other words, I have used "positioned" as an active verb, with Korean Americans and African Americans as actors, but here I sense a master hand positioning Korean Americans and African Americans as objects.

The stories of conflict are not about ordinary, marketplace competition. Nor do they tell of empowering community. Instead, they plot relative subordination, subordinated domination, and subordinating storytelling. In doing so, the stories of race and conflict flatten our understanding of racial identity.

Constructed Identities and Racial Pairing

The stories of conflict have filtered largely through the major media; other stories have been filtered out. Media-selected images and words both represent and reinforce the constructed conflict. The stories described above were told in words. The stories addressed here were also told with pictures. The latter, I suspect, will prove more memorable and therefore more significant in the construct of conflict. Recall, for a moment, the much-photographed Latasha Harlins and Soon Ja Du, gang member looters, and armed Korean storeowners.[13] These images have merged into the African American–Korean American conflict plotted by the master narrative. They operate by informing and reinforcing the identities created for conflict. The result: Shoplifter, looter, and gang member images are reinforced as the operative aspects of African American identity; crime-victim, gun-toting-merchant, and defender-of-property images emerge as the Korean American character types.[14] Thus, apparently race-neutral categories—criminals and property-owning crime victims—become part of African American and Korean American racial identities.

Racializing identity has another effect: It submerges class and gender. According to the constructed identities, Korean Americans are merchants. African Americans are not simply criminals but are most likely poor, because shoplifting and looting are considered crimes of poverty. And both gun-toting merchants and gang member looters are probably typified as male.[15] These identities describe class and gender as characteristics of race, not effects of racism. The construct of conflict defines African American and Korean American identities in opposition to each other. It neatly positions Korean Americans as white, relative to blacks. In other words, in black-white conflicts, blackness would be similarly criminalized and whiteness would be accorded victim status. This conclusion does not require a leap of logic or faith. Rodney King and Latasha Harlins emerged as the two main symbols of racial injustice during the events surrounding the uprising. The Rodney King verdict became representative, in part, of white oppression of blacks. Once the uprising began, many invoked the name Latasha Harlins to recall the sentence issued in *People v. Soon Ja Du*. "Latasha Harlins" came to represent (white) systemic, race-based injustice even while it reinforced the sense of African American–Korean American conflict and goaded many to target Korean-owned stores for looting and vandalism. For purposes of defining racial injustice, "Korean" became provisionally identified with whiteness. Racial pairing not only creates racial differences but also makes racial difference a source of inevitable conflict. The primary model for identifying bases for positive relations between groups is that of sameness-difference—the assumption that there are either samenesses or differences and that we should identify and focus on sameness and overlook difference. The underlying assumption is that difference can

lead only to contention. Positive relations between blacks and Asians become impossible because there are only apparent racial differences. "Black" now suggests the possibility of conflict with Asian, and "Asian" with black.

Racial pairing also essentializes race. The essentialized understanding of race occurs via a syllogism: The stories of conflict construct African American identity in opposition to Korean American identity. In the context of intergroup conflict with African Americans, the oppositional Asian is Korean; all Asians are Korean. This syllogism silently strips Korean identity of ethnic and cultural content, making "Korean" interchangeable with "Asian." It is important that "Korean" has been defined in the context of conflict with African Americans. So it is probably more accurate to say that the syllogism concludes: All Asians are Korean for purposes of intergroup conflict. Further, the constructed Korean American–Asian identity—economically successful minorities, hardworking entrepreneurs[16]—reinforces its opposite, constructed blackness. "It is no accident . . . that immigrant populations (and much immigrant literature) understood their 'Americanness' as an opposition to the resident black population."[17]

The media-reinforced construct makes racial identity not only flat but also transparent. The stories of conflict have given many the sense that they know about Korean Americans and African Americans. "Korean American" and "African American" invoke a whole set of conclusions that do not follow from a personal or group history or from Korean American or African American experience but from the construct of conflict. For those who are both object and subject of the conflict, the essentialized racial identities filter out the possible bases of understanding. What is perceived as Korean rudeness may reinforce the experience African Americans have had—race-based rejection. In responding negatively to Korean Americans, African Americans may be rejecting imposed blackness. In addition, many of the comments made by both African Americans and Korean Americans to reporters indicated that the speaker not only lacked understanding of the culture, experience, or history of the other group but also rejected the need to try—the other group was the one that had an obligation to conform in some way. For example, in response to claims of bigotry by black customers, Korean storeowners often asserted that they had businesses to run, thereby suggesting that good business practice did not include recognizing local concerns. Or consider African Americans who discounted the Korean cultural practice of not touching strangers by asserting "this is America." The construct of conflict not only filters out personal experience, group history, and culture but deems them irrelevant.

Distancing Stories, Symbols of Disorder

Consider the effect of the stories of conflicts: The notion of a Korean American–African American conflict locates the causes of the uprisings in problems originating within and bounded by communities of color. At the same time, the rubric of race and racism used to describe the conflict is legalistic; it focuses on intent and attributes racism to wrong-minded individuals. This denies the possibility of embedded, culture-wide racism. It makes race fungible and independent of the history of racial subordination in the United States. And it distances the problem of intergroup conflict from the dominant society; the problem is defined as one of race. This distance distinguishes race from whiteness.

The constructed conflict created a great sense and desire for distance. Even as the uprising and the events surrounding it enraged, demoralized, inspired, and traumatized me, I also felt safe and fortunate in viewing it all from afar. When I acknowledged my lack of physical proximity as my good fortune, I removed myself from those more directly affected. It was not my problem. Since the conflict was specifically cast as African American–Korean American, that I am Japanese and not Korean American made this conclusion easier to reach. I used the categories deployed in this construct to opt out. I can, to the extent that I opt out, sympathize with victims and condemn villains. This may make me well-meaning. But it protects me from participation, which is harder to accomplish, more difficult to bear, but may reduce the sense that the conflict is confined to two specific groups. I could not opt out entirely. I was affected—perhaps because I identify as a person of color and as an Asian American, more inclusive descriptors that place me within the conflict.

At first, I wanted to deny that intergroup conflict was a significant problem. I wanted to say that the problem was economic. That may have been an effort to reject the submerging, essentializing effects of imposed racial identity. I might have been resisting the sense of inevitable unresolvable conflict that flows from my experience and understanding of race. I know that others denied race as the problem. Perhaps they did so because they know that not every person intentionally discriminates. Some described the problem as specific to Los Angeles. But "Los Angeles" is not located in Southern California. As I have been arguing, it is part of the master narrative. Each of us creates and locates it somewhere else to make it unique, episodic—that is, not integral to American functioning—and, above all, "not my fault." Racial distancing enables each of us to say, "It was really too bad. But fundamentally, it is not my problem."

Symbols of Disorder, or Why Multiculturalism Won't Work

The constructed Korean American–African American conflict has become, for many, the racial conflict of the moment. The symbolized conflict is not only that between Korean Americans and African Americans. It is the potential for conflict among the (too) many groups of racial minorities. To the extent that the apparent Korean American–African American conflict contributes to the conclusion that a multiracial/multicultural[18] society is doomed to conflict, it displaces white supremacy as the central race issue. That displacement, in turn, may strengthen the distinction between whiteness and race.

The stories of conflict also describe interracial tension as representative and key to broader social disorder. Because the constructed identities conflate other forms of problematized status with race, intergroup conflict implicates underclass and failure to assimilate. One result is that whiteness becomes symbolic of order and race becomes symbolic of disorder. Thus, while Latasha Harlins and Rodney King became symbols of systemic racial injustice, "Los Angeles" has become a metaphor for the failure of racial diversity.

It is difficult to escape the constructs I describe. To the extent that we interpret our experience from within the master narrative, we reinforce our own subordination. We must also compete for space with the master narrative. That is where the master hand tailors stories about identity and conflict to the situation—African American–Korean American relations, Los Angeles, Latasha Harlins and Soon Ja Du, Rodney King—in ways that make Asianness the subordinator of blackness and vice versa, and in ways that

isolate the conflict from whiteness. Whether Korean and other Asian Americans can counter racism may depend, finally, on our ability to claim identities outside the master narrative.

Conflict—the real-world kind, I mean—can be bloody, misguided, and wholly tragic. It behooves us always to try to understand how and why bloodshed breaks out as it does. But the very narratives and stories we tell ourselves and each other afterward, in an effort to explain, understand, excuse, and assign responsibility for conflict, may also be, in a sense, the source of the very violence we abhor. I have identified a number of ways the "master narrative" works itself out in the stories by which we constructed "Los Angeles." This master narrative is at one and the same time lulling, disturbing, provocative, and always powerfully apologetic. Understanding how we assemble reality unjustly, apologetically, and in status quo–preserving ways may enable us, with effort, to disassemble it—and perhaps, one day, to define difference as a basis for coalition and fairness.

NOTES

1. Compare the conflict constructed from the confirmation hearings of Clarence Thomas, nominated for Supreme Court Justice. The fact that both Clarence Thomas and his accuser Anita Hill are African American had the effect of submerging race to gender in dominant culture's account of the conflict. This reinforces the point that existing categories inadequately describe the experience of oppression. See Kimberlé Williams Crenshaw, *Whose Story Is It Anyway? Feminist and Antiracist Appropriations of Anita Hill*, in Race-ing Justice, En-Gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality 402 (Toni Morrison ed., 1992); Adrienne D. Davis & Stephanie M. Wildman, *The Legacy of Doubt: Treatment of Sex and Race in the Hill-Thomas Hearings*, 65 S. Cal. L. Rev. 1367, 1378–84 (1992).

2. For an elaboration of the effects of imposed truth, see Michel Foucault, *Truth and Power*, in Power/Knowledge: Selected Interviews & Other Writings, 1972–1977 (Cohn Gordon ed., 1980).

3. I do acknowledge that some, for commercial, political, or other reasons, consciously and tactically construct stories. For purposes of this chapter, the media are the primary storymakers. It is important to remember, however, that while print, television, and radio media may have commercial motives, to some extent the stories are part and parcel of mainstream culture.

4. Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 Cornell L. Rev. 1258, 1277–82 (1992); see generally Peter L. Berger & Thomas Luckman, The Social Construction of Reality: A Treatise in the Sociology of Knowledge (1966).

5. See Joel Kovel, White Racism: A Psychohistory 211–12 (1984), describing "metaracism": "Metaracism is a distinct and very peculiar modern phenomenon. Racial degradation continues on a different plane, and through a different agency: those who participate in it are not racists—that is, they are not racially prejudiced—but metaracists, because they acquiesce in the larger cultural order which continues the work of racism."

6. See Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -Isms)*, 1991 Duke L.J. 397, 397, also Chapter 40, this volume (illustrating the use of "filter" to explain how personal experience shapes one's worldview.)

7. See Symposium, *Time, Property Rights, and the Common Law*, 64 Wash. U. L.Q. 661 (1986), for an evaluation of this principle. Historically, the first-in-time principle has been racialized. See, e.g., Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573–74 (1823) (holding valid a land patent taken from the United States because the United States' claim derived from the (white) European "discovery" of America; the Court reached its conclusion, in part, by distinguishing between mere "occupancy" made by Native American nations and "ultimate dominion" asserted by the European nations).

8. For valuable discussion on the link between property rights and status, see Joseph William Singer, *Sovereignty and Property*, 86 Nw. U. L. Rev. 1, 40–51 (1991). See also Derrick Bell, And We Are

Not Saved, 135 (1989) (where the fictional character Geneva Crenshaw, recalling the fate of the Black Reparations Foundation and its leader, Goldrich, stated, "Goldrich planned to raise the actual status of blacks as compared with their white counterparts, and that is why in the Chronicle he was more condemned than canonized").

9. See Bakke v. Regents of Univ. of Cal., 438 U.S. 265, 400 (1978) (Marshall, J., dissenting) ("The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured"); see also Derrick Bell, Faces at the Bottom of the Well (1992) (discussing racial realism). For discussion of the history of racism and the historical origins of Western concepts of race, see Christina Delacampagne, *Racism and the West: From Praxis to Logos*, in Anatomy of Racism 83 (David Theo Goldberg ed., 1990); David Theo Goldberg, *The Social Formation of Racism Discourse*, in Anatomy of Racism, *supra*, at 295.

10. Immigration and naturalization laws at various times have defined "American" in similarly exclusive ways. Sucheng Chan, Asian Americans: An Interpretive History 45–61 (1991) (describing anti-Asian laws, including exclusive immigration and naturalization laws); Yuji Ichioka, The Issei: The World of the First Generation Japanese Immigrants, 1885–1924, at 210–54 (1988) (describing the struggle for naturalization rights, Alien Land Law litigation, and the 1924 Immigration Act); Ronald Takaki, Strangers from a Different Shore: A History of Asian Americans 99–112, 271–73, 419–20 (1989) (discussing anti-Chinese laws, including the Chinese Exclusion Act of 1882 and *People v. Hall*, the Asiatic Exclusion League activities against Korean immigrants, and the Immigration Act of 1965).

11. Takaki, *supra* note 10, at 101, 105. See also Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 Tex. L. Rev. 1929, 1943–46 (1991) (discussing the Chinese exclusion cases and the Japanese internment cases as judicial expressions of anti-Asian stereotypes).

12. Roger Daniels, The Politics of Prejudice 65–68 (1977).

13. See People v. Super. Ct. (Soon Ja Du), 7 Cal. Rptr. 2d 177, modified, 5 Cal. App. 4th 1643a (1992). The print media devoted extensive space to presenting verbal descriptions of the Soon Ja Du case and the events during the uprising. It is, however, the photographic and video images that have proved the most memorable and defining. A store security camera recorded Soon Ja Du shooting Latasha Harlins and the preceding confrontation. The television media replayed this video many times. Television camera crews filmed two Korean men firing weapons in defense of their store, and people, including black men, looting stores and other businesses during the uprising. These videos were broadcast on the television news and published as photos in newspapers across the nation.

14. See, e.g., Ira Reiner, Gangs, Crime, and Violence in Los Angeles: Findings and Proposals from the District Attorney's Office iv (1992). The study reports that "the police have identified almost half of all black men in Los Angeles County between the ages of 21 and 24 as gang members." *Id.* That the police made these identifications should raise questions about the finding. The report itself admits that the "number is so far out of line with other ethnic groups that careful, professional examination is needed to determine whether police procedures may be systematically overidentifying Black youths as gang members." *Id.* See also Stephen Braun & Ashley Dunn, *View of Model Multiethnic City Vanishes in Smoke*, L.A. Times, May 1, 1992, at Al ("Each new graphic televised image—. . . angry black assailants, frightened Korean merchants guarding their shuttered markets with guns—threatened to reinforce the long-held fears and prejudices gnawing at the city's populace, worried community leaders and race relations experts said Thursday").

15. See, e.g., Reiner, *supra* note 14, at 118–19.

16. See Takaki, *supra* note 10, at 474–84 (discussing the harmful effects of the myth of the model minority).

17. Toni Morrison, Playing in the Dark 47 (1992). For a case illustrating how Asians as relative whites were deployed against blacks, see *Gong Lum v. Rice*, 275 U.S. 78 (1927).

18. Stuart Alan Clarke, *Fear of a Black Planet: Race, Identity Politics, and Common Sense*, 21 Socialist Rev. 37, 40–41 (illustrating how some have racialized multiculturalism so as to present it as a threat to democratic principles. "In this context, it is unsurprising that the 'multicultural threat' is pictured most compellingly in the public imagination as a black threat"). *Id.* at 41.

40. Obscuring the Importance of Race

The Implication of Making Comparisons Between Racism and Sexism (or Other -Isms)

TRINA GRILLO AND STEPHANIE M. WILDMAN

While this chapter was being written, Trina Grillo, who is of Afro-Cuban and Italian descent, was diagnosed as having Hodgkin's disease (a form of cancer) and underwent several courses of radiation therapy. In talking about this experience, she said that "cancer has become the first filter through which I see the world. It used to be race, but now it is cancer. My neighbor just became pregnant, and all I could think was 'How could she get pregnant? What if she gets cancer?'"

Stephanie Wildman, her coauthor, who is Jewish and white, heard this remark and thought, "I understand how she feels; I worry about getting cancer too. I probably worry about it more than most people, because I am such a worrier."

But Stephanie's worry is not the same as Trina's. Someone with cancer can think of nothing else. She cannot watch the World Series without wondering which players have had cancer or who in the players' families might have the disease. This worldview with cancer as a filter is different from just thinking or even worrying often about cancer. The worrier has the privilege of forgetting the worry sometimes, even much of the time. The worry can be turned off. The cancer patient does not have the privilege of forgetting about her cancer; even when it is not in the forefront of her thoughts, it remains in the background, coloring her world.

This dialogue about cancer illustrates a principal problem with comparing one's situation to another's. The "analogizer" often believes that her situation is the same as another's. Nothing in the comparison process challenges this belief, and the analogizer may think that she understands the other's situation fully. The analogy makes the analogizer forget the difference and allows her to stay focused on her own situation without grappling with the other person's reality.

Yet analogies are necessary tools to teach and explain, so that we can better understand each other's experiences and realities. We have no other way to understand others' lives, except by making analogies to our own experience. Thus, the use of analogies provides both the key to greater comprehension and the danger of false understanding.

A version of this chapter previously appeared in Stephanie M. Wildman et al., Privilege Revealed: How Invisible Preference Undermines America.

Introduction

Like cancer, racism/white supremacy is an illness. To people of color, who are the victims of racism/white supremacy, race is a filter through which they see the world. Whites do not look at the world through this filter of racial awareness, even though they also compose a race. This privilege to ignore their race gives whites a societal advantage distinct from any received from the existence of discriminatory racism. Throughout this chapter we use the term "racism/white supremacy" to emphasize the link between the privilege held by whites to ignore their own race and discriminatory racism.

Author bell hooks describes her realization of the connection between these two concepts: "The word *racism* ceased to be the term which best expressed for me exploitation of black people and other people of color in this society and . . . I began to understand that the most useful term was white supremacy."[1] She recounts how liberal whites do not see themselves as prejudiced or interested in domination through coercion, yet "they cannot recognize the ways their actions support and affirm the very structure of racist domination and oppression that they profess to wish to see eradicated."[2] For these reasons, "white supremacy" is an important term, descriptive of American social reality. This chapter originated when the authors noticed that several identifiable phenomena occurred without fail in any racially mixed group whenever sex discrimination was analogized (implicitly or explicitly) to race discrimination. Repeatedly, at the annual meeting of the Association of American Law Schools (AALS), at meetings of feminist legal scholars, in classes on sex discrimination and the law, and in law school women's caucus meetings, the pattern was the same. In each setting, although the analogy was made for the purpose of illumination, to explain sexism and sex discrimination, another unintended result ensued—the perpetuation of racism/white supremacy.

When a speaker compared sexism and racism, the significance of race was marginalized and obscured, and the different role that race plays in the lives of people of color and of whites was overlooked. The concerns of whites became the focus of discussion, even when the conversation supposedly had been centered on race discrimination. Essentialist presumptions became implicit in the discussion; it would be assumed, for example, that all women are white and all African Americans are men. Finally, people with little experience in thinking about racism/white supremacy but who had a hard-won understanding of the allegedly analogous oppression assumed that they comprehended the experience of people of color and thus had standing to speak on their behalf.

No matter how carefully a setting was structured to address the question of racism/white supremacy, these problems always arose. Each of us, the authors, has unwittingly participated in creating these problems on many occasions, yet when we have tried to avoid them, we have found ourselves accused of making others uncomfortable. Even after we had identified these patterns, we found ourselves watching in amazement as they appeared again and again, and we were unable to keep ourselves from contributing to them.

We began to question why this pattern persisted. We concluded that these phenomena have much to do with the dangers inherent in what had previously seemed to us to be a creative and solidarity-producing process—analogizing sex discrimination to race discrimination. These dangers were obscured by the promise that to discuss and

compare oppressions might lead to coalition-building and understanding. On an individual psychological level, the way we empathize with and understand others is by comparing their situations with some aspects of our own. Yet comparing sexism to racism perpetuates patterns of racial domination by marginalizing and obscuring the different roles that race plays in the lives of people of color and of whites. The comparison minimizes the impact of racism, rendering it an insignificant phenomenon—one of a laundry list of -isms or oppressions that society must suffer. This marginalization and obfuscation is evident in three recognizable patterns: (1) the taking back of center stage from people of color, even in discussions of racism, so that white issues remain or become central in the dialogue; (2) the fostering of essentialism, so that women and people of color are implicitly viewed as belonging to mutually exclusive categories, rendering women of color invisible; and (3) the appropriation of pain or the rejection of its existence that results when whites who have compared other oppressions to race discrimination believe that they understand the experience of racism.

Taking Back the Center

White supremacy creates in whites the expectation that issues of concern to them will be central in every discourse. Analogies serve to perpetuate this expectation of centrality. The center-stage problem occurs because dominant group members are already accustomed to being center stage. They have been treated that way by society; it feels natural, comfortable, and in the order of things.

The harms of discrimination include not only the easily identified disadvantages of the victims (such as exclusion from housing and jobs) and the stigma imposed by the dominant culture but also the advantages given to those who are not its victims. The white, male, heterosexual societal norm is privileged in such a way that its privilege is rendered invisible.

Because whiteness is the norm, it is easy to forget that it is not the only perspective. Thus, members of dominant groups assume that their perceptions are the pertinent ones, that their problems are the ones that need to be addressed, and that in discourse they should be the speaker rather than the listener. Part of being a member of a privileged group is being the center and the subject of all inquiry in which people of color or other nonprivileged groups are the objects.

So strong is this expectation of holding center stage that even when a time and place are specifically designated for members of a nonprivileged group to be central, members of the dominant group will often attempt to take back the pivotal focus. They are stealing the center[3]—often with a complete lack of self-consciousness.

One such theft occurred at the annual meeting of a legal society, where three scholars, all people of color, were invited to speak to the plenary session about how universities might become truly multicultural. Even before the dialogue began, the views of many members of the organization were apparent by their presence or absence at the session. The audience included nearly every person of color who was attending the meeting, yet many whites chose not to attend.

When people who are not regarded as entitled to the center move into it, however briefly, they are viewed as usurpers. One reaction of the group temporarily deprived of the center is to make sure that nothing remains for the perceived usurpers to be in the

center of. Thus, the whites who did not attend the plenary session, but who would have attended had there been more traditional (i.e., white) speakers, did so in part because they were exercising their privilege not to think in terms of race and in part because they resented the out-groups having the center.

Another tactic used by the dominant group is to steal back the center, using guerrilla tactics where necessary. For example, during a talk devoted to the integration of multicultural materials into the core curriculum, a white man got up from the front row and walked noisily to the rear of the room. He then paced the room in a distracting fashion and finally returned to his seat. During the question period he was the first to rise, leaping to his feet to ask a lengthy, rambling question about how multicultural materials could be added to university curricula without disturbing the canon—the exact subject of the talk he had just, apparently, not listened to.

The speaker answered politely and explained how he had assigned a Navajo creation myth to accompany St. Augustine, which highlighted Augustine's paganism and resulted in each reading enriching the other. He refrained, however, from calling attention to the questioner's rude behavior during the meeting, to his asking the already-answered question, or to his presumption that the material the questioner saw as most relevant to his own life was central and "canonized," while all other reading was peripheral and, hence, dispensable.

Analogies offer protection for the traditional center. At another gathering of law professors, issues of racism, sexism, and homophobia were the focus of the plenary session for the first time in the organization's history. Again at this session, the number of white males present was far fewer than would ordinarily attend such a session. After moving presentations by an African American woman, a Hispanic man, and a gay white man who opened their hearts on these subjects, a question and dialogue period began.

The first speaker to rise was a white woman, who, after saying that she did not mean to change the topic, said that she wanted to discuss another sort of oppression—that of law professors in the less elite schools. As professors from what is perceived by some as a less-than-elite school, we agree that the topic is important and it would have interested us at another time. But this questioner had succeeded in depriving the other issues of time devoted (after much struggle) specifically to them and turned the spotlight once again onto her own concerns. She did this, we believe, not out of malice, but because she too had become a victim of analogical thinking.

The problem of taking back the center exists apart from the issue of analogies; it will be with us as long as any group expects, and is led to expect, to be constantly the center of attention. But the use of analogies exacerbates this problem, because once an analogy is taken to heart it seems to the center stealer that she is not stealing the center but rather continuing the discussion on the same topic, and one that she knows well.[4] So when the format of the program implicitly analogized gender and sexual preference to race, the center stealer was encouraged to think, "Why not go further to another perceived oppression?"

When socially subordinated groups are lumped together, oppression begins to look like a uniform problem and one may neglect the varying and complex contexts of the different groups being addressed. If oppression is all the same, then we are all equally able to discuss each oppression, and there is no felt need for us to listen to and learn from other socially subordinated groups.

Fostering Essentialism

Essentialism is implicit in analogies between sex and race. Angela Harris explains gender essentialism as "[t]he notion that there is a monolithic 'women's experience' that can be described independent of other facets of experience like race, class, and sexual orientation."[5] She continues, "A corollary to gender essentialism is racial essentialism—the belief that there is a monolithic black experience or Chicano experience."[6]

To analogize gender to race, one must assume that each is a distinct category, the impact of which can be neatly separated, one from the other.[7] The essentialist critique shows that this division is not possible. Whenever it is attempted, the experience of women of color, who are at the intersection of these categories and cannot divide themselves to compare their own experiences, is rendered invisible. Analogizing sex discrimination to race discrimination makes it seem that all the women are white and all the men African American. The experiential reality of women of color disappears. "Moreover, feminist essentialism represents not just an insult to black women but a broken promise—the promise to listen to women's stories, the promise of feminist method."[8]

Many whites think that people of color are obsessed with race and find it hard to understand the emotional and intellectual energy that people of color devote to the subject. But whites are privileged in that they do not have to think about race, even though they have one. White supremacy makes whiteness the normative model. Being the norm allows whites to ignore race, except when they perceive race (usually someone else's) as intruding on their lives.

The Appropriation of Pain or the Rejection of Its Existence

Part of the privilege of whiteness is the freedom not to think about race. Whites need to reject this privilege and to recognize and speak about their role in the racial hierarchy. Yet whites cannot speak validly for people of color—only about their own experiences as whites. Comparing other oppressions to race gives whites a false sense that they fully understand the experience of people of color. Sometimes the profession of understanding by members of a privileged group may even be a guise for a rejection of the existence of the pain of the unprivileged. For people of color, listening to whites who profess to represent the experience of racism feels like an appropriation of the pain of living in a world of racism/white supremacy.

The privileging of some groups in society over others is a fact of contemporary American life.[9] This privileging is identifiable in the ordering of societal power between whites and people of color, men and women, heterosexuals and gays and lesbians, and able-bodied and physically challenged people. This societal ordering is clear to children as early as kindergarten.[10]

Judy Scales-Trent has written about her own experience as an African American woman, of "being black and looking white," a woman who thereby inhabits both sides of the privilege dichotomy.[11] As one who was used to being on the unprivileged side of the race dichotomy in some aspects of her life, she discusses how the privilege of being able-bodied allowed her to ignore the pain of an unprivileged woman in a wheelchair, humiliated in seeking access to a meeting place. She realized that her role as the privileged

one in that pairing likened her to whites in the racial pairing. The analogy helped her see the role of privilege and how it affects us, presenting another example of how comparisons are useful for promoting understanding. But this insight did not lead her to assume that she could speak for those who are physically challenged; rather, she realized that she needed to listen more carefully.

Not all people who learn about others' oppressions through analogy are blessed with an increased commitment to listening. White people who grasp an analogy between an oppression they have suffered and race discrimination may think that they understand the phenomenon of racism/white supremacy in all its aspects. They may believe that their opinions and judgments about race are as fully informed and cogent as those of victims of racism. In this circumstance, something approximating a lack of standing to speak exists because the insight gained by personal experience cannot easily be duplicated—certainly not without careful study of the oppression under scrutiny.[12] The power of comparisons undermines this lack of standing, because by emphasizing similarity and obscuring difference it permits the speaker implicitly to demonstrate authority about both forms of oppression. If we are members of the privileged halves of the social pairs, then what we say about the dichotomy will be listened to by the dominant culture. Thus, when we employ analogies to teach and to show oppression in a particular situation, we should be careful that in borrowing the acknowledged and clear oppression we do not neutralize it or make it appear fungible with the oppression under discussion.

Conclusion

Given the problems that analogies create and perpetuate, should we ever use them? Analogies can be helpful. They are part of legal discourse, as well as common conversation. Consciousness-raising may be the beginning of knowledge. Starting with ourselves is important, and analogies may enable us to understand the oppression of another in a way we could not without making the comparison. Instead of drawing false inferences of similarities from analogies, it is important for whites to talk about white supremacy, rather than leaving all the work for people of color. Questions remain regarding whether analogies to race can be used, particularly in legal argument, without reinforcing racism/white supremacy. There are no simple answers to this thorny problem. We will have to continue to struggle with it and accept that our progress will be slow and tentative.

Epilogue

Today, the Sunday before Yom Kippur, I (Stephanie) go with my parents to my children's Sunday school for the closing service. The rabbi is explaining to the children the meaning of Yom Kippur, the holiest Jewish day, the Day of Atonement. "It is the day," he explains, "when we think of how we could have been better and what we did that wasn't wonderful."

He tells a story of two men who came to the rabbi before Yom Kippur. The first man said he felt very guilty and unclean and could never be cleansed because he had once raised a stick and hurt someone. The second man said he could not think of anything

very terrible he had done and that he felt pretty good. The rabbi told the first man to go to the field and bring back to the synagogue the largest rock that he could find. He told the second man to fill his pockets with pebbles and to bring them back to the synagogue, too.

The first man found a boulder and with much difficulty carried it to the rabbi. The second man filled his pockets with pebbles, brought them to the rabbi, and emptied his pockets. Pebbles scattered everywhere.

Then the rabbi said to the first man, "Now you must carry the rock back and put it back where you found it." To the second man he said, "And you too must gather up all the pebbles and return them to where you found them."

"But how can I do that? That is impossible," said the second man.

The rabbi telling the story says that the pebbles are like all the things you have done for which you should wish forgiveness—you have not noticed them or kept track.

And so the rabbi reminds the children that they should consider when they had ever done things that they should not have done.

He then asks them what looks different in the synagogue. The covering of the dais had been changed to white, which he explains is for purity and cleanliness. He asks the children to stand to see the special torah covers, also white to symbolize atonement and cleanliness.

My mother leans over to me at this point and says, "Can you imagine how someone black feels, hearing a story like this?"

Although no one in the temple was intending to be racist/white supremacist, the conversation could have had that effect, privileging whiteness in a society that is already racist/white supremacist. Is that racism the large rock, the boulder? It must seem truly that large and intractable to people of color. It seems like a boulder to me, when I think consciously about it. Yet it seems that as whites we treat our own racism as so many little pebbles; part of our privilege is that it may seem unimportant to us. So many times we are racist and do not even realize it and so cannot acknowledge or atone for it or even attempt to change our behavior. Like the second man, we say we are not racist, because it is our wish not to be. But wishing cannot make it so. The sooner we can see the boulder *and* the pebbles, the sooner we can try to remove them.

NOTES

1. b. hooks, *Overcoming White Supremacy: A Comment*, in Talking Back: Thinking Feminist, Thinking Black 112 (1989).

2. *Id.* at 113.

3. Parents of young children who try to have a telephone conversation will easily recognize this phenomenon. At the sound of the parent's voice on the phone, the child materializes from the far reaches of the house to demand attention.

4. In one sex discrimination class, the assigned reading consisted of three articles by black women. In the discussion, many white women focused on sexism and how they understood the women of color by seeing the sexism in their own lives. The use of analogy allowed the white women to avoid the implications of white privilege and made the women of color feel that their distinct experience was rendered invisible.

Additionally, for the first time that semester, and although the end of the semester was near, many members of the class had evidently not done the reading. Was this a guerrilla tactic to retake the

center or simply a lack of interest by the dominant group in the perceptions of the nondominant group (another form of manifesting entitlement to centrality)?

5. A. Harris, Chapter 34, this volume.

6. *Id*.

7. See Elizabeth V. Spelman, Inessential Woman (1988) (criticizing the way that gender essentialism ignores or effaces the experiences of women perceived as different from the white norm). For further discussion of the essentialist critique, see Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. Chi. Legal F. 139; and Harris, *supra* note 5; see also R. Delgado & J. Stefancic, *Why Do We Tell the Same Stories?*, 42 Stan. L. Rev. 207 (1989) (describing the role of categorization, broad or narrow, in channeling thought).

8. Harris, *supra* note 5.

9. See, e.g., S. Wildman, *Integration in the 1980s: The Dream of Diversity and the Cycle of Exclusion*, 64 Tulane L. Rev. 1625, 1629 (1990) (discussing the privileging of white males in the legal profession).

10. See F. Kendall, Diversity in the Classroom: A Multicultural Approach to the Education of Young Children 19–21 (1983) (describing the development of racial awareness and racial attitudes in young children). Although the prevalent view would state that children are "oblivious to differences in color or culture," *id*. at 19, children's racial awareness and their positive and negative feelings about race appear by age three or four. *Id*. at 20.

11. J. Scales-Trent, *Commonalities: On Being Black and White, Different and the Same*, 2 Yale J.L. & Feminism 305, 305 (1990).

12. Standing to talk about the harm of racism has received attention in legal academic circles. Randall Kennedy argues that people of color should not receive particular legitimacy within the academy simply because they are of color. R. Kennedy, Chapter 70, this volume. Kennedy takes issue with the writings of several scholars of color whom he characterizes as proponents of a "racial distinctiveness thesis," which holds that the perspective of a scholar who has experienced racial oppression is different and valuable because of this awareness.

Replying to Kennedy, Leslie Espinoza argues that it is precisely Kennedy's standing as a person of color that gives special voice and power to his message: "Because Kennedy is black, his article relieves those in power in legal academia of concern about the merits of race-focused critiques of their stewardship, and it does so on the 'objective' basis of scholarly methodology." L. Espinoza, *Masks and Other Disguises: Exposing Legal Academia*, 103 Harv. L. Rev. 1878 (1990). Espinoza discusses the "hidden barriers," *id*. at 1879, to participation by people of color in the legal academy; these "[s]ubtle barriers create a cycle of exclusion." *Id*. at 1881. The dominant discourse within the legal academy provides an identity to the privileged group as well as "a form of shared reality in which its own superior position is seen as natural." R. Delgado, Chapter 9, this volume.

41. A House Divided

The Invisibility of the Multiracial Family

ANGELA ONWUACHI-WILLIG AND JACOB WILLIG-ONWUACHI

Two decades ago, Peggy McIntosh expounded on the theoretical concept of white privilege in her article "White Privilege: Unpacking the Invisible Knapsack."[1] White privilege, she said, "is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools, and blank checks" that includes individual advantages such as the following:

1. I can, if I wish, arrange to be in the company of people of my race most of the time.
2. I can avoid spending time with people whom I was trained to mistrust and who have learned to mistrust my kind or me.
3. If I should need to move, I can be pretty sure of renting or purchasing housing in an area that I can afford and in which I would want to live.
4. I can be pretty sure that my neighbors in such a location will be neutral or pleasant to me.
5. I can go shopping alone most of the time, pretty well assured that I will not be followed or harassed.

Today McIntosh's words ring equally true and have become a staple in the antiracist canon. We, a black woman and a white man who are married and living together in Iowa with our three biracial children, have given McIntosh's work serious thought over the years, both voluntarily and involuntarily. We use it in our lives as a basis for examining our own invisible knapsacks of privilege, such as our unearned privileges as heterosexuals. For example, in our actions and efforts to support the legal recognition of same-sex marriage, we often remind ourselves of the benefits that we have received as a result of the Supreme Court's decision in *Loving v. Virginia*[2] (1967) striking down antimiscegenation statutes and ensuring the legality of our multiracial marriage in every state. We also

A version of this chapter previously appeared as Angela Onwuachi-Willig and Jacob Willig-Onwuachi, *A House Divided: The Invisibility of the Multiracial Family*, 44 Harv. C.R.-C.L. L. Rev. 231 (2009). Originally published in the *Harvard Civil Rights–Civil Liberties Law Review*.

use McIntosh's work as a basis for understanding our own individual social advantages and disadvantages as a result of our two different races. For instance, I, Jacob, a white man, am often reminded of my own white privilege when I shop alone in malls and am neither followed around in stores nor asked to produce various forms of identification when purchasing items. Whereas I, Angela, a black woman, am often exposed to my racial disadvantage when I read the newspaper, watch television, or listen to the news, all of which are filled with negative and stereotypical images of black people. Finally, we use McIntosh's work as a means for understanding and evaluating how our marital union complicates our racial advantages and disadvantages. Primarily, we use it as an avenue for understanding how our privileges—mainly Jacob's—disappear as a result of our marriage.

While *Loving* has forever changed the lives of interracial, heterosexual couples by allowing them to legally marry, it has not led society to embrace all multiracial couples and families. Instead, society and law continue to assume that all intimate couples and families are monoracial.

One More Invisible Knapsack of Privileges

Everyone in our society possesses one or more invisible knapsacks of unearned privileges, whether based on race, color, class, sex, religion, sexual orientation, nationality, able-bodiedness, marital status, or other identity categories. At the same time, however, individuals also may suffer or endure societal disadvantages that attach to one or more of their identity categories.

The Heterosexual Knapsack

Just as experience taught McIntosh not to recognize her white privilege, many heterosexuals have been conditioned to remain oblivious about their own unearned privileges based on sexual orientation. Consider a few examples:

1. In all fifty states, intimate heterosexual partners can marry each other as long as they do not violate other marital restrictions, such as age or number restrictions, and can have their marriage recognized by every other state in the union.
2. Heterosexual couples can turn on the television or read the newspaper and see reflections of their cross-sex, intimate relationships widely represented.
3. As long as they are otherwise qualified, heterosexual couples can adopt children in all fifty states.
4. When out in public, the children of heterosexuals are presumed to "belong" to them as parents.
5. The children of heterosexual couples receive texts and classes that implicitly support their family unit.

Indeed, while this list of heterosexual advantages could be endless, the list of heterosexual couples that may enjoy all of these benefits is more restricted. Because of the interlocking nature of hierarchies in our society, not all heterosexual couples are treated

equally. Every couple's experiences in the world are a function of other identity categories, such as interraciality or socioeconomic class.

Unpacking the Heterosexual Knapsack of Privileges

In 1964, Mildred Jeter, a black woman, and Richard Loving, a white man, filed a class action lawsuit that challenged the constitutionality of Virginia's ban on interracial marriage. Just six years earlier, in 1958, Mildred and Richard had left their home state of Virginia, which enforced antimiscegenation statutes, to marry each other in Washington, D.C., which did not prohibit interracial marriages. Following their marriage, the Lovings returned to reside in their home state. In Virginia, however, they were arrested, charged with violating a state ban on interracial marriages, and threatened with a one-year prison sentence unless they left the state without returning for twenty-five years. On appeal, the U.S. Supreme Court struck down Virginia's antimiscegenation statute, on equal protection grounds, even though it applied equally to whites and nonwhites. The Court reasoned that the statute had no purpose other than to discriminate against racial minorities and promote white supremacy. The Court further held that the statute violated the Due Process Clause because marriage was a fundamental right that the state could not restrict for an invidious reason.

Since that historic day in 1967, the *Loving* decision has stood as a transformative case on race relations and a symbol of the steady breakdown of racial barriers in intimate and personal relationships. Same-sex marriage advocates applaud *Loving* for its protection of citizens' private decisions about whom they choose to love and with whom they choose to join in family. Legal scholars such as Randall Kennedy encourage the public to view *Loving* as a tool for actively advancing and facilitating interracial relationships in the fight against racism.

Although many years have passed since the groundbreaking decision, society does not recognize and acknowledge interracial and multiracial couples and families in all aspects of life. As Kimberlé Crenshaw illustrated in her seminal work on intersectionality, different groups of people may encounter varied forms of discriminatory behavior based on the intersection of two or more identity categories. Intersectionality recognizes that power, privilege, disadvantage, and discrimination are functions of interlocking spectrums of identity. For example, because the identities of black men and black women differ along the intersection of race and sex, black women may have distinct vulnerabilities to violence and discrimination from black men. Although Crenshaw's theory of intersectionality focused on black women and how they suffer oppression based on the convergence of racism and sexism in their lives, her theory applies to other groups.

While interracial, heterosexual couples may face discrimination based on a single identity category such as their marital status or socioeconomic class, they also may encounter discrimination at the intersection of race and family. As the two of us have seen in our own lives, interraciality tends to make our very existence as a couple invisible and places many of the privileges that generally attach to heterosexual couples and families beyond our reach. For example, although we enjoy the legal right to marry and have our marriage recognized in every state throughout the nation, no other privilege on the above list inures to us. For example:

1. Heterosexual couples can turn on the television or read the newspaper and see reflections of their cross-sex, intimate relationships widely represented. But we do not see reflections of ourselves as a married, interracial, heterosexual couple, widely represented in the media. Even when we do, the plot line nearly always ends in tragedy, spurred by the mixing of races.
2. As long as they are qualified, heterosexual couples can adopt children in all fifty states. But even after the Multiethnic Placement Act, we as an interracial couple would encounter difficulty in adopting children, especially children who were not of African descent.
3. When out in public, the children of heterosexuals are presumed to "belong" to them as parents. But when we are out in public, together or separately, our children often are not presumed to be ours. For example, people frequently ask us, "Is that your child?" or "Are you playing big brother today?" Little children tell us that we do not "match" our children.
4. The children of heterosexual couples receive texts and classes that implicitly support their family unit. Our children do not.

Unlike monoracial, heterosexual couples, we often find our status as a family assumed away, even when we are out with our children. Other people rarely assume that we are intimate partners when we go shopping together in the grocery store. At best, store cashiers and other customers assume that we are friends, even with our rings on our hands and our children with us. At worst, clerks speak to Angela as though she were a random stranger throwing items into Jacob's basket. Jacob is always asked, "Is this together?" Other customers perceive us as store clerk and shopper, almost always approaching Angela to ask if she will assist them as well.

Additionally, unlike white heterosexual couples, fear of mistreatment plays a role for us when choosing public accommodations. We try to plan where we will eat, play, or stay overnight as a means of avoiding discrimination. At times, we even game the system, sending Jacob in first to scope out the premises or check us in at a hotel. We also have encountered difficulty in finding neighborhoods where people approve of our household. Where possible, we have steered ourselves directly to integrated neighborhoods.

Other interracial heterosexual couples face the same obstacles that we do. For instance, the children of an Asian Pacific American male–white female couple also are unlikely to be given texts or classes that implicitly support their family unit. Likewise, an Asian Pacific American male–white female couple will see few media representations of couples like them. When out shopping in a grocery store, an Asian Pacific American male, unlike Angela, is unlikely to be perceived as a store worker who is helping a white female customer. Neither race nor gender stereotypes regarding Asian Pacific American men lend themselves to that type of imagery. Just changing the type of store, however, may alter the experience of both couples. For example, in an electronics store, racialized and gendered stereotypes may lead customers to believe that the Asian Pacific American male is a worker who is helping a white female customer. Indeed, as one couple—a white woman and an Indian American man—has related to us, he is often approached by customers who believe that he is a store worker when they are out together in an electronics or computer store.

Even other black female–white male couples may experience certain events differently than we do along the intersection of race, family, and color. For example, a very light-skinned black woman with a white husband may instead face having people constantly assume that her family is white, despite her own personal identification and that of her children. In sum, just as the disadvantages that people and families may encounter in life can be similar across identity categories, they also can vary based on differing intersections of identity categories.

The Legal Invisibility of the Interracial Family

The disadvantages of interracial couples are not merely social. The law, too, plays its own role in reifying the monoracial ideal. This role is evident in the language and application of Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act.

Under this act, only certain classes of citizens are protected from discrimination in housing. Title VIII provides that "it shall be unlawful"

> (a) [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.
> (b) [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin. . . .
> (d) [t]o represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

Plaintiffs can prove discrimination with direct or circumstantial evidence by using the burden-shifting model that the Supreme Court specifically developed for evaluating employment discrimination in *McDonnell Douglas Corp. v. Green*.[3] Applying this burden-shifting model to housing discrimination cases, courts have held that a plaintiff must prove housing discrimination through three different steps. First, the plaintiff must establish a prima facie case of discrimination by proving the following four factors: (1) that she is a member of a racial minority, (2) that she applied for and was qualified to rent or purchase certain property or housing, (3) that she was rejected, and (4) that the housing or rental property remained available thereafter. Once the plaintiff proves these factors, the court draws an inference of discrimination and moves to the second step, in which the owner or landlord must articulate a legitimate explanation for rejecting the plaintiff's application. If the defendant satisfies this burden, then, in the third step, the plaintiff must prove that the defendant's stated reason was a pretext for discrimination. The plaintiff can show pretext by demonstrating that the proffered reason had no basis in fact, did not actually motivate the challenged conduct, or was insufficient to warrant it. However, even upon proof of pretext, a jury may still rule in favor of the defendant if it believes that a nondiscriminatory factor was at play. The ultimate burden of persuasion rests with the plaintiff at all times.

Additionally, a person discriminated against because of her association with an individual in a protected class can use the *McDonnell Douglas* framework to prove

discrimination. For example, a white individual who believes that she was denied a rental because of her black friends may generally file a discrimination claim "because of" race under Title VIII. Courts in such cases hold that plaintiffs suffer discrimination because of their own race, not just because of their relationship to someone of another race.

These housing discrimination precedents are less effective combating the type of discrimination that interracial heterosexual couples may face as a familial unit. The members of a monoracial heterosexual couple who can assert race discrimination in their complaint can plead their claims together as a couple. However, the members of an interracial heterosexual couple who are discriminated against because of their interraciality (i.e., because they have engaged in race-mixing) have to make their individual races and family unit exclusive of each other to explain the factual basis of their discrimination claims. In essence, although housing discrimination law is designed to recognize citizens' lives as part of a collective unit, it fails in these instances to fully encompass the harms done to interracial heterosexual couples.

Indeed, we encountered this very problem with housing discrimination law when we filed a joint housing discrimination claim. While our lawsuit did not turn on a claim of discrimination based on interraciality, we did confront the question of how interraciality would fit into our factual allegations, ultimately deciding to move forward with a more traditional and recognizable claim based on race. A hypothetical helps explain our predicament.

Consider, for example, a married couple—Andrew Williams, a black man, and Jackie Owens, a white woman. Andrew and Jackie live in a large city on the East Coast, where Andrew works as a doctor at a prominent hospital and Jackie as a high school teacher. Two years earlier, they had relocated from a large Midwestern city, where they lived in a suburban house they owned jointly. Upon moving, they sold their house and rented an apartment in the bustling city center, close to Andrew's new hospital. They enjoyed the experience of living in the city, but wanted to move to a quieter, more residential area. Because they planned to wait a few more years before purchasing their own house, they looked for another apartment or house to rent in a nearby suburb.

Andrew and Jackie found an advertisement for a two-bedroom apartment on a website with local rental listings. They called the landlord-owner to set up an appointment to view the unit. Although the landlord could not meet them personally, he arranged a time for a rental agent to show Andrew and Jackie the apartment.

When the couple arrived, they found the house attractive and well maintained, and they appreciated its location on a quiet tree-lined street. While Andrew checked out the lawn, Jackie rang the doorbell and was greeted warmly with a handshake by the rental agent, Betty, who was white. When Andrew walked up behind Jackie and introduced himself as Jackie's husband, Betty's demeanor seemed to change. Betty greeted Andrew only perfunctorily and quickly turned her back to begin the tour of the apartment. Both Andrew and Jackie noted Betty's odd behavior but quickly put it out of their minds.

As they viewed the apartment, Andrew and Jackie fell in love with it. Immediately after finishing the tour, Andrew called the landlord from the car to express their desire to rent the property. The landlord seemed very happy that they were interested and explained that he already had other applications for the apartment but had not yet made a decision. He instructed them to leave their application with the rental agent with whom he would be speaking later that afternoon. The owner went on to say that, if they liked

that apartment, he had another apartment just coming available for rent nearby that they would surely like as well. The owner gave Andrew the address of the other apartment over the phone so that he and Jackie could drive by it and asked them to call him later to schedule a time to see the other unit. Once Andrew got off the phone, he and Jackie filled out an application and gave it to the rental agent. That evening, Andrew called the landlord to follow up about the apartments. He and Jackie were confident that the landlord would select them once he saw the strength of their application. During the phone conversation, the landlord told Andrew that he had their application and was speaking to the rental agent at the very moment but that he would call Andrew back later. When Andrew spoke to the landlord again, the landlord told him that the first apartment was no longer available. Then, before Andrew could even ask about the second apartment, the landlord informed him that the second apartment, which Andrew understood as not even being on the market yet, was also no longer available.

The next week, Andrew and Jackie began to look on the Internet for rental listings again. They noticed that the same landlord had a new listing for an apartment for rent in that same area. They wondered if either a third apartment had become available, if the renting of the second apartment had fallen through, or if (remembering Betty's odd behavior) the landlord did not want to rent to them for impermissible reasons. Andrew then e-mailed the landlord, reintroducing himself and inquiring about the apartment listing. Andrew wrote:

> Hello. I am writing to see if I can reschedule an appointment to view the apartment that you advertised on the housing.com website. You and I have actually spoken before on the telephone. My wife and I recently viewed the apartment that you had for rent at 34 Carson Road. I'm Andrew Williams, the person who called to tell you how much we liked the Carson apartment. At the time, you indicated that you had another apartment that we were sure to like (if we liked the Carson apartment) at 35 Eager Street. When we spoke last, you indicated that this apartment was not available.
>
> I was looking through ads on housing.com and saw your ad for another apartment in the area. Is this the apartment on Eager or a different apartment? Is it available? Can my wife and I set up an appointment to view the advertised apartment tonight or any other time? Thanks in advance for your quick response.
>
> Andrew Williams

In his reply, the owner indicated that the listing was in fact for the second apartment but asserted that it was still not available. He wrote:

> Dear Dr. Williams,
>
> This apartment, I thought was available, but for now it isn't. (We spoke about its nonavailability earlier. The web ad shows a time-lag). Sorry for the confusion. I wish you good luck in your search.
>
> Best Wishes.

Two days later, at Jackie's request, a friend e-mailed the owner to inquire about the second apartment, which was still listed on the site. The landlord, who was not aware of

any connection between the friend and Jackie, indicated in his response that the house was still available for rent and, in fact, suggested a meeting time with the friend to view the apartment. (The friend later canceled the appointment.) Thereafter, Andrew contacted an employment discrimination attorney who told Andrew and Jackie that they had reasonable evidence to support a claim of discrimination.

Andrew and Jackie filed a complaint with the state discrimination commission asserting discrimination because of Andrew's race. After all, they could easily prove the four elements of the prima facie case of discrimination: (1) that Andrew belonged to a minority group; (2) that Andrew, along with Jackie, had applied for and was qualified to rent or purchase the property at issue; (3) that Andrew, along with Jackie, was refused the housing despite being qualified; and (4) that the housing remained open thereafter, and the owner or landlord continued to seek or review applications from persons of lesser or similar qualifications outside the protected (race) class.

During the preliminary investigation of the complaint, the owner provided his legitimate, nondiscriminatory reason for not renting the second apartment to Andrew and Jackie: that he had to go out of town in a couple of days after speaking to Andrew on the phone and did not think that he could rent the apartment before he left. In fact, the landlord conceded that he did not enter into an agreement to rent the second apartment until two months after he first told Andrew and Jackie that it was not available. He also revealed that he had rented the second apartment to three unrelated women in their twenties. These women, apparently friends or roommates, had significantly worse credit scores than Andrew and Jackie and a combined income that was less than one-third of Andrew and Jackie's. Finally, the owner produced evidence that he had rented to white, black, and Asian monoracial families and couples in the past (though the black couple had begun their lease after the filing of Andrew and Jackie's complaint), which would make it harder, though not impossible, to prove a claim of discrimination based solely on Andrew's race. Still, the landlord provided no explanation for lying to Andrew on two separate occasions by telling him that the apartment was no longer available when, in fact, it was. Nor did the landlord explain why he did not believe that he could rent the apartment before he left when Andrew and Jackie had indicated a desire to rent either the first or second apartment immediately.

Although Andrew and Jackie have persuasive (in fact, almost perfect) evidence of wrongdoing by the landlord under the *McDonnell Douglas* framework, they will encounter difficulty in explaining and detailing discrimination because of the identification of their protected class category. Although Andrew and Jackie have a strong claim based solely on discrimination against Andrew, their strongest claim for discrimination lies at the intersection of race and family, not just on race or family alone. After all, the owner of the apartment in this hypothetical appears not to be discriminating against either Andrew or Jackie based on animus toward their particular racial group but rather against them together as an interracial couple. Yet the law—here, housing discrimination law—fails to fully address their experience in the face of their complex familial identity. No protected category under the law appears to include Andrew and Jackie's family as one interracial unit, which not only complicates Andrew and Jackie's claim but also redoubles their injury—at least with respect to dignity—by implicitly erasing the existence of their family.

Under current housing discrimination statutes, Andrew and Jackie cannot pursue an interraciality discrimination claim based on their familial status because housing

discrimination statutes define "familial status" in relation to one's dependents. For example, Title VIII defines "familial status" to mean

> [o]ne or more individuals (who have not attained the age of 18 years) being domiciled with—
> (1) a parent or another person having legal custody of such individual or individuals; or
> (2) the designee of such parent or other person having custody, with the written permission of such parent or person.

Because the discrimination experienced by Andrew and Jackie did not result from having children in the family, they do not fit within the category of persons or families included in the term "familial status."

Additionally, assuming that Andrew and Jackie are in a state that provides protection for discrimination based on marital status, Andrew and Jackie also cannot prove their claim based on marital status because that term generally refers only to individuals' status as either married or single. For example, in *County of Dane v. Norman*, the Wisconsin Supreme Court made clear that, under Wisconsin's housing discrimination statute, "marital status" was defined as "being married, divorced, widowed, separated, single or a cohabitant."

Most of all, Andrew and Jackie will encounter difficulty in factually asserting a joint claim of discrimination because of their interraciality as a family. Had the owner's actions against them simply been targeted at Andrew alone, Andrew and Jackie could seek to plead and prove disparate treatment under the *McDonnell Douglas* burden-shifting framework by pleading racial animus against Andrew individually (as they did in this hypothetical). Because, however, the facts suggest that the landlord might have discriminated against Andrew and Jackie because of their interraciality as a couple, and not just because of animus toward Andrew's racial group, the couple will have to engage in wordplay to explain and prove the factual basis for their claim of discrimination against them as an interracial couple. Specifically, Andrew and Jackie will each have to assert discrimination based on the law of discrimination by association, claiming separately and individually that, but for the race of their spouse, they each individually would have been treated differently. In so doing, they will have to divide their family unit.

Class Protection Based on Interracial Status

Although courts arguably can find (and certainly would find) discrimination because of race for couples like Andrew and Jackie under the analysis used in interracial association cases, this method does not fully address the problem of housing discrimination against interracial couples based on race-mixing as such. Rather, it perversely maintains and reinforces discrimination. Specifically, while the interracial association analysis can technically offer such interracial heterosexual couples redress through damages and other forms of relief under Title VIII, it fails to address the expressive harms or lack of dignity in the continued assumption of monoraciality among families in housing discrimination statutes.

Unlike in the employment setting, where the law of discrimination by association has been applied to individuals, housing discrimination law is intended to recognize the family unit, as demonstrated by its protection of people based on familial status and marital status. Housing discrimination law is intended to protect the principle that not all couples or families are the same. Yet here the law implicitly presents all families and couples as monolithic—specifically, as monoracial (and heterosexual). It mandates that claimants in an interracial family split their individual races and family unit to factually assert a claim. In other words, it requires that the family unit be broken up, at least legally, to receive protection and, in so doing, fails to fully recognize the unit's very existence.

The analysis in interracial association cases thus fails to acknowledge the true nature of discrimination against the mixed-race heterosexual couple. Such discrimination concerns more than pure race discrimination because it is based on interraciality and the particular stereotypes targeted at people who cross racial boundaries. As the hypothetical demonstrates, it is possible for an alleged discriminator not to treat individuals differently on the basis of race but to treat couples differently on the basis of racial mixing. In other words, a landlord can choose to treat individuals and even monoracial families equally across many races, but may, if she finds interracial couples and multiracial families repugnant, treat them unequally.

The need for changes in statutory housing discrimination law is growing every year. As the Equal Employment Opportunity Commission (EEOC) recognized, "[n]ew forms of discrimination are emerging. With a growing number of interracial marriages and families . . . , racial demographics . . . have changed and the issue of race discrimination in America is multi-dimensional."[4] If multidimensional discrimination against interracial, heterosexual couples is to be fully addressed in housing, legislators must offer the possibility of a more nuanced interpretation of such couples' experiences by specifically adding interraciality as an additional protected category in housing discrimination statutes. Such an addition is the only means by which the law may address the expressive harms or lack of dignity that can result from the current framing of family in housing discrimination statutes as monoracial.

NOTES

1. Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, Indep. Sch., Winter 1990.

2. 388 U.S. 1 (1967).

3. 411 U.S. 792 (1973).

4. U.S. EEOC, *Why Do We Need E-RACE?* (2008), http://www.eeoc.gov/eeoc/initiatives/e-race/why_e-race.cfm; see also Kevin R. Johnson, *The Legacy of Jim Crow: The Enduring Taboo of Black-White Relationships*, 84 Tex. L. Rev. 739, 739 (2006).

From the Editors

Issues and Comments

Should minority communities demonstrate solidarity by embracing their own offenders as much as possible, as Regina Austin contends, or should they distance themselves from those offenders and call for swift, harsh punishment?

Is the notion of group conflict between minorities a myth, constructed by the white press to serve the purposes of elite whites and in particular to discredit the multicultural movement? Is focus on distinctness, and a small unit of analysis, debilitating for the cause of racial reform—or does genuine reform spring mainly from small, relatively homogenous groups as Lisa Ikemoto and others imply?

Why do some white people direct attention away from concerns of people of color by focusing on their own situations?

When the legal system grants a concession to a new group, such as mixed-race couples wishing to marry, is this only the beginning of a struggle as two authors in this part warn? If so, is the concession (allowing them to marry) little more than a token advance calculated to take some of the pressure off an unfair system and postpone more far-reaching change?

For further impressive commentary on essentialism and minority communities, see the article by Gerald Torres on the decline of the universalist ideal and its replacement by local, or "plural," justice in the Suggested Readings.

SUGGESTED READINGS

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Roberts, Dorothy E., *BlackCrit Theory and the Problem of Essentialism*, 53 U. Miami L. Rev. 855 (1999).

Scales-Trent, Judy, *Commonalities: On Being Black and White, Different, and the Same*, 2 Yale J.L. & Feminism 305 (1990).

Torres, Gerald, *Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Plural Justice—Some Observations and Questions of an Emerging Phenomenon*, 75 Minn. L. Rev. 993 (1991).

PART IX

GAY-LESBIAN QUEER ISSUES

SCHOLARS HAVE BEEN addressing the connections between sexuality and race, such as the role of machismo in Latino culture or how certain minority groups emerge in popular imagery as hapless or effeminate while others come across as hypersexual and lusting after white flesh.

Gay and lesbian scholars have begun to create a body of Queer jurisprudence that examines whether antiracist literature and movements incorporate a heterosexist bias that marginalizes and excludes the concerns, perspectives, and voices of gays and lesbians. If a lesbian of color finds herself hounded out of a law teaching position, is that a civil rights issue, a sexual issue, or both? If a conference of civil rights or critical race theory scholars, or an editor of a collection like this one, devotes no attention to gay-lesbian issues, is one possible defense that the event or volume aimed at covering just the one problem, race? What if a conference on gay-lesbian issues neglects the role of race?

Elvia Arriola addresses many of these issues, questioning whether they are ever separable. Darren Hutchinson discusses the role of movement politics and organizing in bringing about law reform in the area of gay rights. Russell Robinson suggests that the panic over black men who are "on the down low" is greatly exaggerated and proposes a solution to the spread of AIDS that is both simple and humane.

42. Gendered Inequality

ELVIA R. ARRIOLA

Governing paradigms encourage legal analysts to make problematic assumptions. First, the various characteristics of one's identity, such as sexual orientation, gender, and race, are always disconnected. Second, these characteristics carry fixed and clear meanings. Third, the various aspects of one's identity may be ranked so that, for example, race may be prioritized over gender. Fourth, some characteristics, such as class, do not provide a relevant basis for discrimination claims. Finally, these paradigms create false dichotomies and false power relationships and promote limited visions of equality. They obscure whether or how discrimination occurs, what remedy to use, or why conflict has arisen.

Under my holism-irrelevance model, courts would recognize that a person's identity is rarely limited to a singular characteristic. Instead, identity represents the confluence of an infinite number of factors. Those can include race, religion, sexual orientation, nationality, ethnicity, age, class, ideology, and profession. The components of an individual identity constantly shift, some becoming more prominent in certain settings than others. I arrive at this conclusion through an understanding that no single trait defines my own identity. Rather, my being Mexican, Catholic, a woman who is lesbian identified, a feminist lawyer, a professor, and a yogin are all important aspects of my identity.

Although numerous factors compose an individual identity, social actors may identify that individual on the basis of a single trait. The trait that becomes prominent, or even legally relevant, is seldom predictable. While a single trait may become prominent and legally relevant, discrimination in fact stems from stereotypes about a person's entire identity. Thus, models that fail to acknowledge that people move in and out of communities and that categories never match reality cannot adequately reveal how multiple unconscious attitudes motivate acts of discrimination. My approach rejects both the individual's and the law's tendency to choose their own preferred and accepted categories or to see them as necessarily separate and unrelated. Courts should acknowledge the multiple forms of oppression that stereotypes often render invisible. Consider

A version of this chapter previously appeared as Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 Berkeley Women's L.J. 103 (1994). Originally published in the *Berkeley Women's Law Journal*.

the following hypotheticals, which illustrate the complexity of personal identities and discrimination.

Suppose, for example, that an employer pays all women the same wage. However, he places white women in the front office jobs because the clientele is mostly white and relegates blacks and Hispanics to the back room. Meanwhile, he sexually harasses the white women. Would a black woman denied a front office job have any right to challenge the employer on the basis of racism, or sexism, or both? What about a white woman? Is one issue more important than the other?

Or consider an Asian employer who prefers to hire Hispanics and Asians over blacks or whites. How do we assess this kind of preferential treatment when our standard paradigms of analysis see whites as oppressors and all minorities as victims? Is this a case of the so-called problem of reverse discrimination? What about when an employer hires Mexican nationals over Mexican Americans because the latter are more likely to question working conditions and wages?

Finally, suppose that a white male employer fires a black lesbian after she rebuffs his sexual advances. Is this discrimination on the basis of race, gender, or sexual identity or some combination of the three? Claims of discrimination brought by lesbians of color face two obstacles under current discrimination analysis. First, the categories of race and gender may be viewed as distinct and separate. Second, the category of sexual identity is not even recognized as a basis of legally remediable discrimination. Faced with a claim by a woman of color, a court could determine that although the categories of race and sex apply, these categories have not been shown to bear any clear relationship to each other. Consider *Munford v. James T. Barnes & Co.*,[1] a case brought by a black woman whose white male supervisor demanded that she have sex with him. She repeatedly refused. The sexual harassment carried racial overtones. Limited by conventional legal reasoning, the court in *Munford* failed to see how racism and sexism intersected in this case. It held instead that the race discrimination claim was "far removed" from the sexual harassment claim.[2]

For a lesbian of color, the same methodology that fails to recognize a claim of racialized sexual harassment, or gendered racial harassment, also denies her claims of homophobic sexism. The firing of a black lesbian in the hypothetical above presents a complex picture of identity and discrimination. Yet the source of the problem is not complex; it is simple, though subtle—she is being fired because she has defied white male supremacy and is a victim of antilesbian sexism.

Law should thus recognize the role of unconscious attitudes and the ways that interrelated factors create unique, compounded patterns of discrimination and affect special social identities. It should reject the idea of arbitrarily separating out categories to address discrimination in our society and instead understand discrimination as a problem that arises when multiple traits and the stereotypes constructed around them converge in a specific harmful act. Traditional categories then become points of departure for a richer analysis that explores the historical relationships between certain social groups and an individual's experience within each of these groups.

This model is holistic because it looks to the whole harm, the total identity. It is an irrelevance perspective because it assumes that one trait or several traits operating together create unfair and irrelevant bases of treatment. Thus, under a holism-irrelevance model, the theory and practice of nondiscrimination law become tools for mediating

social conflict by challenging the power of deeply ingrained cultural attitudes that perpetuate cycles of oppression for certain social groups.

We need new approaches that acknowledge the reality of identity and personhood, notwithstanding that an individual may not fit rigid, dichotomized categories such as masculine or feminine. Governing paradigms encourage the courts to ignore social reality and to refuse to extend existing and relevant legal protections to lesbians and gays. Courts have refused to extend these protections to lesbian and gay litigants because antigay discrimination merges questions of conduct with identity. This refusal reflects the legal culture's insistence that discrimination occurs within distinct and separate categories and denies the complexity of individual identity. Discrimination harms not only the individual but society as a whole. Equality theorists should recognize the public policy underlying antidiscrimination law: respect for one's total identity, including gender, sexuality, race, class, age, and ethnicity. Each trait is important to one's moral worth, yet none provides justification for the denial of equal rights under the law.

NOTES

1. 441 F. Supp. 459 (E.D. Mich. 1977).
2. *Id*. at 466–67.

43. Sexual Politics and Social Change

DARREN LENARD HUTCHINSON

Social movements are essential for legal and political change. A "social movement" is an organized and sustained political effort to alter policy and public opinion on matters of interest to the movement's participants. A growing body of scholarship among constitutional law scholars has examined the relationship between social movement activity and the evolution of Supreme Court doctrine. Reva Siegel, for example, connects changes in the Court's treatment of sex-based discrimination to feminist organizing and shifting gender roles in the post–World War II era. And Michael Klarman has written extensive accounts of the relationship between the civil rights movement, Southern backlash, and progressive changes in the status of blacks before the law.

The work of these scholars depicts Court doctrine in a much more complicated fashion than many traditional accounts. Although Supreme Court justices are indeed unelected and have lifetime tenure, their rulings, particularly on matters of broad social concern, respond to Congress, the president, and public opinion. Because social movements can influence the opinion of members of Congress, the president, the electorate, and individual judges, they can also inform the perspectives of courts and reshape constitutional law. Consequently, movements have an important role in doctrinal evolution, especially in connection with racial justice and gay, lesbian, bisexual, and transgender (GLBT) rights.

Is the time ripe for liberal social movements to create substantial changes in the legal status of GLBT individuals nationally and locally, in particular regarding same-sex marriage? Recent rulings by the highest courts in California, Connecticut, Iowa, and Massachusetts hold that state laws that prohibit same-sex marriage violate those states' constitutions. Californians, however, amended the state constitution to reverse the court's ruling, while voters in Florida and Arizona passed constitutional amendments defining marriage in heterosexual terms. Although same-sex marriage warrants attention because of the important equal protection concerns it presents, in the past, pursuit of this right led to a political backlash that ultimately limited GLBT rights.

A version of this chapter previously appeared as Darren Lenard Hutchinson, *Sexual Politics and Social Change*, 41 Conn. L. Rev. 1523 (2009). Originally published in the *Connecticut Law Review*.

Social Movements, Sexual Orientation, and Court Doctrine

Bowers v. Hardwick was the first Supreme Court case having to do with GLBT rights. *Bowers* held that the Constitution does not "confer upon homosexuals a right to engage in sodomy."[1] In *Bowers* the Court applied rational basis review and held that majoritarian notions of morality supplied a sufficient basis for the antisodomy statute.

The tone and substance of *Bowers* sent social movement actors away from the federal system and to the states in search of new venues to vindicate GLBT rights. They also lobbied for the liberalization of corporate antidiscrimination and benefits policies. These efforts resulted in the development of antidiscrimination norms that protect GLBT individuals from discrimination and the reform of policies that had traditionally distributed employee benefits based on concepts such as marriage that inherently discriminate against GLBT individuals. The attainment of rights at the state and local levels and in the private sector augmented the social status of gays and lesbians and helped create an alternative view of constitutional law and sexuality that would later lead to the overruling of *Bowers*.

As a result of localized social movement advocacy, when the Court decided *Lawrence v. Texas*, the political and legal landscape concerning GLBT rights had changed substantially. For example, while more than half the states criminalized sodomy when the Court decided *Bowers*, only thirteen did so when it issued its ruling in *Lawrence*. Also, only four states, including Texas, criminalized same-sex sodomy when the Court decided *Lawrence*.

Furthermore, several foreign courts, including the European Court of Human Rights, had already invalidated antisodomy laws, which indicated to the Court that Western civilization had reached a new consensus regarding the appropriateness of laws that criminalized private adult consensual sexual relations. In addition, while *Lawrence* does not explicitly rest on this fact, at the time of the ruling, opinion polls indicated that a majority of the public opposed the criminalization of adult consensual homosexual conduct.

These developments did not go unnoticed by members of the Court. Indeed, the majority opinion makes explicit reference to fundamental changes in the nature of GLBT rights in the states and on the international stage that occurred between *Bowers* and *Lawrence*. The opinion also discusses changes in foreign law, which sparked a heated rebuke from Justice Antonin Scalia in his dissenting opinion. The strategic choice by progay social movements to pursue GLBT rights within state and local governments helped refashion the legal and political landscape regarding sexuality and sexual orientation, which made *Lawrence* a much more secure ruling than *Bowers*.

The Court in *Lawrence* nevertheless cabined its decision to limit its reach and to protect the Court's legitimacy from erosion from a potential conservative political backlash. The Court, for example, stated that its ruling did not create a right to legal recognition of GLBT relationships, much less to engaging in public sex or prostitution. The Court also strained to describe the case as turning on a type of sex that was potentially part of an "enduring" "personal bond" between the petitioners (who had actually been engaged in a casual escapade). The Court attempted to create "respectable" gay sexuality by implying an intimate relationship between the parties without going far enough to legitimize same-sex marriage and invite criticism of its ruling.

Predictably, Justice Kennedy, the moderate voice on the Court, authored *Lawrence* (and *Romer v. Evans*). As some political scientists have argued, public opinion tends to have the "most pronounced" impact on judicial moderates.

The Court's effort to distance *Lawrence* from same-sex marriage, however, was unsuccessful. After the ruling, public support for it decreased dramatically—even though the Court disclaimed the notion that *Lawrence* would lead inevitably to judicial recognition of same-sex marriage. Public support for the practice fell once again after the Massachusetts Supreme Judicial Court invalidated the state's ban on same-sex marriage in *Goodridge v. Department of Public Health*, an opinion that explicitly cites *Lawrence*. Conservatives effectively used the rulings to mobilize voters against GLBT rights. Accurately predicting that the cases presented a political opportunity for conservative activism, President George W. Bush made same-sex marriage a campaign issue by proposing a constitutional amendment banning it. Conservatives introduced similar measures in state legislatures. Although the federal amendment effort failed, many political commentators believe that opposition to same-sex marriage caused a surge in voter participation among social conservatives, particularly in key swing states where voters considered initiatives banning same-sex marriage on Election Day 2004. Thus, the backlash to it could have possibly secured Bush's reelection.

To avoid setbacks such as the 2004 antigay backlash, GLBT activists must locate and exploit political opportunities for national and local policy reform. This approach necessarily requires GLBT activists to resist assuming that a broadened landscape for change exists merely because of recent electoral successes.

Red Victories and Blue Euphoria: An Election Is Not a Social Movement

The U.S. electorate holds diverse political viewpoints. Even voters who traditionally favor one political party or candidate over another do not necessarily share the same positions on substantive issues, and even if they reach similar positions, they may do so for different reasons. Blacks and Latinos tend to support Democratic candidates because of the party's stronger support for civil rights and economic justice relative to the Republican Party, but these groups often endorse socially conservative positions on issues such as abortion and GLBT rights. The influence of religion in black and Latino communities explains these groups' embrace of social conservatism. Nevertheless, many blacks and Latinos compromise their views on socially conservative issues to endorse Democratic candidates. By contrast, white evangelicals tend to prioritize socially conservative issues in their electoral decisions, which explains their support for Republican candidates, despite the GOP's general opposition to progressive class and labor policies that could benefit poor whites.

Although many persons within the GLBT community condemned black and Latino voters, their anger was somewhat misplaced. First, singling out blacks and Latinos obscures the broader support for same-sex marriage across racial groups. Second, the racial narrative fails to appreciate the importance of religion in shaping support for the measure. Religiosity—not race—was the strongest factor that determined whether a voter supported the measure, and black and Latino support for California Proposition 8 in 2004, the same-sex marriage ban, turned primarily on religion.

Often, GLBT advocates invoke racial analogies to argue that gays and lesbians should receive the same civil rights protection that blacks and other persons of color already enjoy. The analogy represents a legitimate effort to generate empathy for victims of homophobia and to navigate a legal culture that favors arguments rooted in precedent. This approach, however, fuels conflict between the two groups because people of color disagree with the implication that the law already sufficiently protects them from discrimination and inequality, and their own stereotypes of GLBT people cause them vehemently to resist comparisons of heterosexism and racism.

Conclusion

Recent court rulings and legislation in New Hampshire and Vermont indicate evolution on the issue of GLBT equality. GLBT social movements have pursued an effective strategy that seeks judicial and legislative recognition of same-sex marriage in liberal states to reshape the legal and political landscape of GLBT rights before advocating the issue in federal courts or in Congress. This is the same legal strategy that social movements employed to alter the legal status of GLBT persons after the *Bowers* decision. This strategy played a large role in the Supreme Court's eventual invalidation of sodomy laws.

But unless liberal social movements carefully choose which issues to pursue in national politics and which to advocate in state and local jurisdictions, they could provoke a massive political backlash against GLBT rights. Given the strong public opposition to same-sex marriage, this issue seems appropriately pursued in state courts and legislatures.

Social movement actors must resist believing that the success of Democratic politicians will necessarily translate into victories for GLBT causes. The passage of Proposition 8 despite Barack Obama's historic victory in California in the same election demonstrates that Democratic voters (like all other voters) take complicated positions and that they can embrace social conservatism and vote for liberal candidates. The controversy surrounding evangelist Rick Warren demonstrates that Democratic politicians will cater to moderate or even conservative interests if doing so could benefit them politically. The Obama administration's early defense of the constitutionality of the Defense of Marriage Act also demonstrates that political calculations will continue to lead liberal politicians to embrace conservative positions. Social conservatism and triangulation among Democrats can lead to conflict and political losses, but social movement strategies that take into account the complex political choices of voters and politicians could help diminish or prevent such setbacks in the future.

NOTE

1. Bowers v. Hardwick, 478 U.S. 186, 190–91 (1986).

44. Racing the Closet

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Recently, the media have brought to light examples of ordinary black men who are said to live on the "down low" (DL) in that they have primary romantic relationships with women while engaging in secret sex with men. A central theme of this DL discourse is that DL men expose their unwitting female partners to HIV, which stems from their secret sex with men. DL discourse warrants examination because it sits at the intersection of three important civil rights movements: (1) the gay rights movement, (2) the black antiracist movement, and (3) AIDS activism. I critique DL discourse to reveal important lessons about media framing, gender schemas, and victimization and the relationship of all three to law. DL discourse tends to conceal several relevant and interconnected groups, including nonblack men who engage in similar practices, down low women, and women whose sexual relationships are not monogamous or "respectable." These erasures permit the media to boil the underlying issues down to a battle between two caricatures—dangerous black men and their innocent wives and girlfriends. However, a close analysis of this framing provides the opportunity to recognize complicating nuances and draw structural connections between black men who have sex with men (MSM) and black women. I argue that both of these groups confront structural constraints that push them to the fringes of the black community and the broader society while limiting their romantic possibilities.

The media and the public have applied an insidious racialized double standard to black and white men who engage in similar conduct. The black men who have sex behind their wives' backs horrify us, yet we see Ennis and Jack, the star-crossed lovers in the Oscar-winning box-office hit *Brokeback Mountain*, as victims of the closet. When Governor Jim McGreevey came out as a "gay American," the empathy that the public felt for his wife, Dina, did not require casting Jim as a villain. We frame black and white men through radically disparate lenses even when they engage in the same underlying conduct. Juxtaposing white men on the down low against the stories of all-black depravity featured in DL discourse makes apparent that these media stories race the closet.

A version of this chapter previously appeared as Russell K. Robinson, *Racing the Closet*, 61 Stan. L. Rev. 1463 (2009). Originally published in the *Stanford Law Review*.

This is not to say that black and white MSM are identically situated vis-à-vis the closet. But the major differences may not be the ones suggested by the media, such as the association of DL with promiscuity. First, black men face not just homophobia but also racism, oppressive forces that combine in vexing ways. For instance, black men who identify as gay may face accusations that they have let down the black community, which often views "good black men" as an endangered species. Jim McGreevey can come out without anyone fretting about the white community lacking strong male leaders or linking such a lack to his sexual identity. If black men do not come out as frequently as white men, one explanation is that they face greater pressure to shun a second stigmatizing identity. Importantly, this pressure arises not just from the black community and its supposed greater homophobia but also from white people. The white gay men who bemoan the internalized homophobia of black men and suggest that coming out is a cure-all are often the very ones who contribute to the closet that confines black men by excluding and marginalizing black MSM in gay spaces and public representations. White gay men have dominated public images of gay men, which makes it hard for many men of color contemplating coming out to understand where they would fit in. The black gay images in the media that black men see are likely to be caricatures—like the DL—that fail to reflect how black men see themselves.

Although DL discourse has convinced many readers that the DL is a real and significant phenomenon in the black community, no one has ever proved the prevalence of this practice there or elsewhere. Indeed, it may be impossible to do so since the very conception of the practice entails secrecy. Asking a man whether he is down low may not produce a reliable answer since DL men, by definition, are perceived as hiding their sexual relationships with men and denying the relevance of their engagement in such sex. Many media stories on the DL fail to quote any actual men on the DL beyond J. L. King, the one man who has built a career on acting as a media spokesperson for the group. Thus, the media set up the DL as a phenomenon whose existence can be neither proved nor refuted. The blossoming of the DL story in major media outlets, despite the lack of identifiable DL men and minimal empirical evidence, speaks to the background stereotypes about black pathology that enable the story to bypass normal expectations of verification.

Despite these verification challenges, some public health scholars who have also been intrigued by the DL story as a possible explanation for high HIV rates among black women have attempted to study DL men. Although these studies shed some light on men who fit at least some of the characteristics of the typical media definition of down low, they are subject to important limitations. First, it is possible that a group of DL men would not talk to researchers, despite rigorous procedures intended to protect their identities. Second, some studies select subjects by asking men whether they identify as down low and thus sweep in some men who do not sleep with women and men simultaneously but nonetheless subscribe to DL identity for reasons that may include a rejection of the whiteness of gay identity and the view that DL is a trendier term for the closet. These limitations raise skepticism about assumptions that may amount to nothing more than stereotype.

One might expect HIV-specific transmission statutes, which were partly motivated by news reports of a black man infecting numerous white women, to offer a solution to the down low because such laws punish people who know they are HIV positive and

have sex with another without disclosure. Yet many DL men currently live beyond the reach of HIV transmission statutes and under the radar of the HIV testing regime because they do not see themselves as belonging to the risk group of gay men and thus do not know their HIV status. Instead of simply trying to identify individual perpetrators, an approach that has had minimal impact, the government could protect individuals by establishing regular HIV testing as a norm for all sexually active people, not just those who fit a flawed profile of those at risk. Studies show that most people who receive an HIV-positive diagnosis alter their behavior and engage in less unprotected sex with HIV-negative partners.

Although I attack media conceptions of black men on the down low and their links to government policies, I do not mean to excuse or justify the behavior of a man (of any race) who lies to his wife or female partner about his sexual relationships with men and exposes her to HIV. While surely some men fit the DL caricature, media discourse on the DL contains little of the complexity, personal struggle, and humanity apparent in the lives of many black men who have sex with men and women and refuse to identify as gay. It also tends to distract from the structural forces that contribute to individual decision making. DL discourse fosters a new sexualized stigma for black men while ignoring the compelling questions of intersectionality and identity politics prompted by the DL.

Down Low Discourse: The Dominant Story

What is the down low? Whether in white-dominated media, such as the *New York Times*, or black-controlled media, such as *Essence*, the term "down low" typically refers to men who are "(1) Black, (2) not identifying as gay, (3) having sex with both men and women, (4) not disclosing their sexual behavior with men to female partners, and (5) never, or inconsistently, using condoms with males and females."[1] Public health experts state that it is entirely unclear how many men satisfy this definition, and it has not been established that the DL is more common among black men than men of other races or is a primary reason why HIV rates in black women are high. The term "down low" originated in the black community, but it did not initially refer to sex between men. Rather, the term emerged from R&B songs describing illicit heterosexual affairs, including those by female artists like TLC ("Creep") and Salt-n-Pepa ("Whatta Man"). A hit song from 1995 by singer R. Kelly provided perhaps the most prominent usage of the term in R&B/hip-hop. In the song's chorus, Kelly instructs his partnered female lover to "keep [their affair] on the down-low. Nobody has to know." By 2001, when the mainstream media noticed the term, it had become associated primarily with men who have relationships with women while secretly having sex with men. More recently, it has been adopted by black men who may not have sex with women but may not be out in the traditional sense and may seek to distance themselves from the term "gay," which they see as rooted in white norms. The media coverage has produced public perceptions that the down low is a common practice among black men. These perceptions have taken on a life of their own and tend to conceal the scant empirical support.

Perhaps the most inflammatory example of this discourse is an episode of the *Oprah Winfrey Show* from April 2004. This episode featured J. L. King, an African American man and the author of *On the Down Low.* In case King's stories of sleeping with men while being married to and raising children with a black woman were not disturbing

enough, Oprah featured two men with even more salacious tales of life on the down low. Oprah began the show by stating that "AIDS is on the rise again. Here's a shocker! It's one of the big reasons why so many women are getting AIDS. Their husbands and their boyfriends are having secret sex with other men." Then two men, whose identities were obscured, provided accounts of their sex lives with women and men:

> MAN #1: Having a main girl, two other girls on the side and three guys makes for a lot of sex in the course of a month. I have noncommitted sex with men. In no way, shape, or form do I consider myself gay. I just don't—I refuse to accept that at all. I won't even use the term "bisexual." Being in a relationship with a woman . . . there is a certain warmness, a certain comfort that you just can't get with another dude. The women I sleep with have not always known that I also sleep with men. In the past, I haven't told them because it's a lot easier to just not to [*sic*] tell.
>
> MAN #2: I'm shuffling three guys right now, actually. One is married; the other two gentleman [*sic*] I am with basically for sex. What we do is very promiscuous . . . very, very, very promiscuous. Sometimes I practice safe sex; sometimes I do not. The married guy, we use condoms all the time. He insists on it. The other two guys, we don't use condoms. Usually, if I am with a woman, we don't practice safe sex.
>
> MAN #1: For quite a while, I had very bad behavior and had unprotected sex with men, with women.
>
> *[Later in the show]*
>
> MAN #1: After I was diagnosed with HIV, my behaviors didn't change. My behaviors got worse. I hung out in bars and picked up anonymous people. I had unprotected sex with guys, with women. Unfortunately, I would say I most likely have infected other people. I didn't protect myself or anything else.

Presumably, Oprah and her producers selected these men because their stories make for good television. However, they provided no reason for believing that these anecdotes are representative of DL black men in general. Nonetheless, the show perpetuated the notion that DL men are highly promiscuous with men and women and place their own sexual gratification above all else.

An *Essence* story further underscores the central theme of most DL discourse—black women as unwitting victims and "low down" black men as the villains. *Essence* titled one DL story "Deadly Deception." The article begins, "There have always been men on the 'down low,' self-described straight men who have sex with other men. Problem is, the HIV threat makes the deception of these brothers disturbing, deadly—and just low-down."[2] The DL man thus represents not just an individual enemy but a racial traitor. He is supposed to be a "brother," yet he is hurting his black "sisters," and implicitly the black community, by turning to men for sex and deceiving black women.

An important backdrop for many of these articles is the frustrated heteronormative aspirations of many single black women, who are depicted as doing everything right and yet being denied the black husbands to whom they are entitled. These stories either assume or demonstrate the respectability of the black women they frame as victims, which is supposed to heighten the injustice of their exposure to the DL threat. For example,

during the Oprah episode, Jane testified, "I was the original 1950s good girl. I was a virgin on my wedding night." When her husband abandoned her after many years of marriage, Jane turned to a longtime male friend for companionship and sex. She said he infected her with HIV. *Ebony* began one of its stories on the DL with the following:

> She's never shot-up dope. She's never been what society might call promiscuous. In fact, by traditional standards, Ida Bythersmith has lived what some people consider the American Dream. She fell in love and married the man of her dreams, gave birth to a healthy child and settled in a quiet, middle-class community on Chicago's South Side.[3]

Thus, a condition of respectability appears to be middle-class status, behaving as a "good girl," and not knowing or having reason to know that her partner was involved with men.

Stories on the down low frequently stress how shocked women are that the men featured in these stories do not appear feminine or otherwise stereotypically gay. The DL man alarms people not simply because of his behavior but because of a widespread belief that gender identity and sexual orientation correlate in men. Engaging in same-sex intimacy is wrongly perceived as stripping males of their masculinity. They are widely perceived as fallen and closer on the gender spectrum to women than a "real" man. This expectation is then used to police MSM and their gender presentation. Many people expect gay men to disclose their sexual identity through telltale signs of effeminacy, either subtle or overt. After all, is it too much to expect a limp wrist, pursed lips, a lisp, or sway in his walk? The DL man (and many out MSM) disobeys social norms by eschewing these traits and displaying a masculine gender presentation. Similarly, he does not partake in other aspects of gay culture that might make him identifiable: displaying a "gym body" (which is not necessary to attract most women); wearing trendy, formfitting clothes (which are of course designed to reveal the gym body); and using expensive grooming products. Further frustrating efforts to identify him, the DL man expresses attraction toward women, thus eliding another telltale sign of a gay man—lack of or feigned sexual interest in women. Therefore, the DL man transgresses social norms in performing masculinity persuasively and failing to affiliate with gay culture. In so doing, he upsets the expectation that gay men should be identifiable, which makes it easy for society to relegate them to the margins. Moreover, in disregarding the rules of sexual identity, the DL man reminds not just women but also men that any man might enjoy sex with men if it were detached from the stigmatized social identity that normally comes with it.

Blurring the Perpetrator-Victim Divide

Even as DL discourse sets up a divide between black female victims and black MSM perpetrators, it grants only certain women access to the role of victim. Several categories of women are either expunged or shrouded because they would complicate the divide and present more complex and realistic images of black women. These marginalized women include those who knowingly sleep with an MSM, including bisexual women who might prefer or be comfortable with a bisexual man, and women who choose to

stay with an MSM even after learning about his interest in men. The Centers for Disease Control and Prevention (CDC) found that 12 percent of young men who disclose their sexual orientation (i.e., out gay or bisexual men) reported having one or more female sex partners within the last six months. Moreover, half of these men acknowledged having unprotected vaginal or anal sex with at least one female partner in the last six months. Another study found that one-third of the men who self-identified as DL reported that their main partners were females who knew they had sex with male partners. These findings counter several deeply entrenched assumptions in DL discourse: (1) out men do not sleep with women, (2) women would not sleep with a man if they knew he had sex with men, and (3) if a woman would sleep with such a man, she would certainly demand that he use a condom because of the risk of HIV.

A central problem with DL discourse is its tendency to assume that all or most male-female sex occurs in the course of committed relationships. The implicit and misplaced assumption is that every black woman—or every black woman who matters—is in a relationship that she views as committed and monogamous. One study of self-identified DL men, however, found that "few DL-identified MSM in this study currently had a female main partner—most female partners reported by these men were nonprimary partners."[4] The various forms of male-female relationships that fall outside marriage or committed partners, whether called "hooking up," "friends with benefits," or "maintenance sex," are not even mentioned in most DL discourse. The failure to acknowledge women in such situations, especially in black-controlled media, seems to arise from their failure to conform to a traditional, "respectable" image of female sexuality. The focus on black female victimhood may forestall important conversations on how society can support female agency in sexual relationships and empower women to reduce their exposure to HIV.

Rarely does it seem to occur to writers of DL discourse that a woman could transmit HIV to her male partner. The woman is typically assumed to be monogamous and her MSM partner to be promiscuous.

Moreover, people sometimes have sex without asking questions about their partner's sexual history or other potential contemporaneous partners. Thus, in addition to women who know about a man's entanglement with men, others do not know because they do not ask. If they are simply hooking up for a night or two, women may choose not to ask about a man's sexual history. Even if she did ask, such a woman might reason, she cannot expect full candor from someone she just met or knows only casually. Women can take as lovers men who behave bisexually, even without male deceit.

Another type of woman who receives little attention in most DL discourse is the one who chooses to stay with her husband after she learns of his relationships with men. The *New York Times* revealed such women in a story that focused on white couples and did not mention the DL.[5] The article identified "Brokeback marriages," named after the acclaimed, groundbreaking movie *Brokeback Mountain*, which depicted two men who fell in love and maintained a clandestine sexual relationship while they were married to women. According to the founder of a group that counsels people with queer spouses, one-third of the wives who contact the network stay with their husbands. And half of those marriages last for at least three years. One woman formally divorced her husband yet later reconciled with him and permitted him to continue having sex with men. Another decided to keep her marriage intact but began having extramarital relations herself.[6]

In sharp contrast to the framing of most DL stories, the Brokeback marriages article assiduously avoids placing the blame on the men in such marriages and instead reveals the complex motivations animating the decision making of the husbands and wives. Although the conduct of the men in Brokeback marriages is indistinguishable from that of DL men, the *New York Times* treats white men on the DL with a compassion and generosity rarely seen in a DL story. One social scientist even suggests that the women who marry gay men bear some responsibility for the marriages: "'Straight people rarely marry gay people accidentally,' he wrote. . . . Some women find gay men less judgmental and more flexible, while others unconsciously seek partnerships that are not sexually passionate."[7]

Black Men Can Be Victims Too

Bisexuality Is Not an Intelligible Option

The dominant explanation of the down low is that it reveals that many black gay men remain closeted because of the extreme homophobia of the black community. The perceived prevalence of such men encourages black women to root out men who are thought to be posing as straight but are actually gay. Although homophobia certainly is a factor, the central flaw in this account is that it denies the existence of genuine bisexuality, even though many men (black and otherwise) attest to experiencing significant sexual attraction to both sexes. A recent study indicated that over one million men identify as bisexual, almost as many as identify as gay. Studies suggest that black men and other men of color are more likely than white men to report having had sex with both men and women. However, many heterosexual- and homosexual-identified people believe that men are either gay or straight—there is no room for something in between. A prominent *New York Times* article advanced this belief and attempted to ground it in science. The article reported a 2005 study that attempted to measure sexual arousal patterns in self-identified bisexual men by attaching a gauge to each man's penis to measure its circumference and then showing each man clips of adult films. All men were required to watch several two-minute sexual clips sandwiched between two neutral, relaxing clips. Two sexual clips depicted two men having sex with each other; two others depicted two women having sex.

Genuine bisexuality in men matters because it suggests that some of the men who lead DL lives are not closeted gay men but rather men whose desires and behavior do not fit the prevalent simplistic conceptions of sexuality. Some DL men may not be gay or straight; they might be "something else." The sexual binary pressures such men to hide their interest in men because their wives or girlfriends are likely to read it as a disclosure of gay identity. In short, to the extent that DL men are genuinely bisexual or have a sexuality that does not fit any well-worn label, their failure to disclose their sexuality to women may not be driven by a gratuitous desire to deceive or harm their female partners but by the reality that their sexual desire, as they conceive and experience it, is unintelligible in contemporary U.S. culture. Moreover, a black man who does not fit the heterosexual-homosexual binary is likely influenced by the knowledge that disclosing his sexuality will invite another form of discrimination, in addition to the race-based kind, and that it may be more stigmatizing than simply coming out as gay, which at least is often understood as a legitimate if disfavored identity.

The Down Low Harms Out Black Men

The gender binary reflected in DL discourse, which frames women as presumptive victims and men as presumptive perpetrators, obscures that DL harms men, including DL men and out black men. Although the media imply that openly gay black men represent what DL men are supposed to be, out black men warrant remarkably little notice in most stories. As I have written elsewhere, members of minority groups face identity-based pressures from members of their own groups as well as pressures from mainstream expectations. Some DL-identified men appear to be among the most strident proponents of identity policing among black MSM. It is not uncommon for men who describe themselves as DL also to describe themselves as masculine in their online profiles. Further, some DL-identified men emphasize that they will not associate with out men or with those they deem effeminate. In fact, some men appear to conflate the two: to be out is to be effeminate. The assumption may be that only those men who could not perform masculinity would be out. Some ads frame inner-city experience and a thug persona as requirements for authentic blackness, although few expect this to manifest itself in actual criminal or violent behavior. Such norms are not exclusive to DL-identified men and are also apparent in ads posted by white men in search of stereotypical black men.

Some might wonder why an out black man would seek out DL or DL-identified men in the first place. Why aren't out black men and DL men in completely different romantic marketplaces? The issue boils down to racial segregation and the numbers game. De facto racial segregation is prevalent in the United States and wields a strong influence on conceptions of race and romantic possibilities. Most people partner with someone of the same race for a variety of reasons, some legitimate, many not. The impact of same-race partnering, however, does not fall equally. A heterosexual white person who lives in a mostly white community and wants to date only white people faces few restrictions. If, say, 80 percent of the community is white, almost half of that number (either the male or female half) is available for partnering. Even if 10 percent of the whites are gay, lesbian, or bisexual (a generous assumption), the white heterosexual still has ample opportunity for same-race partnering. The black heterosexual, by contrast, is limited to half the black population, which is 20 percent of the community in this stylized example. Black heterosexual women face a further disadvantage—and black heterosexual men, a relative advantage—because of the sex ratio imbalance in black populations in the United States. Because of the mass incarceration of black men (see Chapters 27 and 53), the number of eligible black women significantly outstrips that of eligible black male partners.

The romantic market for the black MSM is even more sharply circumscribed. He is subject to the same diminution of the black male population that haunts black women. Yet he also is limited to the fraction of black men who engage in sex with men. If he is out and prefers to date only other out black men, his market is further reduced because black men appear less likely than white men to be out. He may choose to deal with DL or DL-identified men, yet if he is seeking a long-term committed relationship, this may very well be an exercise in frustration, as such a man may resist attachments that would out him, such as sharing a home with a male partner and meeting his partner's family. Moreover, gay male spaces are often racially segregated. In many black communities, out men, DL-identified men, and DL men intermingle in bars, clubs, and Internet sites. Although white-dominated spaces may seem to offer an alternative, a black man is likely

to feel he is a token and be either shunned or fetishized, depending on how he performs blackness. If he plays up his racial identity by performing the stereotype of an aggressive black "top," white men may relegate him to a momentary fetish. If he defies the racial expectation—by being an effeminate "bottom," for example—he is likely to draw little interest from white men.

The romantic possibilities of an out black man are thus limited by structural constraints that do not similarly restrict white gay men. Moreover, men in lower socioeconomic classes are more likely to have to depend on heterosexual, and likely homophobic, relatives and friends for material support. For instance, such men may have to share living quarters with several family members or take on roommates, which may leave them no space for cultivating a same-sex relationship. While the black professional is more likely to have the capacity to cut ties with his racial community and move to a gay enclave, many such men feel a strong pull toward their families and the broader black community. Because his success makes him atypical among black men, the black professional is likely to find a large socioeconomic gap separating him from potential black male romantic partners. Race, in turn, isolates him from white men whom he might otherwise view as compatible on the basis of socioeconomic status. In sum, race, socioeconomic status, and gendered sex role norms (i.e., pressure to identify as a "top") work in tandem to shrink the romantic options of black MSM.

Governmental Policies Reduce the Number of Eligible Black Male Romantic Partners

Governmental policies that rely heavily on incarcerating young black men for drug crimes and do little to combat violence and poor public health in the black community produce a strikingly low male-female ratio in black communities. These policies include a war on drugs that punishes drugs used by blacks much more severely than those used by whites. Federal laws that disproportionately punish crack offenses as compared to cocaine offenses have locked up many low-level black male crack offenders through mandatory minimum sentences. The Supreme Court never finished the work begun by *Brown v. Board of Education* and has turned a blind eye to pervasive de facto racial segregation in schools. This national lack of commitment to education has produced a pipeline through which black boys drop out of school, become caught up in criminal activity, and find that their status as ex-cons makes legitimate employment inaccessible.

This legal backdrop has helped produce a world in which "[a]lmost one-third of black men between the ages of 20 and 29 years are in jail, in prison, on probation, or on parole."[8] The mass incarceration of black young men physically removes them from the romantic marketplace in black communities. The impact of this removal may be felt sharply by black women in their twenties and thirties, a period in which most other women marry: "According to the 2000 Census, 47 percent of black women in the 30-to-34 age range have never married, compared with 10 percent of white women."[9]

The imbalanced sex ratio distorts romantic relationships and sexual networks in black communities. Not only does it produce a larger percentage of African American women who have never married than women of other races; the "shortage of men places women at a disadvantage in negotiating and maintaining mutually monogamous

relationships, because men can easily find another relationship if they perceive their primary relationship to be problematic."[10] The smaller pool of eligible black men increases the market power of a black man, especially those who earn a good income and are not incarcerated. According to one study, 34 percent of black men ages fifteen to forty-four reported having fifteen or more sex partners in their lifetime, compared to 22 percent of white men and 18 percent of Latinos. "[M]en who maintain multiple simultaneous partnerships may be confident that their primary partner will not end the relationship, because primary relationships are relatively difficult for women to attain."[11]

Romantic Segregation Limits Romantic Possibilities for Black Women and Black MSM

An underlying assumption in much DL discourse holds that black men are the only potential partners for black women. White, Latino, and Asian men are rarely mentioned as potential partners or part of the problem. This tendency to assume that only black men will mate with black women manifests what I call "romantic segregation" and contributes to the plight of black women. If black women have fewer opportunities to partner with black men because of the governmental policies described above, one might expect them to partner with white men and other men of color. As media stories have (over)emphasized, an elite segment of single professional black women is increasingly educated and financially prosperous. Yet few signs suggest that white and other nonblack men are rushing in to partner with these eligible black women.

A primary explanation for this failure is an aesthetic hierarchy infected with racial stereotypes that position white women at the top, Asian American women and Latinas in the middle, and black women at the bottom. The hierarchy reflects a preference for certain race-related physical features, such as lighter skin tones and straight hair, but also stereotypes that depict black women as bossy, difficult, and sexually promiscuous. The distortion of black women's sexuality seems critical in elevating white women as the aesthetic ideal. A study of interracial dating preferences by M. Belinda Tucker and Claudia Mitchell-Kernan included a telephone survey of 1,116 adult residents in Southern California.[12] The survey asked respondents if there were racial/ethnic groups they would not marry and if so, to list which groups. White men were more likely to exclude black women than any other race, and their opposition to a black wife (72.5 percent) far exceeded that of white women to a black husband (44.7 percent). By contrast, black women most frequently excluded Asian men (51.7 percent), rather than white men. The interracial marriage rates reflect the hierarchy.

The Miss America beauty pageant, which began in 1921, once barred black women from competing; a black woman did not compete until 1970, three years after *Loving v. Virginia*.[13] While blacks make up about 13 percent of the population, roughly 7 percent of the Miss America and Miss USA winners have been black. Of forty-nine Playmates of the Year in *Playboy* magazine, just one was black. In film, where female roles often revolve around their sexuality, black women struggle to be cast in lead roles and as love interests; black women are typically relegated to bit parts as prostitutes, asexual mother figures, or neck-rolling mammies. These media depictions form part of the backdrop for interactions (or the absence of interactions) between black women and nonblack men.

Film and television images of gay men reflect a similar pattern of marginalization and distortion. The few black lesbian, gay, bisexual, and transgender (LGBT) images tend to be minor or recurring roles or are relegated to independent channels of distribution that reach a tiny audience, such as the 2008 movie and 2006 TV series *Noah's Arc*. Specifically, images of black MSM tend to fall into three problematic categories: (1) aggressive, threatening angry black men; (2) flamboyant queens; and (3) black men in relationships with white men, which seems to imply that black MSM are of interest only when they are paired with a white man.

Further evidence of the status of black MSM comes from an empirical study of racial preferences on an MSM website used for sex and dating. My research assistant and I posted profiles and torso photographs of the same racially ambiguous model but changed the race and sex position ("top" or "bottom") each time we posted. We then counted the numbers of e-mails received by each profile. This study revealed that the black and Asian profiles received significantly fewer e-mails than the white and Latino profiles. Moreover, the interest in black men correlated with the stereotype of black sexual aggression and masculinity. The black bottom profiles received, by far, the fewest number of e-mails in the entire study. Thus, certain black MSM, like black heterosexual women, struggle to attract partners. The experience of black women may also provide a cautionary tale for black MSM who think that obtaining marriage rights will necessarily translate into opportunities to be married.

The Branding of HIV as a Gay White Disease Disserved Black MSM and Black Women

A final connection between black MSM and black women returns to the HIV/AIDS setting and, like the impact of mass incarceration, reveals the role of government. As noted earlier, the media typically cite rising HIV rates among black women as the justification for exploring the DL. This provides an opportunity to think about how the government has responded to HIV in the black community.

Cathy Cohen has demonstrated how early government and media descriptions of HIV/AIDS effectively branded it as a gay white male problem, thus leading black MSM and women to discount its threat to them. In explaining HIV/AIDS to the public, the media relied heavily on information from the federal government, primarily the CDC. The dominant media narrative was that the "first wave" of HIV/AIDS primarily affected gay men, and especially white gay men, and years later, the "second . . . wave" expanded the reach of the epidemic to intravenous drug users and women of color.[14] We now know that this story was flawed.

Although the media rarely mentioned race explicitly, its representations of AIDS victims concentrated unduly on white, privileged, openly gay men—the group with the strongest connections to the media. Black MSM, by and large, "did not merit the attention of the *[New York] Times*'s reporters and editors." Once the media became aware of the rising number of AIDS cases in black communities, it tended to "pit[] white gay men and their demands against the increasing numbers of blacks and Latinos living with AIDS," as if one could not be black and gay. Some media reports, following the CDC's lead, suggested that HIV/AIDS stemmed from engaging in a "gay lifestyle."

An analysis of leading media sources, including the *New York Times*, bears this out. Just 5 percent of the *Times* stories about AIDS from 1981 to 1993 focused on African Americans, and 62 percent of those fixated on black celebrities—namely, Earvin "Magic" Johnson and Arthur Ashe—rather than the everyday African Americans at high risk. Yet blacks made up "32 percent of all AIDS cases" from the beginning of the epidemic until 1993. "The majority of women diagnosed with AIDS are Black." And among MSM, black and brown men constitute an increasingly disproportionate share of HIV and AIDS cases. Hence, the media's framing marginalized non-gay-identified black MSM and black women.

Moreover, the distinction between gay men as the primary victims and intravenous drug users as secondary is questionable because it appears that medical authorities substantially undercounted the number of drug users who died of AIDS. This failure arose from structural differences in access to health care. White and relatively wealthy gay men were much more likely to regularly see a private doctor, and their doctors were more likely to report potential cases of HIV/AIDS to the CDC. By contrast, drug users were likely to rarely visit a doctor and rarely see the same one.

The Failure of HIV Transmission Laws

Because society continues to view HIV primarily as a problem of gay men and intravenous drug users, non-gay-identified MSM and their female partners may not see themselves as at risk. Although public health scholars have to some extent moved away from a focus on gay identity and adopted more inclusive terms such as "MSM," HIV prevention and testing efforts remain highly concentrated in gay communities. Under current law, this underinclusive approach to HIV testing is paired with HIV-specific criminal laws. Criminal laws in many states impose strong penalties on people who know they are HIV positive and fail to disclose their status to a sexual partner. But these laws have done little to stem HIV transmission, partly because they fail to engage the complex dynamics of many sexual relationships and reflect a simplistic perpetrator-victim dichotomy like that fostered by DL discourse. I thus propose a legally mandated expansion of HIV testing, beyond so-called risk groups, that would reach some of the people who inadvertently transmit HIV, which appears to be a bigger problem than knowing transmission. Rather than focusing on individual bad actors, I recommend a legal focus on public health interventions, which may alter the conditions in which people negotiate the risks of sexual intimacy.

Studies of the sexual practices of MSM reveal the complexity of sexual scenarios that may result in HIV transmission and assist in explaining the disconnect between legal prohibitions and actual sex practices. Based on their belief that gay men are the primary group at risk of HIV, scholars have concentrated on uncovering sexual norms and negotiation practices among MSM. Data about condom usage between black women and black male partners, particularly black MSM, appear to be limited. The investigation of sexual norms among MSM is valuable in its own right. This is so because HIV-transmission statutes apply to a man infected by a man, as well as a woman infected by a man. Understanding the complexity of norms regarding safe sex should help us understand why few HIV-positive men have been prosecuted for infecting a male partner.

Consider some hypothetical sexual scenarios in which arguably both partners have some responsibility for discussing HIV and safe sex. These scenarios are intended to counter the assumption of HIV transmission laws that there is always an obvious perpetrator and victim. Assume in each of the following scenarios that, of the two people having sex, the first person is HIV negative and the second HIV positive.

- Linda goes to a swingers club with a boyfriend in Chicago late on Friday night. She attended this club before with an ex-boyfriend. She knows that many of the men in attendance are bisexual. On Friday, she meets an attractive man by the bar. They do several lines of cocaine and have unprotected sex. No one brings up HIV or using a condom.
- After a lonely weekend in San Francisco, Todd logs on to a website for men who enjoy "bareback," or unprotected, sex with other men. Although he formerly canceled his website membership, on this Sunday, he quickly connects with a man who lives five blocks away. The man tells him to unlock his door and get ready for casual sex. Todd reluctantly complies; some minutes later, the man enters the house and immediately has bareback sex with Todd.
- Anita plans a dinner at her home in Los Angeles for her boyfriend, Julio, who is being released from prison after serving ten years in the state penitentiary for selling drugs. Her brother, also an ex-con, has told her how during his time in the state penitentiary he felt pressure to join a prison gang and rape men or else become a target of rape himself. After a romantic dinner, Julio and Anita have sex. When Anita suggests that they use a condom, Julio refuses because, he says, he wants to feel close to Anita after being away so long. Anita goes along with this.
- Matt is surprised to see Richard, a very sexy man, cruising him at a supermarket in Seattle. The two strike up a conversation and exchange numbers. Later that night, they go to dinner and have an enjoyable conversation. Richard invites Matt back to his place. After making out on the couch, Matt asks to use the bathroom to freshen up before sex. Richard recalls that he left his HIV-related medications on the sink in the bathroom. Matt returns, and they have unprotected sex without discussing HIV. Although Matt typically insists on using condoms, he does not tonight because he doesn't want to possibly upset Richard, whom he sees as out of his league, and interrupt the romantic encounter.
- Shante is out with her girlfriends at a bar in Detroit when Derrick, a tall, handsome man, approaches her. She is taken with his deep voice, enchanting eyes, and smooth talk. They flirt for a few hours, and at the end of the night the man asks to take her home. Monique, one of Shante's girlfriends, warns her that "Derrick's face looks a little funny." Monique says that his face looks gaunt, with pronounced cheekbones, not unlike the facial wasting experienced by a gay man with AIDS who works at her beauty salon. Shante, who has had several drinks, tells Monique she's being ridiculous. "A man that strapping and masculine could not have AIDS," she insists. Shante and Derrick retire to her house, where they have sex without a condom. Since she is on birth control, Shante is not concerned.

These scenarios represent ways an HIV-negative person might become infected through sex with a positive person. One cannot say how often these or similar situations actually occur. But they do help us imagine how a person might become infected with HIV without a clear perpetrator and victim. In each case, a person knew or should have known of a heightened risk of HIV and yet chose to have unprotected sex for reasons that range from emotional attachment to lack of confidence in dating a more attractive partner to misconceptions about masculinity.

Sexual partners often do not discuss HIV, and under some circumstances, the positive and negative partners might act under contradictory assumptions. Relationship status matters. The degree of intimacy in a relationship appears to determine whether a positive partner discloses his HIV status, but intimacy also increases the likelihood of unsafe sex. Positive men are most likely to disclose their status when in a relationship, while they tend to feel a lesser obligation to disclose it to casual sexual partners. By the same token, context matters. Positive men may assume that sex partners in certain casual sex markets are themselves positive or expect not to have a discussion about HIV before sex.

I raise these scenarios not to suggest that the HIV-positive partner has done nothing wrong in failing to disclose his HIV status but to argue that the other partner might share some responsibility. This discussion also illuminates reasons why the other partner might not press charges even if she learned of the illegal failure to disclose. Such a person might accept some responsibility for failing to insist on using a condom in light of the scenario indicating heightened risk. Especially when the person does not become infected as a result of unprotected sex (which is entirely probable after a one-time exposure), she is likely not to turn to the criminal law and submit to the invasion of privacy required to bring a case against her HIV-positive sex partner.

A Structural Approach to HIV Risk

Do these complexities and the minimal impact of existing criminal laws mean the law is powerless to halt the spread of HIV? No. Although the analysis above does cast doubt on the viability of criminal regulation, focusing on structural conditions that engender HIV infection offers a better alternative. A critical limitation of most HIV-transmission statutes is that they require the defendant to know he is HIV positive, and many people who are positive simply do not know. Moreover, HIV-positive people who are unaware account for a disproportionate share of transmission to negative partners—at least half and as much as two-thirds. This is because people who learn they are positive generally change their sexual behavior and may gain access to highly active antiretroviral therapy, which can reduce their viral load to low or undetectable levels. Specifically, HIV-positive men who have sex with men and women (MSMW) were more likely to have disclosed their same-sex behavior to their female partners and much less likely to have engaged in unprotected sex with female and male partners than HIV-negative MSMW and MSMW who did not know their HIV status. But blacks, including black women and non-gay-identified MSM, are less likely to know they are positive and less likely to be on antiviral medication. A multicity survey of over nine hundred black MSM found that 93 percent of those who tested positive did not know their status before the test. The branding of HIV as a problem for gay men who live a lifestyle more common among whites misled

black people about their risk. As a result, blacks may not sufficiently recognize their risk, obtain testing, and receive treatment.

The law must think beyond the established risk groups to reach those who have been left out while still channeling resources to the groups hardest hit by HIV. The CDC has recommended that health care providers institute routine HIV testing for all people ages thirteen to sixty-four. Routine testing is superior to offering testing only to members of established risk groups, because the latter "fails to identify a substantial number of persons who are HIV infected." Studies suggest that a "substantial number of persons, including persons with HIV infection, do not perceive themselves to be at risk for HIV or do not disclose their risks." Further, "[r]outine HIV testing reduces the stigma associated with testing that requires assessment of risk behaviors. More patients accept recommended HIV testing when it is offered routinely to everyone, without a risk assessment." One survey found that 31 percent of respondents said "they would be concerned that people would think less of them if they found out they had been tested." Making HIV testing a standard aspect of health care for everyone can change norms and reduce stigma.

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1. Richard J. Wolitski et al., *Self-Identification as "Down Low" Among Men Who Have Sex with Men (MSM) from 12 US Cities*, 10 AIDS & Behav. 519 (2006).

2. Taigi Smith, *Deadly Deception*, Essence, Aug. 2004, at 148.

3. Kevin Chappell, *The Truth About Bisexuality in Black America*, Ebony, Aug. 2002, at 158.

4. Wolistki et al., *supra* note 1, at 526; see also J. P. Montgomery et al., *The Extent of Bisexual Behavior in HIV-Infected Men and Implications for Transmission to Their Female Sex Partners*, 15 AIDS Care 829, 834 (2003).

5. Katy Butler, *Many Couples Must Negotiate Terms of 'Brokeback' Marriages*, N.Y. Times, Mar. 7, 2006, at F5.

6. *Id.*

7. *Id.*

8. Adaora A. Adimora & Victor J. Schoenbach, *Social Context, Sexual Networks, and Racial Disparities in Rates of Sexually Transmitted Infections*, 191 J. Infectious Diseases S115, S119 (2005).

9. Ellis Cose & Allison Samuels, *The Black Gender Gap*, Newsweek, Mar. 3, 2003, at 46.

10. Adimora & Schoenbach, *supra* note 8, at S118.

11. *Id.*

12. M. Belinda Tucker & Claudia Mitchell-Kernan, *Social Structural and Psychological Correlates of Interethnic Dating*, 12 J. Soc. & Pers. Relationships 341, 348 (1995).

13. 388 U.S. 1 (1967).

14. Cathy J. Cohen, The Boundaries of Blackness: AIDS and the Breakdown of Black Politics 125 (1999).

From the Editors

Issues and Comments

Human traits often mix in one individual, as described in Elvia Arriola's article. Might the solution, then, to the problem of discrimination be the creation of a flat discrimination offense when someone, without good cause, treats another harshly on the basis of trait X, regardless of what that trait may be? Will this lead to a rash of cases, such as discrimination based on hair that is too short or too long? If we limit relief to discrimination based on suspect traits, or combinations of them, does this solve the problem?

Given, as Darren Hutchinson shows, that GLBT individuals are desperately in need of new rights, can they await the slow process of public consensus building that he considers a precondition for favorable court rulings? Should not judges lead society instead of the other way around?

Everyone party to casual sex should, of course, use a condom. Failure to do so is to lack consideration for one's partner (to put it mildly), especially if one thinks one may be harboring a sexually transmitted disease. But a man who is in a committed relationship with a woman and nevertheless surreptitiously sleeps around with men seems to be doing something worse than simple carelessness. So does Russell Robinson's solution of routine testing for everyone miss something important, morally speaking?

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PART X

BEYOND THE BLACK-WHITE BINARY

JUST AS GAY and lesbian scholars have been calling attention to the way heterosexist assumptions erase their perspectives, needs, and contributions from the civil rights agenda, Latino and Asian scholars have been challenging the way conventional antiracism law sees everything in black and white.

Does our political and legal system really incorporate a black-white binary paradigm, in which the primary histories, struggles, cases, and strategies are those of African Americans? Is the essential, paradigmatic, civil rights story that of African Americans? If so, what does this do to the chances of Asians, Latinos, Indians, and other nonwhite groups to obtain redress? Must they liken themselves to blacks, even though their situation may be radically different from that of the baseline group?

If nonblack groups can win the attention of the civil rights community only by presenting themselves as protoblacks, what happens to issues such as immigration, accent or national-origin discrimination, English-only rules, and bilingual education—problems that Asians and Latinos do not share with most blacks? Many authorities today subscribe to the notion of differential racialization, which argues that society racializes different groups in different ways at different times. These writers hold that studying society's treatment of various groups deepens one's understanding of the texture of race, offers a vital comparative element, and allows coalitions among different communities of color that are based on a more resonant perception of similarities and crosscutting differences than one that proceeds without it.

Most of the selections in Part X push for an understanding of race and racism that goes beyond a simple black-white binary paradigm. Juan Perea states the earliest and still strongest case for doing so. Robert Chang shows how society minimizes the problems of Asian Americans, sometimes by referring to them as a model minority.

Ian Haney López puts forward the case for viewing the experience of Latinos in racial terms, while George Martinez shows the folly of pretending

that it has been otherwise. Muneer Ahmad considers violence against Middle Eastern people and Muslims. Roy Brooks and Kirsten Widner defend the traditional black-white binary by means of an examination of black history, practice, and current reality.

Kenneth Prewitt considers the changing categories that the U.S. census has used to classify Americans over the years and shows how shifting political tides, not some biological or external reality, dictated the system of categories at any given time. For further discussion of these issues, see Part XI, on cultural nationalism and separation.

45. The Black-White Binary Paradigm of Race

JUAN F. PEREA

> American society has no social technique for handling partly colored races. We have a place for the Negro and a place for the white man: The Mexican is not a Negro, and the white man refuses him an equal status.
>
> **—Max Handman, quoted in David Montejano, *Anglos and Mexicans in the Making of Texas, 1836–1986*[1]**

Consider how we are taught to think about race. I believe that most such thinking is structured by a paradigm that is widely held but rarely recognized for what it is and does. It is crucial, therefore, to identify and describe this paradigm and to demonstrate how it binds and organizes racial discourse, limiting both the scope and the range of legitimate viewpoints in that discourse.

Thomas Kuhn, in *The Structure of Scientific Revolutions*,[2] describes the properties of paradigms and their power in structuring scientific research and knowledge. While Kuhn writes in connection with scientific knowledge, many of his insights are useful in understanding paradigms and their effects more generally. A paradigm is a shared set of understandings or premises that permits the definition, elaboration, and solution of a set of problems defined within the paradigm. An accepted model or pattern, it resembles "an accepted judicial decision in the common law . . . [that] is an object for further articulation and specification under new or more stringent conditions."[3]

Thus, a paradigm is the set of shared understandings that permits us to distinguish which facts matter in the solution of a problem and which don't. As Kuhn writes:

> In the absence of a paradigm or some candidate for paradigm, all of the facts that could possibly pertain to the development of a given science are likely to seem equally relevant. As a result, early fact-gathering is a far more nearly random activity than the one that subsequent scientific development makes familiar.[4]

Paradigms thus define relevancy. In so doing, they control fact gathering and investigation. Data-gathering efforts and research are focused on understanding the facts and circumstances that the relevant paradigm has taught us are important. Paradigms are crucial in the development of science and knowledge because, by setting boundaries within which problems can be understood, they permit detailed inquiry into these

A version of this chapter previously appeared as Juan F. Perea, *The Black/White Binary Paradigm of Race*, 85 Cal. L. Rev. 1213 (1997), 10 La Raza L.J. 127 (1998). Originally published in the *California Law Review* and the *La Raza Law Journal*.

problems. In Kuhn's words, a "paradigm forces scientists to investigate some part of nature in a detail and depth that would otherwise be unimaginable."[5] Indeed, it is this depth of research that eventually yields anomalies and discontinuities and, ultimately, the necessity to develop new paradigms. However, as a paradigm becomes the widely accepted way of thinking and of producing knowledge on a subject, it tends to exclude or ignore alternative facts or theories that do not fit the scientist's expectations.

Kuhn uses the term "normal science" to describe the elaboration and further articulation of the paradigm and the solution of problems that are perceivable because of the paradigm. Scientists and researchers spend almost all their time engaged in normal science, conducting their research under the rules prescribed by the paradigm and attempting to solve problems cognizable and derivable within its structure. However, normal science "often suppresses fundamental novelties because they are necessarily subversive of its basic commitments."[6] As Kuhn puts it, normal science "seems an attempt to force nature into the performed and relatively inflexible box that the paradigm supplies. No part of the aim of normal science is to call forth new sorts of phenomena; indeed those that will not fit the box are often not seen at all."[7] As research progresses in depth and detail within a paradigm, unexpected discoveries come to light, yielding anomalies not adequately explained by the current paradigm. In time, and in the face of problems not adequately explained by the paradigm, scientists are forced to replace it with some new understanding that explains better the observed anomalies.

Literature and textbooks play an important role in producing and reproducing paradigms. Kuhn identifies textbooks and popularizations, conveying scientific knowledge in a language accessible to the general public, as authoritative sources of established paradigms. Although Kuhn suggests that science is more vulnerable to textbook distortions of history than other disciplines because of the assumed objectivity of scientific inquiry,[8] I believe his insights regarding paradigms, normal science, and textbooks are extremely useful in explaining the persistent focus of race scholarship on blacks and whites and the resulting omission of Latinos/as, Asian Americans, Native Americans, and other racialized groups from such scholarship. If science as a discipline is more vulnerable to textbook distortions of history, I believe this is only a matter of degree because law, through its reliance on precedent, is also highly dependent on paradigms. Kuhn recognizes as much when he uses judicial precedent as an example of paradigm elaboration.[9] Although Kuhn believes that the extent to which the social sciences have developed paradigms is an open question,[10] race scholarship both inside and outside law is dominated by a binary paradigm of race.

The Binary Paradigm of Race

Paradigms of race shape our understanding and definition of racial problems. The most pervasive and powerful paradigm of race in the United States is the black-white binary. I define this paradigm as the conception that race in America consists, either exclusively or primarily, of only two constituent racial groups, the black and the white. Many scholars of race reproduce this paradigm when they write and act as though only the black and the white races matter for purposes of discussing race and social policy. The current fashion of mentioning "other people of color" without careful attention to their voices, histories, and presence is merely a reassertion of the black-white paradigm. If

one conceives of race as primarily of concern only to blacks and whites and understands other people of color only through some unclear analogy to the "real" races, this just restates the binary paradigm with a slight concession to demographics.

In addition, the paradigm dictates that all other racial identities and groups in the United States are best understood through the black-white binary paradigm. Only a few writers even recognize that they use a black-white paradigm as the frame of reference through which to understand all racial relations. Most simply assume the importance and correctness of the paradigm and leave the reader grasping for whatever significance descriptions of the black-white relationship have for other people of color. Because the black-white binary paradigm is so widely accepted, other racialized groups like Latinos/as, Asian Americans, and Native Americans are often marginalized or ignored altogether. As Kuhn writes, "[T]hose that will not fit the box are often not seen at all."[11]

Andrew Hacker and Two Nations

Andrew Hacker's otherwise excellent book *Two Nations: Black and White, Separate, Hostile, Unequal* provides a stark example.[12] Its title, proclaiming two nations, black and white, boldly professes the black-white binary paradigm. Although Hacker recognizes explicitly that a full perspective on race in America requires inclusion of Latinos/as and Asians, this recognition is, in the context of the entire book, insignificant and underdeveloped. His almost exclusive focus on blacks and whites is clearly intentional: "*Two Nations* will adhere to its title by giving central attention to black and white Americans."[13]

Hacker's justification is that "[i]n many respects, other groups find themselves sitting as spectators, while the two prominent players try to work out how or whether they can co-exist with one another."[14] This justifies marginalization with marginalization. What Hacker and so many other writers on race fail, or decline, to understand is that, by focusing only on blacks and whites, they both produce and replicate the belief that only "two prominent players," black and white, count in debates about race. Other nonwhite groups, rendered invisible by these writers, can thus be characterized as passive, voluntary spectators.

Hacker describes in detail only conditions experienced by white or black Americans. He first characterizes the white nature of the nation and its culture:

> America is inherently a "white" country: in character, in structure, in culture. Needless to say, black Americans create lives of their own. Yet, as a people, they face boundaries and constrictions set by the white majority. America's version of *apartheid*, while lacking overt legal sanction, comes closest to the system even now being reformed in the land of its invention.[15]

Of course, Latinos/as, Asian Americans, Native Americans, Gypsies, and all nonwhite Americans face "boundaries and constrictions set by the white majority," but the vision Hacker advances counts only blacks as significantly disadvantaged by white racism.

Similarly, Hacker describes blackness as uniquely functional for whites:

> As James Baldwin has pointed out, white people need the presence of black people as a reminder of what providence has spared them from becoming. . . . In the

> eyes of white Americans, being black encapsulates your identity. No other racial or national origin is seen as having so pervasive a personality or character.[16]

According to Hacker, then, blackness serves a crucial function in enabling whites to define themselves as privileged and superior, while racial attributes of other minorities do not serve this function.

Hacker's chapter titles largely tell the story of the binary paradigm. Chapter 2, "Race and Racism," discusses only white and black perceptions of each other. Chapter 3, "Being Black in America," is followed by "White Responses." Hacker's omission of nonblack minority groups in his discussion of specific topics similarly suggests these groups' experiences do not exist. Chapter 9, on segregated schooling, describes only the segregation of blacks, making no reference to the extensive history of segregation in education suffered by Latinos/as. Chapter 10, "What's Best for Black Children?," has no commensurate concern for other children. Similarly, chapter 11, on crime, discusses only perceptions of black criminality and their interpretation. In discussing police brutality, Hacker describes only white police brutality against blacks; one finds not a single word about the similar brutality suffered by Latinos/as, Native Americans, or Asian Americans at the hands of white police officers.

The greatest danger in Hacker's vision is the implication that nonwhite groups other than blacks are not really subject to racism. Hacker seems to adopt the deservedly criticized ethnicity theory, which posits that nonwhite immigrant ethnics are essentially whites-in-waiting who will be permitted to assimilate and become white. This is illustrated best in chapter 8, "On Education: Ethnicity and Achievement," which offers the book's only significant discussion of nonwhite groups other than blacks. Asians are described in model-minority terms, because of high standardized test scores (on a group basis). Latinos/as are portrayed both as below standard, because of low test scores, and as aspiring immigrants. Describing Asian Americans, Latinos/as, and other immigrant groups, Hacker writes:

> Members of all these "intermediate groups" have been allowed to put a visible distance between themselves and black Americans. Put most simply, none of the presumptions of inferiority associated with Africa and slavery are imposed on these other ethnicities.[17]

While a full rebuttal of this quotation must wait for another time, its inaccuracy can be quickly demonstrated. Consider, for instance, the observations of the historian David Weber, who described early Anglo perceptions of Mexican people:

> American visitors to the Mexican frontier were nearly unanimous in commenting on the dark skin of Mexican mestizos who, it was generally agreed, had inherited the worst qualities of Spaniards and Indians to produce a 'race' still more despicable than that of either parent.[18]

Rufus B. Sage expressed the common view of Mexicans in 1846:

> There are no people on the continent of America, whether civilized or uncivilized, with one or two exceptions, more miserable in condition or despicable in morals

> than the mongrel race inhabiting New Mexico. . . . To manage them successfully, they must needs be held in continual restraint, and kept in their place by force, if necessary—else they will become haughty and insolent. As servants, they are excellent, when properly trained, but are worse than useless if left to themselves.[19]

More briefly, the common perception of Mexican Americans was that "they are an inferior race, that is all."[20]

Incredibly, and without any supporting evidence, Hacker writes that "[m]ost Central and South Americans can claim a strong European heritage, which eases their absorption into the 'white' middle class."[21] He continues, "While immigrants from Colombia and Cyprus may have to work their way up the social ladder, they are still allowed as valid a claim to being 'white' as persons of Puritan or Pilgrim stock."[22] Hacker's comments are simply beyond belief. While some Latinos/as may look white and may act Anglo (the phenomenon of passing for white is not limited to blacks), Hacker's statement is certainly false for millions of Latinos/as. Anti-immigrant initiatives targeted at Latinos/as and Asians, such as California's Proposition 187 and similar federal legislation targeting legal and illegal immigrants, California's Proposition 209, and the unprecedented proposal by a coalition of lawmakers to deny birthright citizenship to the U.S.-born children of undocumented persons debunk any notion that the presence of Latino/a or Asian people will be accepted or tolerated easily by the white majority.

Hacker seems determined to adhere to the binary paradigm of race and to ignore the complexity introduced by other nonwhite groups because it is convenient. In other words, "real" race is only black or white. Other groups render this framework incoherent. This is why the black-white paradigm of race must be expanded: It causes writers like Hacker to ignore other nonwhite Americans, which in turn encourages others to ignore us as well.

Cornel West and the Black-White Binary Paradigm

Cornel West is one of the nation's most well-known and well-regarded philosophers and commentators on race. While West writes with much more insight than Hacker, his book *Race Matters* is also limited by and reproduces the black-white binary paradigm of race.[23] A collection of essays West wrote on race and race relations, its principal subject is the relationship of blackness to whiteness and the exploration of avenues to alter the unsatisfactory state of that relationship. And while this focus is of course worthy of his attention, he overlooks and ignores relevant subject matter that lies outside the paradigm. West describes the binary nature of our public discourse about race:

> [W]e confine discussions about race in America to the "problems" black people pose for whites rather than consider what this way of viewing black people reveals about us as a nation. . . . Both [liberals and conservatives] fail to see that the presence and predicaments of black people are neither additions to nor defections from American life, but rather *constitutive elements of that life*.[24]

This statement is accurate, and I would fault West only for not recognizing that exactly the same statement is true of Latinos/as, Asians, and Native Americans: We are all

constitutive of American life and identity to a degree that has not been fully recognized and that is in fact actively resisted.

West's near-exclusive focus on blacks and whites, and thus his reproduction of the black-white binary paradigm, is apparent throughout the book. Chapter 2, "The Pitfalls of Racial Reasoning," presents a powerful critique of racial reasoning within the black community that immobilized black leaders, who were generally unable to criticize Clarence Thomas when he was appointed to the Supreme Court. West's binary conception of the nation emerges when he describes the "deep cultural conservatism in white and black America. In white America, cultural conservatism takes the form of a chronic racism, sexism, and homophobia. . . . In black America, cultural conservatism takes the form of an inchoate xenophobia (e.g., against whites, Jews, and Asians), systemic sexism, and homophobia."[25] As Hacker sees two nations, West sees binary Americas—one white, one black. In addition, West's reference to black xenophobia, directed at whites, Jews, and Asians, sets the stage for his later description of black distrust of Latinos/as.

West also describes the binary paradigm from a black point of view, referring to the "black bourgeois preoccupation with white peer approval and black nationalist obsession with white racism."[26] Blacks, in their way, are as preoccupied with whites as whites are with blacks.

In his chapter "Malcolm X and Black Rage," West describes Malcolm X's fear of cultural hybridity, the blurring of racial boundaries that occurs because of racial mixture. Malcolm X saw such hybridity, exemplified by mulattos, as a "symbol . . . of weakness and confusion."[27] West's commentary on Malcolm X's views gives us another statement of the binary paradigm: "The very idea of not 'fitting in' the U.S. discourse of positively valued whiteness and negatively debased blackness meant one was subject to exclusion and marginalization by whites and blacks."[28] Although the context of this quotation is about black-white mulattos, West's observation is crucial to an understanding of why Latinos/as, neither white nor black, are perpetually excluded and marginalized. The reified binary structure of discourse on race leaves no room for people of color who do not fit the rigid black and white boxes supplied by the paradigm. Furthermore most Latinos/as are mixed-race mestizos or mulattos, therefore embodying the kind of racial mixture that Malcolm X, and I, would argue society generally tends to reject. West's observation about mixed-race people who do not fit within traditional U.S. discourse about race applies in full measure to Latinos/as.

When West writes about the struggle for black civil rights in shaping the future of equality in America, he recognizes the need for blacks to repudiate anti-Semitism and other racisms to sustain the moral position garnered through the struggle for civil rights. However, he makes ambivalent comments about the possibilities for coalition with other groups:

> [A] prophetic framework encourages a coalition strategy that solicits genuine solidarity with those deeply committed to antiracist struggle. . . . [B]lack suspicions of whites, Latinos, Jews, and Asians run[] deep for historical reasons. Yet there are slight though significant antiracist traditions among whites, Asians, and especially Latinos, Jews, and indigenous people that must not be cast aside. Such coalitions are important precisely because they not only enhance the plight of black people but also because they enrich the quality of life in America.[29]

This paragraph warrants probing. Given America's history of racism, black suspicions of every group may seem well founded. For example, with respect to Latinos/as, during the nineteenth century as during the present, upper-class Mexicans' identification with Anglos meant becoming more racist and disparaging toward lower-class and darker-skinned Mexicans and blacks. However, West's characterization of Latino/a, Asian, and Native American resistance to Anglo domination and racism as "slight though significant"[30] seems belittling, ill-informed, and marginalizing of Latino/a, Asian, and indigenous people. This comment can be understood as the kind of "inchoate xenophobia" West himself finds in the black community.

Another possible reason for this distrust of Latinos/as may stem from a widespread sense that blacks are being displaced by immigrant Latinos/as. Toni Morrison writes specifically about this distrust. In her essay "On the Backs of Blacks," Morrison describes the hatred of blacks as the defining, final, necessary step in the Americanization of immigrants. "It is the act of racial contempt [in banishing a competing black shoe shiner] that transforms this charming Greek into an entitled white."[31] Morrison sees blacks as persistently victimized by Americanizing processes, always forced to "the lowest level of the racial hierarchy."[32] The struggles of immigrants, according to Morrison,

> are persistently framed as struggles between recent arrivals and blacks. In race talk the move into mainstream America always means buying into the notion of American blacks as the real aliens. Whatever the ethnicity or nationality of the immigrant, his nemesis is understood to be African American.[33]

Morrison is right that American "whiteness" is often achieved through distancing from blacks. Latinos/as participate in the paradigm by engaging in racism against blacks or darker-skinned members of Latino/a communities. Current events belie, however, Morrison's notion of American blacks as "the real aliens." Mexican and other Latino/a and Asian aliens have become targets of state and federal legislation denying them medical and educational resources. The legal attack on entitlement programs and affirmative action programs is an attack on blacks, Latinos/as, and Asians.

In Cornel West's writing, we see the influence of the black-white binary paradigm from the point of view of a leading black writer on race. His view shares points with Andrew Hacker. Both agree on the concepts of white and black Americas (the "two nations") and both focus exclusive attention on the relationship between blacks and whites, although they describe the nature of this relationship in very different terms. Both writers seem indifferent toward the history and conditions experienced by other nonwhite, nonblack groups. Hacker considers, unrealistically, all nonblacks as aspiring immigrants on the path to assimilation with whites. West, like Morrison, views nonblack groups with great suspicion. Morrison, in particular, seems to accept Hacker's view that all nonblacks are (or will be) the enemies of blacks as they Americanize and assimilate.

Taken together, these views pose serious problems for Latinos/as. First, Mexican Americans and Puerto Ricans, like all U.S.-born Latinos/as, are not immigrants. Mexicans occupied the Southwest long before the United States ever found them. Second, this utopian view of immigrant assimilation takes no account of the systemic racism that afflicts Mexican Americans and Puerto Ricans. It serves white writers like Hacker because they can perpetuate the view that the United States has only a single race problem—the

traditional binary problem of the white relationship with blacks—rather than a more complex set of racisms that, if recognized, would demonstrate that racism is much more systemic and pervasive than is usually admitted.

One can thus discern how the binary paradigm interferes with liberation and equality. If Latinos/as and Asian Americans are presumed to be white by both white writers and black writers (a presumption not borne out in the lived experience of most Latinos/as and Asians), then our claims to justice will not be heard or acknowledged. Our claims can be ignored by whites, since we are not black and therefore are not subject to real racism. And our claims can be ignored by blacks, since we are presumed to be not black and becoming white, and therefore we are not subject to real racism. Latinos/as do not fit the boxes supplied by the paradigm.

The "normal science" of race scholarship specifies inquiry into the relationship between blacks and whites as the exclusive aspect of race relations that needs to be explored and elaborated. As a result, much relevant legal history and information concerning Latinos/as and other racialized groups end up omitted from books on race and constitutional law. Omission of this history is extraordinarily damaging to Mexican Americans and other Latinos/as. Students get no understanding that Mexican Americans have long struggled for equality. The absence of Latinos/as from histories of racism and the struggle against it enables people to maintain existing stereotypes of Mexican Americans. These stereotypes are perpetuated even by America's leading thinkers on race. Paradigmatic descriptions and study of white racism against blacks, with only cursory mention of other people of color, marginalizes all people of color by grouping them, without particularity, as somehow analogous to blacks. Other people of color are deemed to exist only as unexplained analogies to blacks. Uncritical readers are encouraged to continue assuming the paradigmatic importance of the black-white relationship while ignoring the experiences of other Americans who also are subject to racism in profound ways.

It is time to ask hard questions of our leading writers on race. It is also time to demand better answers to these questions about inclusion, exclusion, and racial presence than perfunctory references to other people of color. In the midst of profound demographic changes, it is time to question whether the black-white binary paradigm of race fits our highly variegated current and future population. Our "normal science" of writing on race, at odds with both history and demographic reality, needs reworking.

NOTES

1. See David Montejano, Anglos and Mexicans in the Making of Texas, 1836–1986, at 158 (1987).
2. Thomas S. Kuhn, The Structure of Scientific Revolutions (2d ed. 1970).
3. *Id.* at 23.
4. *Id.* at 15.
5. *Id.* at 24.
6. *Id.* at 5.
7. *Id.* at 24.
8. See, e.g., *id.* at 138.
9. See *id.* at 23.
10. See *id.* at 15.
11. *Id.* at 24; see also Juan F. Perea, Los Olvidados: *On the Making of Invisible People*, 70 N.Y.U. L. Rev. 965 (1995); Anne Sutherland, Gypsies: The Hidden Americans (1986).

12. Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal (1992).

13. *Id.* at xii.

14. *Id.*

15. *Id.* at 4.

16. *Id.* at 30, 32.

17. *Id.* at 16.

18. David J. Weber, Foreigners in Their Native Land: Historical Roots of the Mexican Americans 59 (1973).

19. *Id.* at 72, 74 (quoting 2 Rufus B. Sage: His Letters and Papers, 1836–1847 (LeRoy R. & Ann W. Hafen eds., 1956)).

20. This was the justification offered by Texas school officials for segregating Mexican Americans in 1929. See Jorge C. Rangel & Carlos M. Alcala, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 Harv. C.R.-C.L. L. Rev. 307, 307 (1972) (quoting Paul Schuster Taylor, An American Mexican Frontier 219 (1934)).

21. Hacker, *supra* 12, at 10.

22. *Id.* at 12.

23. Cornel West, Race Matters (1993).

24. *Id.* at 2–3.

25. *Id.* at 27.

26. *Id.* at 66.

27. *Id.* It is interesting to note the similarity between Malcolm X's sense that mixed-race people introduced "confusion" into the otherwise clear structures of black and white and Andrew Hacker's sense that Hispanics introduce "incoherence" into the otherwise "clear" vision of black and white races that Hacker describes in such depth. These observations suggest one reason for the continued adherence to a black-white paradigm despite its inadequacy: The paradigm makes racial problems more readily understood than they would be in their full complexity.

28. *Id.*

29. *Id.* at 28–29.

30. *Id.* at 28.

31. Toni Morrison, *On the Backs of Blacks*, in Arguing Immigration 97 (Nicolaus Mills ed., 1994).

32. *Id.*

33. *Id.* at 98.

46. Toward an Asian American Legal Scholarship

Critical Race Theory, Poststructuralism, and Narrative Space

ROBERT S. CHANG

Of the different voices in which I speak, I have been most comfortable with the one called silence. Silence allowed me to escape notice when I was a child. I could become invisible and hence safe.

Yet now I find myself leaving the safety of my silence. I wonder if this is wise. I teach legal writing; I want to teach substantive law.[1] I have been told that engaging in nontraditional legal scholarship may hurt my job prospects, that I should write a piece on intellectual property, where my training as a molecular biologist will lend me credibility.

I try to follow this advice, but my mind wanders. I think about the American border guard who stopped me when I tried to return to the United States after a brief visit to Canada. My valid Ohio driver's license was not good enough to let me return to my country. He asked me where my passport was. I told him that I did not have one and that it was my understanding that I did not need one, that a driver's license was sufficient. He told me that a driver's license is not proof of citizenship. We were at an impasse. I asked him what was going to happen. He said that he might have to detain me. I looked away. I imagined the phone call that I would have to make, the embarrassment I would feel as I told my law firm in Seattle that I would not be at work the next day or maybe even the day after that—until I could prove that I belonged. I thought about my naturalization papers, which were with my parents in Ohio. I thought about how proud I had been when I had become a citizen.

Before then, I had been an alien. Being a citizen meant that I belonged, that I had the same rights as every other American. At least, that is what I used to believe. Things have happened since then that have changed my mind. Like the time I was driving in the South and was refused service at a service station. Or the time I was stopped in New Jersey for suspicion of possessing a stolen vehicle. At first, it was just two cops. Then another squad car came. Four big (white) policemen for one small (Asian) man, in a deserted parking lot—no witnesses if it came to that. Perhaps they were afraid that I might know martial arts, which I do, but I am careful never to let them know. When my license

A version of this chapter previously appeared as Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 Cal. L. Rev. 1241 (1993). Originally published in the *California Law Review*.

and registration checked out, they handed back my papers and left without a word. They could not even say that one word, "Sorry," that would have allowed me to leave that incident behind. I might have forgotten it as a mistake, one of those unpleasant things that happen. Instead, I have to carry it with me because of the anger I feel and because of the fear—fear of the power that certain people are able to exercise over me because of this (contingent) feature that makes me different. No matter how hard I scrub, it does not come clean. No matter how hard I try, and I do try, I can never be as good as everyone else. I can never be white.

These are the thoughts that intrude when I think about intellectual property. I try to push them away; I try to silence them. But I am tired of silence.

And so I raise my voice.

Professor Jerome Culp raised his voice when he proclaimed boldly to the legal academy that it was in "an African-American Moment," a time "when different and blacker voices will speak new words and remake old legal doctrines."[2] He also cautioned that "[t]hose in the legal academy who cannot speak the language of understanding will be relegated to the status of historical lepers alongside of Tory Americans and Old South Democrats."[3] It remains to be seen whether his prophecy will come true. The mainstream legal academy has largely ignored his proclamation and the work of other critical race scholars, if frequency of citation is to be taken as a measure of attention, and some legal scholars have condemned the methods of critical race scholarship.

Nevertheless, the time has come to announce another such moment, an Asian American Moment. This Moment is marked by the increasing presence of Asian Americans in the legal academy who are beginning to raise their voices to "speak new words and remake old legal doctrines."[4] This Moment brings new responsibilities for Asian American legal scholars. This Moment brings new challenges. This Moment also brings us hope.

Many people remain unaware of the violence and discrimination that have plagued Asian Americans since their arrival in this country. Moreover, those who know the history often fail to make the connection between the history and the problems that continue to plague Asian Americans today. The philosopher George Santayana said that "[p]rogress, far from consisting in change, depends on retentiveness. . . . Those who cannot remember the past are condemned to repeat it."[5] When I look at certain events, such as the rise in the incidence of hate crimes directed toward Asian Americans, or the rhetoric of the official English movement and of politicians such as Patrick Buchanan, or even the uproar caused by the sale of the Rockefeller Center and the Seattle Mariners to Japanese investors, I question how much progress we have made. I wonder if Santayana is right, because when I look at those events, I see a replay of the past, variations on the tired theme of anti-Asian sentiment.

Violence Against Asian Americans

Anti-Asian sentiment has historically expressed itself in violent attacks against Asian Americans. The killing of Vincent Chin in Detroit is one variation on this theme. Chin was the Chinese American killed in 1982 by Detroit autoworkers Ronald Ebens and Michael Nitz. Ebens, according to one witness, said "that it was because of people like Chin—Ebens apparently mistook him for a Japanese—that he and his fellow employees

were losing their jobs." The two men pleaded guilty to manslaughter and were each given three years' probation and fines of $3,780. They did not serve a single day in jail for the killing of Vincent Chin.

When criticized for the light sentence, Judge Charles Kaufman defended himself in a letter to a newspaper:

> He said that in Michigan, sentences are tailored to the criminal and not just to the crime. According to him, since Ebens and Nitz had no previous criminal record, were longtime residents of the area, and were respectably employed citizens, he thought there was no reason to suspect they would harm anybody again. Hence, the light sentences.[6]

Following efforts by several California congressmen and a Detroit-based community organization, the U.S. Justice Department brought federal civil rights charges against the two men. During the initial federal civil rights trial, Ebens was found guilty and sentenced to twenty-five years; Nitz was acquitted. Ebens's conviction was overturned on appeal. When his case was retried, it was moved to Cincinnati upon a motion for change of venue. Ebens was ultimately acquitted. The change in venue may have played an important role in this acquittal. Cincinnati residents and jurors had little exposure to Asian Americans; they were also unfamiliar with the level of anti-Asian sentiment then rampant in Detroit.[7]

I relate this story not to point out a miscarriage of justice—others have done so more eloquently than I ever could. And I understand that our judicial system is not perfect. Instead, I tell the story to begin developing the thesis that the killing of Vincent Chin is not an isolated episode. Violence stems from, and is causally related to, anti-Asian feelings that arise during times of economic hardship and the resurgence of nativism.[8]

Another variation on the theme of anti-Asian sentiment is the killing of Navroze Mody. Mody was an Asian Indian who was beaten to death in 1987 in Jersey City by a gang of eleven youths. The gang did not harm Mody's white friend. No murder or bias charges were brought; three of the assailants were convicted of assault, while one was convicted of aggravated assault.

To understand the significance of this attack, it must be placed in context. Asian Indians were the fastest-growing immigrant group in New Jersey; many settled in Jersey City. Racially motivated hostilities increased with the growth of the Asian Indian community and the transformation of Jersey City as Asian Indians opened shops and restaurants. Earlier in the month that Navroze Mody was killed, a Jersey City gang called the Dotbusters had published a letter in the *Jersey Journal* saying that they "would 'go to any extreme' to drive Indians from Jersey City."[9] Violence against Asian Indians began the next day, leading up to and continuing after the killing of Mody. One community leader said that "the violence worked. . . . People moved out, and others thinking of moving here from the city moved elsewhere."[10]

These events read in some ways like a page from the book of history. They resemble other racially motivated incidents of the past, such as what happened in 1877 in Chico, California. While attempting to burn down all of Chico's Chinatown, white arsonists murdered four Chinese by tying them up, dousing them with kerosene, and setting them on fire. The arsonists were members of a labor union associated with the Order of

Caucasians, a white supremacist organization that was active throughout California. The Order of Caucasians blamed the Chinese for the economic woes suffered by all workers.

The Chinese Massacre of 1885 also took place in the context of a struggling economy and a growing nativist movement. In Rock Springs, Wyoming, a mob of white miners, angered by the Chinese miners' refusal to join their strike, killed twenty-eight Chinese laborers, wounded fifteen, and chased several hundred out of town. A grand jury failed to indict a single person.[11]

I could go on, but my point is not merely to describe: I seek to link the present with the past. In linking these late-nineteenth-century events with present events, I may seem to be drawing improper associations by taking events out of context. In fact, I am doing the reverse: placing present events into context to show that today's rising incidence of hate crimes against Asian Americans, like the violence of the past, is fostered by a climate of anti-Asian sentiment spurred by economic troubles and nativism. As Professor Stanley Fish said in a different context, "I am arguing for a match at every level, from the smallest detail to the deepest assumptions. It is not simply that the books written today bear some similarities to the books that warned earlier generations of the ethnic menace: they are the same books."[12] Fish was discussing books, but there is, of course, a sometimes unfortunate link between words and deeds.

Nativistic Racism

The words accompanying the violent deeds of the present also grow out of the resurgence of nativism. This resurgence is apparent in some of the arguments marshaled against multiculturalism and in the official English movement. Some politicians have used the rhetoric of nativism to great effect, gaining support among segments of the population.

Nativism, with its message of America first, has a certain allure. Indeed, to reject its message seems unpatriotic. However, present-day nativism is grounded in racism, and thus, is inconsistent with American values. In this way, it differs from the nativism that first swept this country in the 1840s; that nativism included anti-Catholic and anti-European strains. Present-day nativism also differs from the traditional paradigm of racism by adding an element of "foreign."

Nativistic racism lurks behind the specter of "the Japanese 'taking over,'" which appeared when Mitsubishi Corporation bought a 51 percent share of the Rockefeller Center and when Nintendo purchased "a piece of America's national pastime [the Mariners]." The first problem with the notion of the Japanese taking over is that "the Japanese" did not buy Rockefeller Center and "Japan" did not buy a piece of America's national pastime. In both instances, private corporations made the investments. The second problem is that there is "an outcry when the Japanese buy American institutions such as Rockefeller Center and Columbia Pictures, but not when Westerners do."[13] Moreover, the notion of the Japanese "taking over" is factually unsupported. As of January 1992, in the midst of the clamor about the Japanese buying out America, Japanese investors owned less than 2 percent of U.S. commercial property.[14]

Similarly, in 1910, three years before California passed its first Alien Land Laws (prohibiting aliens ineligible for citizenship from owning real property), Japanese Americans, aliens and citizens, controlled just 2.1 percent of California's farms.[15] Nevertheless, the Japanese Americans were perceived to be a threat of such magnitude that a law was

passed "to discourage further immigration of Japanese aliens to California and to call to the attention of Congress and the rest of the country the desire of California that the 'Japanese menace' be crushed."[16] The law was tailored to meet this aim by limiting its ambit to aliens ineligible for citizenship. In this way, European interests were protected.

The climate of anti-Asian sentiment, still present today, hurts Asian Americans because, as the death of Vincent Chin has demonstrated, many non-Asian Americans persist in thinking of Asian Americans as foreign. It is this sense of foreignness that distinguishes the particular type of racism aimed at Asian Americans.

The Model Minority Myth

This history of discrimination and violence, as well as the contemporary problems of Asian Americans, is obscured by the portrayal of Asian Americans as a model minority. Asian Americans are portrayed as hardworking, intelligent, and successful. This description represents a sharp break from past stereotypes of Asians as sneaky, obsequious, or inscrutable.

But the dominant culture's belief in the model minority allows it to justify ignoring the unique discrimination faced by Asian Americans. The portrayal of Asian Americans as successful permits the general public, government officials, and the judiciary to ignore or marginalize the contemporary needs of Asian Americans.

An early articulation of the model minority theme appeared in *U.S. News and World Report* in 1966:

> At a time when Americans are awash in worry over the plight of racial minorities—
>
> One such minority, the nation's 300,000 Chinese-Americans, is winning wealth and respect by dint of its own hard work.
>
> In any Chinatown from San Francisco to New York, you discover youngsters at grips with their studies. . . .
>
> Still being taught in Chinatown is the old idea that people should depend on their own efforts—not a welfare check—in order to reach America's "promised land."
>
> Visit "Chinatown U.S.A." and you find an important racial minority pulling itself up from hardship and discrimination to become a *model* of self-respect and achievement in today's America.[17]

This model minority theme has become a largely unquestioned assumption about current social reality.

At its surface, the label "model minority" seems like a compliment. However, once one moves beyond this complimentary facade, one can see the label for what it is—a tool of oppression that works a dual harm by (1) denying the existence of present-day discrimination against Asian Americans and the present-day effects of past discrimination and (2) legitimizing the oppression of other racial minorities and poor whites.

That Asian Americans are a model minority is a myth. But the myth has gained a substantial following, both inside and outside the Asian American community. The successful inculcation of the model minority myth has created an audience unsympathetic

to the problems of Asian Americans. Thus, when we try to make our problems known, our complaints of discrimination or calls for remedial action are seen as unwarranted and inappropriate. They can even spark resentment. For example, Professor Mitsuye Yamada tells a story about the reactions of her Ethnic American Literature class to an anthology compiled by some outspoken Asian American writers:

> [One student] blurted out that she was offended by its militant tone and that as a white person she was tired of always being blamed for the oppression of all the minorities. I noticed several of her classmates' eyes nodding in tacit agreement. A discussion of the "militant" voices in some of the other writings we had read in the course ensued. Surely, I pointed out, some of these other writings have been just as, if not more, militant as the words in this introduction? Had they been offended by those also but failed to express their feelings about them? To my surprise, they said they were not offended by any of the Black American, Chicano or Native American writings, but were hard-pressed to explain why when I asked for an explanation. A little further discussion revealed that they "understood" the anger expressed by the Blacks and Chicanos and they "empathized" with the frustrations and sorrow expressed by the Native Americans. But the *Asian* Americans??
>
> Then finally, one student said it for all of them: "It made me angry. *Their* anger made *me* angry, because I didn't even know the Asian Americans felt oppressed. I didn't expect their anger."[18]

This story illustrates the danger of the model minority myth: It renders the oppression of Asian Americans invisible. This invisibility has harmful consequences, especially when those in positions of power cannot see:

> To be out of sight is also to be without social services. Thinking Asian Americans have succeeded, government officials have sometimes denied funding for social service programs designed to help Asian Americans learn English and find employment. Failing to realize that there are poor Asian families, college administrators have sometimes excluded Asian-American students from Educational Opportunity Programs (EOP), which are intended for *all* students from low-income families.[19]

In this way, the model minority myth diverts much-needed attention from the problems of many segments of the Asian American community, particularly the Laotians, Hmong, Cambodians, and Vietnamese who have poverty rates of 67.2 percent, 65.5 percent, 46.9 percent, and 33.5 percent, respectively. These poverty rates compare with a national poverty rate of 9.6 percent.

In addition to government officials, this distorted view of the current status of Asian Americans has infected at least one very influential member of the judiciary and legal academy. At a conference of the Association of American Law Schools, Judge Richard Posner asked two rhetorical questions: "Are Asians an oppressed group in the United States today? Are they worse off for lacking sizable representation on the faculties of American law schools?"[20] His questions are rhetorical because he already has answers,

with figures to back them up: "In 1980, Japanese-Americans had incomes more than 32 percent above the national average income, and Chinese-Americans had incomes more than 12 percent above the national average; Anglo-Saxons and Irish exceeded the average by 5 percent and 2 percent, respectively." He also points out that, "in 1980, 17.8 percent of the white population aged 25 and over had completed four or more years of college, compared to 32.9 percent of the Asian-American population."

The unspoken thesis in Judge Posner's comments, which has been stated by other proponents of meritocracy, is "that, when compared to Whites, there are equal payoffs for qualified and educated racial minorities; education and other social factors, but not race, determine earnings."[21] If Posner is right, Asian Americans should make as much as their white counterparts, *taking into account* "education and other social factors, but not race." Yet when we look more carefully at the statistics, we find some interesting anomalies that belie the meritocratic thesis.

First, Posner's reliance on median family income as evidence for lack of discriminatory effects in employment is misleading. It does not take into account that Asian American families have more workers per household than do white families; in fact, "more Asian American women are compelled to work [than other American women] because the male members of their families earn such low wages."[22] Second, the use of national income averages is misleading because most Asian Americans live in locations that have both higher incomes and higher costs of living. Wage disparities become apparent when geographic location is considered. Third, that Asian Americans have a higher percentage of college graduates does not mean that they have economic opportunities commensurate to their level of education. Returns on education rather than educational level provide a better indicator of the existence of discrimination. Many Asian Americans have discovered that they, like other racial minorities, do not get the same return for their educational investment as do their white counterparts.

A closer look, then, at Japanese Americans, Posner's strongest case, reveals flaws in his meritocratic thesis when individual income, geographic location, educational attainment, and hours worked are considered. In 1980, Japanese American men in California earned incomes comparable to those of white men, but "they did so only by acquiring more education (17.7 years compared to 16.8 years for white men twenty-five to forty-four years old) and by working more hours (2,160 hours compared to 2,120 hours for white men in the same age category)."[23] The income disparities for men from other Asian American groups are more glaring.

Thus, the answer to Posner's first question is yes—Asian Americans are an oppressed group in America. To accept the myth of the model minority is to participate in the oppression of Asian Americans.

In addition to hurting Asian Americans, the model minority myth works a dual harm by hurting other racial minorities and poor whites who are blamed for not being successful like Asian Americans. "African-Americans and Latinos and poor whites are told, 'look at those Asians—anyone can make it in this country if they really try.'" This blame is justified by the meritocratic thesis supposedly proven by the example of Asian Americans. This blame is then used to campaign against government social services for these "undeserving" minorities and poor whites and against affirmative action. To the extent that Asian Americans accept the model minority myth, we are complicit in the oppression of other racial minorities and poor whites.

This blame and its consequences create resentment of Asian Americans among African Americans, Latinos, and poor whites. This resentment, fueled by poor economic conditions, can flare into anger and violence. Asian Americans, the model minority, serve as convenient scapegoats, as Korean Americans in Los Angeles discovered during the 1992 riots. Many Korean Americans "now view themselves as 'human shields' in a complicated racial hierarchy," caught between "the racism of the white majority and the anger of the black minority."[24] The model minority myth plays a key role in establishing a racial hierarchy that denies the oppression of Asian Americans while simultaneously legitimizing the oppression of other racial minorities and poor whites.

Immigration and Naturalization

In 1882, the U.S. government passed the first of a series of Chinese exclusion acts, specifically targeting Chinese by severely restricting Chinese immigration. These acts culminated in the Geary Act of 1892, an act called the most draconian immigration law of all time. This act remained in force for over fifty years. To enforce these exclusionary immigration laws, the government set up a special immigration station in 1910 near San Francisco. Here, hundreds of would-be immigrants were detained for months and were often sent back to China. The Angel Island facility, like Alcatraz Prison nearby, was intended to be escape proof.

The detainment of Chinese immigrants on Angel Island and the discriminatory treatment they received created a sense of alienation and powerlessness in not only the detainees but also those Chinese already in the United States. The detainees were treated like animals or commodities, forced to live in squalid, cramped quarters. The number of persons of Chinese ancestry living in the United States dropped from 107,488 in 1890 to 61,639 in 1920. As their numbers dwindled, most Chinese remained within the security and familiarity of ethnic enclave Chinatowns, while others repatriated. The decline in numbers can also be partially attributed to the gender imbalance that hindered family formation.

Immigration laws were soon passed that directly attacked the development of existing Chinese communities in the United States. When it appeared that more Chinese women were immigrating, a new immigration law was passed in 1924:

> One of the law's provisions prohibited the entry of aliens ineligible for citizenship. "The necessity [for this provision]," a congressman stated, "arises from the fact that we do not want to establish additional Oriental families here." This restriction closed tightly the gates for the immigration of Chinese women. "We were beginning to repopulate a little now," a Chinese man said bitterly, "so they passed this law to make us die out altogether."[25]

This provision crippled the development of a stable Chinese American community, and in conjunction with antimiscegenation laws in many states, it effectively emasculated an entire generation of male Chinese immigrants. Men in other Asian American groups underwent similar experiences, although the strategies employed were different.

These discriminatory measures remained largely in effect until the passage of the 1952 McCarran-Walter Act, which permitted the naturalization of Asian immigrants

and set token immigration quotas. These quotas, based on national origin quotas established in 1921 and codified in the 1924 National Origins Act, were not changed until 1965 when the McCarran-Walter Act was amended to abolish the national origin system and the Asiatic barred zone. The 1965 amendments profoundly affected the development of Asian America.

The 1965 amendments permitted my family to emigrate to the United States from Korea. As an immigrant, I entered this country in the historical context that I have set forth. To an extent, I inherited that legacy of discrimination. I am bound by the still-present stereotype of Asian Americans as aliens, those who do not belong here and whose presence here is not desired. My colleague at the law school mistakes me for the copy boy. Those were not his words, but his question as to whether I was "doing copying for the faculty" made me feel very small. When I am stopped by the police for suspicion of possessing a stolen vehicle, their actions and my reactions take place in the context of a history of nonresponsiveness to and active harassment of Asian Americans by police. Maybe it was the kind of car I was driving. Maybe it was the color of my car. Maybe, just maybe, it was the color of my skin.

I find myself in internal and external conflict when I talk about these things. The internal conflict comes from my being an immigrant, and as one I sometimes wonder if I have a right to complain. This point was brought home to me in an anonymous student evaluation after my first year of teaching in law school: "Leave the racist comments out. Go visit Korea if you don't like it here. We need to unite as a country, not drive wedges between us."[26] I wonder if this student is right.

However, in the same way that I inherit a legacy of discrimination against Asian Americans, I also inherit a legacy of struggle, a struggle that belongs to both foreign-born and American-born Asian Americans. Early Asian immigrants were not politically insular, as popular American history has painted them. It is our responsibility to bring our forebears back from the silence in which they have been placed. We must recognize that the early Asian immigrants were brave enough to raise their voices. We can do no less.

Disenfranchisement

When I joined the faculty at my former school, the dean told me that I could participate in faculty meetings. On the first Tuesday of September, I felt proud to attend my first faculty meeting. I did not know then that it would be the last one I would attend that semester. As issues came up for decision, I voted, just like the other faculty members. It was only after the meeting that I was told that, as a legal writing instructor, I was not allowed to vote. My face turned red. I did not return.

The dean had not lied to me when he told me that I was allowed to participate in faculty meetings; we simply differed in our interpretation of "participation." From my perspective, the dean's notion of "participation" was impoverished because I included "meaningful" as part of my definition of "participation."

To an outside observer, it might appear that I stopped going because I did not care about faculty meetings. But when you listen to my story, you will understand that this is not so.

Systemic disenfranchisement—whether at the level of faculty meetings or national elections—discourages many Asian Americans from participating in the political pro-

cess. This political silence has been attributed to cultural differences and lack of cohesion. These reasons, however, are largely myths created to prevent the enfranchisement of Asian Americans. The low voter registration figures can be attributed to several specific barriers that prevent Asian Americans from participating in a meaningful manner.

The greatest historical barrier to Asian American participation in the political process was that Asian Americans could not become naturalized and could therefore not vote since only citizens had that right. Some states even prohibited American-born Asians from voting. This historical exclusion has an inertia that carries it into the present. Yet the dominant culture and in particular the legislature and judiciary do not understand because they are largely unaware of this pattern of formally excluding Asian Americans.

Two current apportionment policies dilute Asian American voting strength: (1) the splitting of the Asian American population in an area into several voting districts and (2) the establishment of at-large election systems in areas of high Asian American population. Attempts to redress Asian American vote dilution are hindered by a U.S. Supreme Court decision that requires that a minority group "be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district."[27] One problem with this requirement is that it excludes Asian Americans, many of whom are geographically dispersed, at times involuntarily, through the will of the government.

Another formal mechanism that prevents greater voter participation among Asian Americans is the use of English-only ballots. Congress, recognizing the problems with English-only ballots, amended the Voting Rights Act in 1975 and again in 1982 to provide language assistance to "language minorities." However, these measures did not take into account the distinct problems facing Asian Americans. Congress, in establishing that a language minority must constitute at least 5 percent of the voting age population, did not consider the diversity of languages and cultures among Asian Americans. Thus, even if the Asian American population in a given political subdivision were greater than the requisite 5 percent, no single Asian American language minority constituted a large enough group to benefit from the act's provisions. As a result, no Asian American groups were able to claim the status of a "language minority" under that amendment.

This did not change until the voices of Asian Americans spoke our distinct problems into existence. Because Asian Americans were unable to constitute language minorities for the purposes of the 1982 Voting Rights Act, members of the community began to voice concerns and to protest the 1982 act. Many participated in Roundtable Conferences on Civil Rights sponsored by the U.S. Commission on Civil Rights. Their efforts led to the 1992 amendment to the Voting Rights Act, which led to the enfranchisement of many Asian Americans.

Achieving enfranchisement is only the first step toward meaningful political participation and social change. The next step is to elect legislators and appoint public officials who will address and respond to the unique needs of Asian Americans. In legislative halls, executive agencies, and judicial chambers, the law is made and implemented, but Asian Americans, perhaps more so than other disempowered groups, have not yet been able to enter these domains in a significant way. Nevertheless, the voting rights example shows how legal reform can be brought about when Asian Americans participate in the political process and give voice to our oppression and our needs.

The Japanese American Internment and Redress

Although it is difficult to determine when exactly the redress movement began, it did not receive national attention until the 1978 Japanese American Citizens League (JACL) national convention. In 1978, the JACL adopted redress as its priority issue and sought a "$25,000 compensation figure plus the creation of a Japanese American Foundation to serve as a trust for funds to be used for the benefit of Japanese American communities throughout the country."[28] The national attention came when Senator S. I. Hayakawa, in an interview during the convention that was carried by newspapers nationwide, called the JACL's demand for redress "absurd and ridiculous."[29] The media attention that followed gave Japanese Americans their first opportunity "to talk publicly about what they experienced during World War II."[30]

Initial reactions to the movement were mixed, both within and without the Japanese American community. Within the Japanese American community, many rejected redress on the ground that no amount of money could compensate for their suffering. Others saw it as a form of welfare, while others thought that it was best not to reopen past wounds. Many were shocked a model minority should make such demands.

However, in 1980, the government began to respond to demands for redress with the congressional establishment of the Commission on Wartime Relocation and Internment of Civilians. The commission held hearings in several cities, at which more than 750 Japanese American internees testified about their experiences. To many, telling their stories provided a much-needed catharsis. The stories also provided a compelling moral force to the claims of redress. One survivor related how he had felt before he was evacuated:

> I went for my last look at our hard work. . . . Why did this thing happen to me now? I went to the storage shed to get the gasoline tank and pour the gasoline on my house, but my wife . . . said don't do it, maybe somebody can use this house; we are civilized people, not savages.[31]

Others described the conditions in the camps. One survivor commented, "I was too young to understand, but I do remember the barbed wire fence from which my parents warned me to stay away. I remember the sight of high guard towers. I remember soldiers carrying rifles, and I remember being afraid."[32] All evacuees were given numbers; the numbering process was a particularly disheartening experience. The internment left a scar on the Nisei; it has become a point of reference in their lives.

The commission released its findings in 1982, concluding that "Executive Order 9066 and the internment that it sanctioned resulted from 'race prejudice, war hysteria, and a failure of political leadership.'"[33] The commission further presented five recommended remedies. These included a recommendation that an official apology be issued and that each surviving internee be given $20,000. The commission's report and recommendations as well as the work of Japanese American congressmen paved the way for the redress bill, which was passed by the House in September 1987 and by the Senate in April 1988. The government began making payments on October 9, 1990.

Professor Chan comments that "[t]he redress movement has been a prime example of how Asian American elected officials have worked hand in hand with community activists toward a common end."[34] But this end did not come about until the model minority

broke its silence, demonstrating the power of narrative through testimony about the injustice of the internment camps.

NOTES

1. I was teaching legal writing when I wrote this chapter; I now teach contracts. I have, to an extent, gotten my wish.

2. Jerome M. Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 Duke L.J. 39, 40.

3. *Id.* at 41.

4. *Id.* at 40.

5. 1 George Santayana, The Life of Reason 284 (2d ed. 1922).

6. Sucheng Chan, Asian-Americans: An Interpretive History 177 (1991). Professor Chan notes that "[a] number of newspaper editorials pointed out that, in essence, the message Judge Kaufman was imparting to the public was that in the state of Michigan, as long as one was employed or was going to school, a license to kill cost only $3,000." *Id.*

7. See *id.* at 178; U.S. Commission on Civil Rights, Civil Rights Issues Facing Asian Americans in the 1990s, at 26 (1992) ("Whereas Detroit in the early 1980s was the scene of a massive campaign against foreign imports, especially those from Japan, a campaign that inflamed anti-Asian sentiments in that city, there had not been the same type of campaign in Cincinnati").

8. Nativism is the

> intense opposition to an internal minority on the grounds of its foreign (i.e., "un-American") connections. Specific nativistic antagonisms may, and do, vary widely in response to the changing character of minority irritants and the shifting conditions of the day; but through each separate hostility runs the connecting, energizing force of modern nationalism. While drawing on much broader cultural antipathies and ethnocentric judgments, nativism translates them into a zeal to destroy the enemies of a distinctively American way of life.

Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 Minn. L. Rev. 269, 278 (1992) (quoting John Higham, Strangers in the Land 4 (2d ed. 1988)).

9. Al Kamen, *When Hostility Follows Immigration: Racial Violence Sows Fear in New Jersey's Indian Community*, Wash. Post, Nov. 16, 1992, at Al, A6.

10. *Id.* at A6.

11. Paul Crane & Alfred Larson, *The Chinese Massacre*, in 12 Annals of Wyoming 47, 47–49 (1940).

12. Stanley Fish, *Bad Company*, 56 Transition 60, 63 (1992).

13. Ronald E. Yates, *Ishihara's Essays on Japan-US Ties Still Hit the Mark*, Chi. Trib., Apr. 19, 1992, at C3 (quoting Shintaro Ishihara, The Japan That Can Say No: Why Japan Will Be First Among Equals (1991)).

14. See *Don't Reject Japanese Pitch*, USA Today, Jan. 29, 1992, at 10A. This editorial also points out that, in other countries, U.S. businesses own "everything from England's Jaguar to corners near Russia's Red Square." *Id.* British investors actually own much more of the United States than do Japanese investors. See Mike Meyers, *Enduring U.S.-Japanese Rivalry Has Roots That Precede World War II*, Star Trib. (Minneapolis), Dec. 8, 1991, at 1A.

15. Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 Calif. L. Rev. 61, 77 (1947).

16. *Id.* at 62.

17. *Success Story of One Minority Group in U.S.*, U.S. News & World Rep., Dec. 26, 1966, at 73, 73, reprinted in Roots: An Asian American Reader 6 (Amy Tachiki et al. eds., 1971) (emphasis added).

18. Mitsuye Yamada, *Invisibility Is an Unnatural Disaster: Reflections of an Asian American Woman*, in This Bridge Called My Back: Writings by Radical Women of Color 35, 35 (Cherrie Moraga & Gloria Anzaldua eds., 1981).

19. Ronald Takaki, Strangers from a Different Shore 478 (1989).

20. Richard A. Posner, *Duncan Kennedy on Affirmative Action*, 1990 Duke L.J. 1157, 1157 (revised text of speech delivered on January 4, 1991, at Association of American Law Schools convention).

21. Henry Der, *Asian Pacific Islanders and the "Glass Ceiling"—New Era of Civil Rights Activism? Affirmative Action Policy*, in The State of Asian Pacific America, a Public Policy Report: Policy Issues to the Year 2020, at 215, 219 (LEAP Asian Pac. Am. Pub. Policy Inst. and UCLA Asian Am. Studies Ctr. eds., 1993) (discussing and discrediting the meritocratic thesis).

22. Chan, *supra* note 6, at 169.

23. Takaki, *supra* note 19, at 475.

24. See Seth Mydans, *Giving Voice to the Hurt and Betrayal of Korean-Americans*, N.Y. Times, May 2, 1993, §4, at 9 (interviewing Angela Oh, Korean American attorney and president of the Southern California Korean American Bar Association).

25. Takaki, *supra* note 19, at 235 (alteration in original). A portion of this law that excluded from the United States wives of American citizens was repealed in 1930. *Id.*

26. Anonymous student evaluation, Spring 1993 (copy on file with author).

27. Thornburg v. Gingles, 478 U.S. 30, 50 (1986).

28. John Tateishi, *The Japanese American Citizens League and the Struggle for Redress*, in Japanese Americans: From Relocation to Redress 191, 191 (Roger Daniels et al. eds., rev. ed. 1991). The redress issue had been raised within the JACL as early as the 1970 JACL convention in Chicago, but differing views prevented the JACL from reaching a single, coherent position. *Id.*

29. *Id.* at 192. This same Senator S. I. Hayakawa made the following comment in 1971 about the relocation and internment:

> All the people I know have a very positive attitude towards it. The ones I know in Chicago say, "We would have never gone to Chicago, if it hadn't been for the wartime relocation. We would have all been hung along a little strip of the Pacific coast and would have never discovered San Francisco, or New York, or Chicago, Omaha, or Minneapolis, where the Japanese are scattered all over the place. So this really gave us a chance to really become Americans instead of residents of Little Tokyo in Los Angeles."

An Interview with S.I. Hayakawa, President of San Francisco State College, in Roots, *supra* note 17, at 19, 21.

30. Tateishi, *supra* note 28, at 192. Before then, many Japanese Americans remained silent because they had "been infused with a philosophy that stresses: 'Let's make the most of a bad situation and push ahead'" and had "internalized the subtle ways in which the larger society reminds one to stay in his place." Isao Fujimoto, *The Failure of Democracy in a Time of Crisis: The War-Time Internment of the Japanese Americans and Its Relevance Today*, in Roots, *supra* note 17, at 207.

31. Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied 132 (1982) (quoting John Kimoto).

32. *Id.* at 176 (quoting George Takei).

33. Chan, *supra* note 6, at 174.

34. *Id.*

47. Race and Erasure

The Salience of Race to Latinos/as

IAN F. HANEY LÓPEZ

On September 20, 1951, an all-white grand jury in Jackson County, Texas, indicted twenty-six-year-old Pete Hernández for the murder of another farm worker, Joe Espinosa. The League of United Latin American Citizens (LULAC), a Mexican American civil rights organization, took up Hernández's case, hoping to use it to attack the systematic exclusion of Mexican Americans from jury service in Texas.[1] LULAC lawyers Gus Garcia and John Herrera quickly moved to quash Hernández's indictment, arguing that people of Mexican descent were purposefully excluded from the indicting grand jury in violation of the Fourteenth Amendment's guarantee of equal protection of the laws. They pointed out that while 15 percent of Jackson County's almost thirteen thousand residents were Mexican American, no such person had served on any jury commission, grand jury, or petit jury in Jackson County in the previous quarter century. In fact, Texas stipulated that no Mexican American could serve. Despite this stipulation, the trial court denied the motion. After two days of trial and three and a half hours of deliberation, the jury convicted Hernández and sentenced him to life in prison.

On appeal, Garcia and Herrera renewed the Fourteenth Amendment challenge. It again failed. The Texas Court of Criminal Appeals held that "in so far as the question of discrimination in the organization of juries in state courts is concerned, the equal protection clause of the Fourteenth Amendment contemplated and recognized only two classes as coming within that guarantee: the white race, comprising one class, and the Negro race, comprising the other class."[2] Categorizing Mexican Americans as white, and hence incapable of being racially discriminated against by other whites, the Texas court held in effect that the Fourteenth Amendment did not cover Mexican Americans in cases of jury discrimination.

With the assistance of Carlos Cadena, a law professor at St. Mary's University, the LULAC attorneys took the case to the U.S. Supreme Court. On May 3, 1954, Chief Justice Earl Warren delivered the unanimous opinion of the Court in *Hernandez v. Texas*, extending the reach of the Fourteenth Amendment to Pete Hernández and reversing his

A version of this chapter previously appeared as Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 Cal. L. Rev. 1143 (1997); 10 La Raza L.J. 57 (1998). Originally published in the *California Law Review* and the *La Raza Law Journal*.

conviction. The Court did not do so, however, on the ground that Mexican Americans constituted a protected racial group. Rather, the Court held that Hernández merited Fourteenth Amendment protection because he belonged to a class, distinguishable on some basis "other than race or color," that nevertheless suffered discrimination in Jackson County, Texas.[3]

Hernandez is a central case—the first Supreme Court decision to extend the protections of the Fourteenth Amendment to Latinos/as, it is among the great early triumphs in the Latino/a struggle for civil rights. *Hernandez* attains increased significance, however, because it is also the principal case in which the Supreme Court addresses the racial identity of a Latino/a group, namely Mexican Americans. No Supreme Court case has dealt so squarely with this question, before or since. This point is all the more striking, and *Hernandez* all the more exceptional, because at least on the surface the Court refused to consider Mexican Americans as a group defined by race or color. If theorists intend, as I believe we should, to use race as a lens and language through which to assess the Latino/a experience in the United States, we must come to terms with the elision of race in *Hernandez*.

Race and Erasure

In the *United States Reports*, *Hernandez* immediately precedes another leading Fourteenth Amendment case, *Brown v. Board of Education*, having been decided just two weeks before that watershed case. Despite extending the reach of the Fourteenth Amendment by unanimous votes, the two cases differ dramatically. In *Brown*, the Court grappled with the harm done through segregation but considered the applicability of the Equal Protection Clause to African Americans a foregone conclusion. In *Hernandez*, the reverse was true. The Court took for granted that the Equal Protection Clause would prohibit the state conduct in question, but wrestled with whether the Fourteenth Amendment protected Mexican Americans. Nevertheless, as in *Brown*, stark evidence of racism permeates *Hernandez*.

As catalogued by the Court, the evidence in the case revealed the following: First, residents of Jackson County, Texas, routinely distinguished between "white" and "Mexican" persons. Second, business and community groups largely excluded Mexican Americans from participation. Third, until just a few years earlier, children of Mexican descent were required to attend a segregated school for the first four grades, and most children of Mexican descent left school a few years later. Fourth, at least one restaurant in the county seat prominently displayed a sign announcing "No Mexicans Served." Fifth, on the Jackson County courthouse grounds at the time of the underlying trial stood two men's toilets, one unmarked, and the other marked "Colored Men" and "Hombres Aqui" ("Men Here"). Finally, "for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County," a county 15 percent Mexican American.[4]

In their brief to the Court, Hernández's lawyers placed heavy emphasis on this history of discrimination:

> While the Texas court elaborates its "two classes" theory, in Jackson County, and in other areas in Texas, persons of Mexican descent are treated as a third class—a

> notch above the Negroes, perhaps, but several notches below the rest of the population. They are segregated in schools, they are denied service in public places, they are discouraged from using non-Negro rest rooms. . . . They are told that they are assured of a fair trial at the hands of persons who do not want to go to school with them, who do not want to give them service in public places, who do not want to sit on juries with them, and who would prefer not to share rest room facilities with them, not even at the Jackson County court house.[5]

"The blunt truth," Hernández's lawyers insisted, "is that in Texas, persons of Mexican descent occupy a definite minority status."[6] The Court relied on the evidence enumerated above to support its conclusion that Hernández qualified for equal protection under the Fourteenth Amendment.

The Paradox of Race

In light of the Court's heavy reliance on the overwhelming evidence of racial discrimination presented in the case, its insistence that Mexican Americans do not constitute a race seems surprising. It seems all the more so when one recalls that at the time the Court decided *Hernandez*, national hysteria regarding Mexican immigration was running high and also in light of evidence of possible racist antipathies toward Mexican Americans on the Supreme Court itself.[7] In part, the Court's reticence to acknowledge the cases might have stemmed from the fact that all parties characterized Mexican Americans as racially white.

Consider LULAC's position. Founded in 1929 in Texas by members of the small Mexican American middle class, this organization stressed both cultural pride and assimilation. These twin goals were not without their tensions, however, particularly with respect to the question of racial identity. Emphasizing the former often led LULAC to identify Mexican Americans as a distinct race. For example, LULAC's first code admonished members to "[l]ove the men of your race, take pride in your origins and keep it immaculate; respect your glorious past and help to vindicate your people"; its constitution announced, "We solemnly declare once and for all to maintain a sincere and respectful reverence for our racial origin of which we are proud."[8] On the other hand, focusing on assimilation and the right to be free of widespread discrimination, LULAC often emphasized that Mexican Americans were white. "As descendants of Latins and Spaniards, LULACers also claimed 'whiteness,'" according to historian Mario Garcia. "Mexican Americans as 'whites' believed no substantive racial factor existed to justify racial discrimination against them."[9] To a certain extent, LULAC resolved the tension between seeking both difference and sameness by pursuing these on distinct planes: difference in terms of culture and heritage but sameness regarding civil rights and civic participation. However, this resolution could not be maintained neatly using the notion of race as then constituted. Race inseparably conflated biology, culture, heritage, civil rights, and civic participation. In racial terms, to be Mexican and different was irreconcilable with being white and the same.

This tension notwithstanding, the decision to defend Pete Hernández constituted part of LULAC's strategy of fighting discrimination against Mexican Americans through the Texas courts. This strategy dictated as well the decision of the lawyers for Hernández

to argue that Mexican Americans were white. As Mario Garcia writes, "In [its] anti-segregation efforts, LULAC rejected any attempt to segregate Mexican Americans as a nonwhite population. . . . LULACers consistently argued that Mexicans were legally recognized members of the white race and that no legal or physical basis existed for legal discrimination."[10] For Hernández's attorneys, the decision to cast Mexican Americans as white was a tactical one, in the sense that it reflected the legal and social terrain on which they sought to gain civil rights for their community. On this terrain, being white was strategically key.

In addition, however, the Court's assessment of the evidence in *Hernandez* was no doubt informed by the contemporary conception of race as an immutable natural phenomenon and a matter of biology—black, white, yellow, or red, races were considered natural, physically distinct groupings of persons. Races, the Court no doubt supposed, were stable and objective, their boundaries a matter of physical fact and common knowledge, consistent the world over and across history.

Proceeding from this understanding, the Court could not help but be perplexed by the picture of Mexican American identity presented in *Hernandez*, an identity that at every turn seemed inconstant and contradictory. Though clearly the object of severe racial prejudice in Texas, all concerned parties agreed Mexican Americans were white; though officially so, the dark skin and features of many Mexican Americans seemingly demonstrated that they were nonwhite; and though apparently nonwhite, Mexican Americans could not neatly be categorized as red, yellow, or black. A biological view of race positing that each person possesses an obvious, immutable, and exclusive racial identity cannot account for, or accept, these contradictions. Under a biological view of race, the force of these contradictions must on some level have served as evidence that Mexican Americans did not constitute a racial group. Thus, the Court insisted in the face of viscerally moving evidence to the contrary that the exclusion of Mexican Americans from juries in Jackson County, Texas, turned neither on race nor color.

Nevertheless, *Hernandez* is virtually unintelligible except in racial terms—in terms, that is, of racial discrimination, of segregation, of Jim Crow facilities, of social and political prejudice, of exclusion, marginalization, and devaluation. The Court's evasion of race notwithstanding, the facts of *Hernandez* insist that when Pete Hernández was indicted for murder in 1951 an inferior racial identity defined Mexican Americans in Texas.

That despised identity developed in Texas over the course of more than a century of Anglo-Mexican conflict. In the early years of the nineteenth century, white settlers from the United States moving westward into what was then Spain and, after 1821, Mexico, clashed with the local people, eventually giving rise to war between Mexico and the United States in 1846. During this period, whites in Texas and across the nation elaborated a Mexican identity in terms of innate, insuperable racial inferiority. According to historian Reginald Horsman, "By the time of the Mexican War, America had placed the Mexicans firmly within the rapidly emerging hierarchy of superior and inferior races. While the Anglo-Saxons were depicted as the purest of the pure—the finest Caucasians—the Mexicans who stood in the way of southwestern expansion were depicted as a mongrel race, adulterated by extensive intermarriage with an inferior [Native American] race."[11] These views continued, and were institutionalized, over the remainder of the nineteenth century and well into the twentieth. According to historian Arnoldo De León, "[I]n different parts of [Texas], and deep into the 1900s, Anglos were more or less

still parroting the comments of their forbears. . . . They regarded Mexicans as a colored people, discerned the Indian ancestry in them, identified them socially with blacks. In principle and in fact, Mexicans were regarded not as a nationality related to whites, but as a race apart."[12]

Ironically, the solution to the racial paradox posed in *Hernandez* lies within the community attitudes test advanced by the Court. The Court propounded this test as a measure of whether Mexican Americans exist as a distinct, though nonracial group. In fact, no more accurate test could be fashioned to establish whether Mexican Americans, or any group, constitute a race. Race is not biological or fixed by nature; it is instead a question of social belief. Thus, albeit unwittingly, the *Hernandez* opinion offered a sophisticated insight into the nature of race: Whether a racial group exists is always a local question to be answered in terms of community attitudes. To be sure, race is constructed through the interactions of a range of overlapping discursive communities, from local to national, ensuring that divergent and conflicting conceptions of racial identity exist within and among communities. Nevertheless, understanding race as a question of community attitude emphasizes that race is not biological but social. Therein lies the irony of the Court's position: Avoiding a racial understanding of *Hernandez* in part because of a biological conception of race, the Court nevertheless correctly understood that the existence of Mexican Americans as a (racial) group in Jackson County turned, as race does, not on biology but on community attitude.

The Experience of Race

Are Latinos, then, a race? To begin with, rejecting race as a basis for conceptualizing Latino/a lives risks obscuring central facets of our experiences. Reconsider the evidence of discriminatory treatment at the root of *Hernandez*. In Jackson County, Mexican Americans were barred from local restaurants, excluded from social and business circles, relegated to inferior and segregated schooling, and subjected to the humiliation of Jim Crow facilities, including separate bathrooms in the halls of justice. Each of these aspects of social oppression substantially affected, although of course even in their totality they did not completely define, the experience of being Mexican American in Jackson County at mid-century.

To attempt to fathom the significance of such experiences, imagine being present at the moment that Garcia called his cocounsel at trial, John Herrera, to testify about the segregated courthouse bathrooms. Keep in mind that Herrera's ties to Texas stretched back at least to the original 1836 Texas Declaration of Independence, which was signed by his great-great-grandfather, Col. Francisco Ruiz, one of two Mexicans to sign that document. As excerpted from the trial court transcript, Herrera's testimony was the following:

Q. During the noon recess I will ask you if you had occasion to go back there to a public privy, right in back of the courthouse square?
A. Yes, sir.
Q. The one designated for men?
A. Yes, sir.
Q. Now did you find one toilet there or more?

A. I found two.
Q. Did the one on the right have any lettering on it?
A. No, sir.
Q. Did the one on the left have any lettering on it?
A. Yes, it did.
Q. What did it have?
A. It had the lettering "Colored Men" and right under "Colored Men" it had two Spanish words.
Q. What were those words?
A. The first word was "Hombres."
Q. What does that mean?
A. That means "Men."
Q. And the second one?
A. "Aqui," meaning "Here."
Q. Right under the words "Colored Men" was "Hombres Aqui" in Spanish, which means "Men Here"?
A. Yes, sir.[13]

Under cross-examination by the district attorney, Herrera continued:

Q. There was not a lock on this unmarked door to the privy?
A. No, sir.
Q. It was open to the public?
A. They were both open to the public, yes, sir.
Q. And didn't have on it "For Americans Only," or "For English Only," or "For Whites Only"?
A. No, sir.
Q. Did you undertake to use either one of these toilets while you were down here?
A. I did feel like it, but the feeling went away when I saw the sign.
Q. So you did not?
A. No, sir, I did not.[14]

By themselves, on paper, the words are dry, disembodied, untethered. It is hard to envision the Jackson County courtroom, difficult to sense its feel and smell; we cannot hear Garcia pose his questions; we do not register the emotion perhaps betrayed in Herrera's voice as he testified to his own exclusion; we cannot know if the courtroom was silent, solemn and attentive, or murmurous and indifferent. But perhaps we can imagine the deep mixture of anger, frustration, and sorrow that would fill our guts and our hearts if it were we—if it were we confronted by that accusatory bathroom lettering, we called to the stand to testify about the signs of our supposed inferiority, we serving as witnesses to our undesirability to prove we exist.

Imagining such a moment should not be understood as giving insight into the very worst damage done by racism in this country. Nor should it be taken to suggest that everyone constructed as nonwhite has come up against such abuse or has experienced it the same way. Finally, it should not be taken to imply that those denigrated in nonracial terms do not also suffer significant, sometimes far greater harms. Imagining the

moment described above cannot and does not pretend to afford insight into the full dynamics of racial oppression or provide a solid base from which to compare other forms of disadvantage.

What it does afford, however, is a sense of the experience of racial discrimination in the United States. In this country, the sort of group oppression documented in *Hernandez*, the sort manifest on the bathroom doors of the Jackson County courthouse, has traditionally been meted out to those characterized as racially different, not to those simply different in ethnic terms. It is on the basis of race—on the basis, that is, of presumably immutable difference, rather than because of ethnicity or culture—that groups in the United States have been subject to the deepest prejudices, to exclusion and denigration across the range of social interactions, to state-sanctioned segregation and humiliation. In comparison to ethnic antagonisms, the flames of racial hatred in the United States have been stoked higher and have seared deeper. They have been fueled to such levels by beliefs stressing the innateness, not simply the cultural significance, of superior and inferior identities. To eschew the language of race is to risk losing sight of these central racial experiences.

Race *should* be used as a lens through which to view Latinos/as in order to focus our attention on the experiences of racial oppression. However, it should also direct our attention to racial oppression's long-term effects on the day-to-day conditions encountered and endured by Latino/a communities. Consider in this vein the segregated school system noted in *Hernandez*. Jackson County's scholastic segregation of whites and Mexican Americans typified the practices of Texas school boards: Although not mandated by state law, from the turn of the century, school boards in Texas customarily separated Mexican American and white students. In his study of the Mexican American struggle for educational equality in Texas, Guadalupe San Miguel writes:

> School officials and board members, reflecting the specific desires of the general population, did not want Mexican students to attend school with Anglo children regardless of their social standing, economic status, language capabilities, or place of residence. . . . Wherever there were significant numbers of Mexican children in school, local officials tried to place them in facilities separate from the other white children.[15]

Though it should be obvious, it bears making explicit that racism drove this practice. A school superintendent explained it this way: "Some Mexicans are very bright, but you can't compare their brightest with the average white children. They are an inferior race."[16] According to San Miguel, many whites "simply felt that public education would not benefit [Mexican Americans] since they were intellectually inferior to Anglos."[17] To be sure, as in Jackson County, school segregation in Texas was most pronounced in the lower grades. However, also as in that county, this fact reflects not a lack of concern with segregation at the higher grades but rather the practice of forcing Mexican American children out of the educational system after only a few years of school. The segregated schooling noted in *Hernandez* constitutes but one instance in a rampant practice of educational discrimination against Mexican Americans in Texas and across the Southwest.

Using the language of race forces us to look to the pronounced effects on minority communities of long-standing practices of racial discrimination. These effects can be

devastating in their physical concreteness, as evidenced by the dilapidated schoolhouse for the Mexican American children in Jackson County's Edna Independent School District. According to the testimony of one frustrated mother, the "Latin American school" consisted of a decaying one-room wooden building that flooded repeatedly during the rains, with only a wood stove for heat and outside bathroom facilities and with but one teacher for the four grades taught there. Such effects may also be personal and intangible, though not for those reasons any less real, dire, or permanent. In Jackson County, as in the rest of Texas, the Mexican American children subject to state-sanctioned segregation no doubt suffered grave harm to their sense of self-worth and belonging—feelings of inferiority embossed on their hearts and minds in ways unlikely ever to be undone, in the language of Chief Justice Warren.[18] Of the 645 persons of Spanish surname in that county over age twenty-four, the lawyers informed the Court, "245 have completed from 1 to 4 years of elementary schooling; 85 have completed the fifth and sixth years; 35 have completed 7 years of elementary schooling; 15 have completed 8 years; 60 have completed from 1 to 3 years of high school; 5 have completed 4 years of high school; and 5 are college graduates."[19]

In Jackson County, segregated schools were just one manifestation of racial discrimination, whose effects warrant close attention if we hope to understand the lives of persons oppressed because of supposed racial differences—people systematically relegated to society's bottom, not just through the operation of individual prejudices but by institutionalized cultural, political, and juridical practices. The impact on community members, such as widespread alienation and low levels of education, largely set the parameters of the lives of those within the community. None but the fewest and most fortunate Mexican Americans raised in the 1950s in Jackson County, Texas, could escape the grinding poverty dictated for them by the racial prejudices of whites there. Because these conditions circumscribe the lives people can reasonably expect to live in this society, racial language remains a salient vocabulary for discussing socially constituted communities, never more so than when those communities have been severely subordinated in racial terms.

NOTES

1. Gustavo C. Garcia, *An Informal Report to the People*, in A Cotton Picker Finds Justice! The Saga of the Hernandez Case (Ruben Munguia ed., 1954).

2. Hernandez v. State, 251 S.W.2d 531, 535 (Tex. Crim. App. 1952).

3. Hernandez v. Texas, 347 U.S. 475, 477, 479–480 (1954). The Court suggested, but did not explicitly rule, that this "other basis" corresponded to ancestry or national origin. *Id.* at 479.

4. *Id.* at 481, 480.

5. Brief for Petitioner at 28–29, Hernandez v. Texas 347 U.S. 475 (No. 406).

6. *Id.* at 13.

7. Mark Tushnet brings to light revealing comments regarding Mexican Americans made by Justice Tom Clark during a 1952 conference discussion of the segregation decisions:

> Clark, in a statement which, apart from its racism, is quite difficult to figure out, said that Texas "also has the Mexican problem" which was "more serious" because the Mexicans were "more retarded," and mentioned the problem of a "Mexican boy of 15 . . . in a class with a negro girl of 12," when "some negro girls [would] get in trouble."

Mark V. Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961, at 194 (1994). Tushnet adds, "These references capture the personal way the justices

understood the problem they were confronting, and the unfocused quality suggests that they were attempting to reconcile themselves to the result they were about to reach." *Id.* Clark, formerly the civil district attorney for Texas and a Truman appointee to the Court in 1949, was replaced on the bench by Thurgood Marshall in 1967. William Lockhart et al., Constitutional Rights and Liberties: Cases, Comments, Questions 1433–35 (8th ed. 1996).

8. Mario T. Garcia, Mexican Americans: Leadership, Ideology, and Identity, 1930–1960, at 30–31 (1989).

9. *Id.* at 43.

10. *Id.* at 48. The insistence by many in the Mexican American community that they be considered white was also fueled by prejudice harbored against blacks.

11. Reginald Horsman, Race and Manifest Destiny: The Origins of American Racial Anglo-Saxonism 210 (1981).

12. Arnoldo De León, They Called Them Greasers: Anglo Attitudes Toward Mexicans in Texas, 1821–1900, at 104 (1983).

13. Transcript of Hearing on Motion to Quash Jury Panel and Motion to Quash the Indictment, State v. Hernandez (Dist. Ct. Jackson Co., Oct. 4, 1951) (No. 2091), Record at 74–75.

14. *Id.* at 76.

15. Guadalupe San Miguel, Jr., Let Them All Take Heed: Mexican Americans and the Campaign for Educational Equality in Texas, 1910–1981, at 54–55 (1987).

16. *Id.* at 32, citing Paul S. Taylor, An American-Mexican Frontier: Nueces County, Texas (1934) (specific page attribution not given).

17. *Id.* at 51.

18. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

19. Brief for Petitioner at 19, Hernandez v. Texas, 347 U.S. 475 (No. 406).

48. Mexican Americans and Whiteness

GEORGE A. MARTINEZ

During slavery, the racial divide between black and white became a source of protection for whites—it safeguarded them from the threat of commodification. Even after slavery ended, the status of being white continued to be a valuable asset, carrying with it a set of assumptions, privileges, and benefits. Given this, it is hardly surprising that minorities have often sought to pass as white—that is, present themselves as white persons. They did so because they thought that becoming white ensured greater economic, political, and social security. Becoming white, they thought, meant gaining access to a panoply of public and private privileges, while it ensured that one would avoid being the object of others' domination.

In light of the privileged status of whiteness, it is instructive to examine how legal actors—courts and others—constructed the race of Mexican Americans. In *Inland Steel Co. v. Barcelona*,[1] an Indiana appellate court addressed the question of whether Mexicans were white. The court noted that, according to the *Encyclopaedia Britannica*, approximately one-fifth of the inhabitants of Mexico are whites, approximately two-fifths Indians, and the balance made up of mixed bloods, blacks, Japanese, and Chinese. Given this, the court held that a "Mexican" should not necessarily be found to be a white person.[2]

The Texas courts also considered the same question. In *In re Rodriguez*,[3] a Texas federal court addressed whether Mexicans were white for purposes of immigration. At that time, federal naturalization laws required that an alien be white to become a citizen of the United States. The court stated that Mexicans would probably be considered nonwhite from an anthropological perspective[4] but went on to note that the United States had entered into treaties with Mexico that expressly allowed citizens of that country to become citizens of the United States. Thus, the court held that Congress must have intended that Mexicans were white within the meaning of the naturalization laws. *In re Rodriguez* reveals how racial categories can be constructed through the political process. Through the give and take of treaty making, Mexicans became white.

A version of this chapter previously appeared as George A. Martinez, *The Legal Construction of Race: Mexican Americans and Whiteness*, 2 Harv. Latino L. Rev. 321 (1997). Originally published by the *Harvard Latino Law Review*.

Other cases show how politics operated to turn persons of mixed blood into whites or the opposite. In immigration cases, mixed-race applicants often failed to establish their whiteness. For example, in one case,[5] the court held that the son of a white Canadian father and an Indian mother was nonwhite and therefore not eligible to naturalize. In another,[6] the son of a German father and a Japanese mother was not a white person within the meaning of the immigration laws.[7] If these cases stand for the proposition that mixed-race persons were not white, Mexicans—a mixture of Spanish and Indian—should not have counted as white. The treaties nevertheless operated to turn them into whites.

The issue of the race of Mexican Americans also arose in connection with school segregation. In *Independent School District v. Salvatierra*,[8] plaintiffs sought to enjoin segregation of Mexican Americans in the city of Del Rio, Texas. There, the court treated Mexican Americans as white, holding that they could not be segregated from children of "other white races, merely or solely because they are Mexicans."[9] Significantly, the court did permit segregation of Mexican Americans on the basis of linguistic difficulties and migrancy.

Mexican American jury participation and exclusion cases also show how the race of Mexican Americans is constructed. For example, in *Hernandez v. State*, a Mexican American had been convicted of murder. Relying on cases holding that exclusion of blacks from jury service violated due process and equal protection, he sought to reverse his conviction on the ground that Mexican Americans had been excluded from the grand and the petit juries. The court recognized only two races as falling within the guarantee of the Fourteenth Amendment: the white and the black. It went on to hold that Mexican Americans are white for purposes of the Fourteenth Amendment. The court reasoned that to say that the members of the various groups composing the white race must be represented on grand and petit juries would destroy the jury system.[10] Since the juries that indicted and convicted the defendant were composed of members of his race—white persons—he had not been denied equal protection of the laws.[11]

In *Hernandez*, the Texas court controlled the legal meaning of the identity of Mexican Americans. There, Mexican Americans sought to assert a group identity—the status of being a distinct group—in an effort to resist oppression (i.e., being excluded from grand and petit juries). The Texas court refused to recognize that identity. Instead, it imposed a definition of "white" on Mexican Americans so as to maintain the status quo—that is, exclusion from juries.

On review, the U.S. Supreme Court also imposed a group definition on Mexican Americans. The court held in *Hernandez v. Texas*[12] that "persons of Mexican descent" are a cognizable group for equal protection purposes in parts of the country where they are subject to local discrimination—but not otherwise.[13] While a start in the right direction, this ruling leaves much to be desired. Defining Mexican Americans in terms of the existence of local discrimination hinders Mexican Americans in asserting their rights, because not every plaintiff can afford the expense of obtaining expert testimony to prove local prejudice.

Similarly, in *Lopez Tijerina v. Henry*,[14] the court refused to allow Mexican Americans to define themselves as a group. Plaintiffs sought to bring a class action on behalf of a class of "Mexican Americans" to secure equal educational opportunity in local schools. The court rejected the claim for class representation, holding that the term "Mexican

American" was too vague and failed to define a class within the meaning of Rule 23 of the Federal Rules of Civil Procedure, governing class actions. Since the class was not adequately defined, the court dismissed the complaint. Class actions permit large numbers of persons to sue if their interests are sufficiently related so that it is more efficient to adjudicate their rights in a single action. Thus, a class action may represent the only viable procedure for people with small claims to vindicate their rights. The *Lopez Tijerina* case, then, seems to be an example of a court refusing to allow Mexican Americans to define themselves so as to resist oppression. Subsequently, other courts permitted Mexican Americans to sue as a class by distinguishing *Tijerina* under the *Hernandez* rationale that local prejudice rendered the class sufficiently identifiable.

Federal agencies also constructed the race of Mexican Americans. For example, in 1930 the Census Bureau made the first effort to identify Mexican Americans. The bureau used the term "Mexican" to classify Mexican Americans, placing it under the rubric of "other races," which also included Indians, blacks, and Asians. According to this definition, Mexican Americans were not considered whites. Interestingly, the Mexican government and the U.S. Department of State both objected to the 1930 definition. By the 1950 census Mexican Americans were classified as whites. The Census Bureau experience presents yet another example of how politics have influenced the construction of a race. The Office of Management and Budget has set forth the current federal law of racial classification. In particular, Statistical Directive No. 15, which governs the collection of federal statistics regarding the implementation of a number of civil rights laws, classifies Mexican Americans as white.

White identity traditionally has served as a source of privilege and protection. Since the law usually recognized Mexican Americans as white, one might have expected that social action would have reflected the Mexican American's privileged legal status as white. That, however, was not the case. Legal recognition of the Mexican American as white had only a slight impact on private conduct. Far from having a privileged status, Mexican Americans faced discrimination very similar to that experienced by African Americans. Excluded from public facilities and neighborhoods and the targets of racial slurs, Mexican Americans typically lived in one section of town because they were not permitted to rent or own property anywhere except in Mexican colonies. Segregated in public schools, they also faced significant discrimination in employment. Earmarked for exclusive employment in the lowest brackets of employment, Mexican Americans were paid less than Anglo-Americans for the same jobs. Moreover, law enforcement officials have committed widespread discrimination against Mexican Americans, arresting them on pretexts and meting out harassment and penalties disproportionately severe compared to those imposed on Anglos for the same acts.[15] In all these respects, actual social behavior failed to reflect the legal norms that defined Mexican Americans as white. Although white as a matter of law, Mexican Americans did not earn anything like the bundle of privileges that Euro-Americans enjoyed on account of their race.

At one point, discrimination against Mexican Americans in Texas became so flagrant that the Mexican Ministry of Labor announced that Mexican citizens would not be allowed to go there. In response, the Texas legislature, on May 6, 1943, passed a resolution that established as a matter of Texas public policy that all Caucasians were entitled to equal accommodations. Subsequently, Mexican Americans attempted to rely on the resolution and sought to claim one of the traditional benefits of whiteness—freedom

from exclusion from public places. In *Terrell Wells Swimming Pool v. Rodriguez*,[16] Jacob Rodriguez sought an injunction requiring a swimming pool operator to offer equal accommodations to Mexican Americans. He argued that he could not be excluded from the pool on the basis of his Mexican ancestry because that would violate the resolution condemning discriminatory practices against all persons of the white race. The court refused to enforce the public policy on the ground that the resolution did not have the effect of law. Thus, Mexican Americans could not claim one of the most significant benefits of whiteness—freedom from exclusion from public places.

The legal construction of Mexican Americans as white thus stands as an irony—thoroughly at odds with the colonial discourses that developed in the American Southwest. As happened in other regions of the world, the colonizers engaged in epistemic violence—that is, produced modes of knowing that enabled and rationalized colonial domination from the standpoint of the West. Through discourse on the Mexican American, Anglo-Americans also reformulated their white selves. Anglo judges, as we have seen, did the same, ruling that Mexicans were cowhites when this suited the dominant group and nonwhite when necessary to protect Anglo privilege and supremacy.

NOTES

1. 39 N.E.2d 800 (Ind. 1942).
2. *Id.* at 801.
3. 81 F. 337 (W.D. Tex. 1897).
4. *Id.* at 349.
5. *In re* Camille, 6 F. 256 (1880).
6. *In re* Young, 198 F. 715 (1912).
7. *Id.* at 716–17. The court observed:

> In the abstractions of higher mathematics, it may be plausibly said that the half of infinity is equal to the whole of infinity; but in the case of such a concrete thing as the person of a human being it cannot be said that one who is half white and half brown or yellow is a white person, as commonly understood.

Id. at 717.

8. 33 S.W.2d 790 (Tex. Civ. App. 1930). *Salvatierra* was the first case to decide the issue of whether segregation of Mexican Americans in public schools was permissible.
9. *Id.* at 795.
10. 251 S.W.2d 531, 532, 535 (Tex. 1952).
11. *Id.* at 536. In *Sanchez v. State*, 243 S.W.2d 700 (1951), a Mexican American had been convicted of murder. He sought to challenge his conviction on the ground that his due process rights had been violated because the county had discriminated against Mexican Americans in the selection of grand jurors. The Texas court held that Mexican Americans are not a separate race but are white people of Spanish descent. 243 S.W.2d at 701. Thus, the defendant's rights were not violated because whites were not excluded from the grand juries.
12. 347 U.S. 475 (1954).
13. *Id.* at 477–79.
14. 48 F.R.D. 274 (D.N.M. 1969).
15. U.S. Commission on Civil Rights, Mexican Americans and the Administration of Justice in the Southwest (Summary) 2 (1970).
16. 182 S.W.2d 824 (Tex. Civ. App. 1944).

49. A Rage Shared by Law

Post–September 11 Racial Violence as Crimes of Passion

MUNEER I. AHMAD

September 11 will long be associated with unthinkable violence. The sheer magnitude of the terrorist attacks, the visual imagery of the collapsing towers of the World Trade Center, and the extensive media attention given to the victims have defined the violence of September 11 in unitary terms. But in the aftermath of the terrorist attacks, another form of violence spread across the country: In the days and weeks after September 11, over one thousand bias incidents against Arabs, Muslims, and South Asians came to light. Forming part of the subterranean history of September 11, these incidents included the murders of as many as nineteen people; assaults of scores of others; vandalism of homes, businesses, and places of worship; and verbal harassment of countless individuals. While the violence of September 11 itself is largely thought to have been incomprehensible, post–September 11 hate violence is remarkable precisely because it is something we can understand. Although condemned as individual acts of criminality, the phenomenon of hate violence toward Arabs, Muslims, and South Asians is one that appeared to need little explanation; it was accepted as a regrettable, but expected, response to the terrorist attacks. As early as September 12, 2001, major newspapers reported predictions of violence against these communities.

The physical violence exercised on the bodies of Arabs, Muslims, and South Asians accompanied a form of legal and political violence toward these communities as well. In the first two years after September 11, the United States developed a corpus of immigration law and law enforcement policy that by design or effect applies almost exclusively to Arabs, Muslims, and South Asians. These laws, operating in tandem with the individual acts of physical violence, produce a psychological violence and reracialize the communities they target as Muslim-looking foreigners unworthy of membership in the national polity.

It would be a mistake to consider hate violence against Arabs, Muslims, and South Asians a passing, or past, phenomenon. Such an assumption ignores the steady stream of violence directed against these communities long after September 11. Nearly two years

A version of this chapter previously appeared as Muneer I. Ahmad, *A Rage Shared by Law: Post–September 11 Racial Violence as Crimes of Passion*, 92 Cal. L. Rev. 1259 (2004). Originally published in the *California Law Review*.

after the terrorist attacks, this violence continued, including the stabbing in the back of a Muslim woman in Virginia while her attacker called her a "terrorist pig," the brutal beating of a Hindu pizza delivery man in Massachusetts who was mistaken for a Muslim, and a cross burning in front of an Islamic center in Maryland. Events such as these suggest that, rather than an isolated phenomenon, the racialization of Arabs, Muslims, and South Asians after September 11 is ongoing and constitutes a major shift in American racial conceptualization. Hate violence has played a major role in this process and continues to do so. Moreover, the very persistence of this violence suggests that it and underlying biases toward Arabs, Muslims, and South Asians have been normalized.

By situating post–September 11 violence within the history of hate violence in the United States, we can begin to understand how the recent experiences of Arabs, Muslims, and South Asians figure into an American tradition of violence as a means of racial differentiation. However, the violence directed toward Arabs, Muslims, and South Asians has been different in kind from many hate crimes in recent memory. For example, the killings of James Byrd and Matthew Shepard have been viewed as incomprehensible acts of violence. In contrast, although Americans have condemned the killings of Arabs, Muslims, and South Asians after September 11, these killings have been understood as the result of a displaced anger, one with which many Americans have sympathized and agreed. Borrowing from criminal law, the hate crime killings before September 11 were understood as crimes of moral depravity, while those since that date have been understood as crimes of passion. Whereas crimes of moral depravity are devoid of any justification whatsoever, crimes of passion are treated as morally understandable though still illegal transgressions.

Seen in this light, post–September 11 violence reveals the role that conceptions of emotion, honor, loyalty, violation, and betrayal have played in the national psychology after the terrorist attacks and provides insight into the role that September 11 has played in the national discourse on immigration. Moreover, it suggests that post–September 11 violence constituted an attempt to protect male honor, which in turn helps explain how violence against Arabs, Muslims, and South Asians has been normalized. Finally, an understanding of the genesis of hate violence against these groups sheds light on the role of the state in furthering this violence and on the racializing impact of such collective violence on Arab, Muslim, and South Asian communities.

Private and Public Racial Violence in the Aftermath of September 11

Two forms of racial violence swept across the United States in the aftermath of September 11. The first concerned what traditionally would be classified as private violence: violence enacted by one (or more) private actor upon another, without direct state participation. This is typified by the thousands of physical attacks carried out by individuals against Arabs, Muslims, and South Asians after the terrorist attacks. The second form of violence is traditionally deemed public, because of the direct participation of state actors. After September 11, this took the form of a broad range of governmental policies that targeted Muslim-looking people.

Feminist insight counsels deep skepticism of public-private distinctions because spheres of privacy are frequently the products of state action (or inaction) and because

the state is itself selectively constitutive of private concerns. Inquiry into post–September 11 violence provides fresh evidence for such skepticism, because the supposedly public and private violence enacted against Arabs, Muslims, and South Asians, far from being separate and discrete phenomena, operate in tandem.

Private Racial Violence

In the immediate aftermath of the terrorist attacks, Arab, Muslim, and South Asian communities in the United States experienced a wave of violence far greater in magnitude than they had ever experienced before. In total, over one thousand separate bias incidents came to light in a period of eight weeks, and though the rate of new incidents has slowed, it continues today, fueled most recently by the war in Iraq. Chief among the incidents were the murders of as many as nineteen people, including Balbir Singh Sodhi, Waqar Hasan, Adel Karas, Saed Mujtahid, Jayantilal Patel, Surjit Singh Samra, Abdo Ali Ahmed, Abdullah Mohammed Nimer, and Vasudev Patel. In addition, these incidents have included the fire bombings of mosques, temples, and *gurdwaras* (Sikh temples); assaults by fist, gun, knife, and Molotov cocktail; acts of vandalism and property destruction against homes and businesses; and innumerable instances of harassment and intimidation. The actual number of incidents is impossible to know, as racial shame, uncertain immigration status, and language barriers inhibit many victims of hate crimes from ever reporting them.

Public Racial Violence

This physical violence against Arabs, Muslims, and South Asians, on its face private, vigilante, and extralegal, accompanied a quickly developed and broadly applied governmental policy of racial profiling of these communities. A term that on September 10 described the phenomenon of police stops of African Americans and Latinos for pretexts, "racial profiling" came suddenly to apply to the singling out of Arabs, Muslims, and South Asians as terrorism suspects after September 11. Whereas 80 percent of Americans opposed racial profiling before September 11, after the attacks almost the same percentage favored it for those assumed to be Arab or Muslim.

Although recent guidelines curb police profiling, a gaping exception allows "law enforcement activities involving threats to national security or the integrity of the nation's borders."[1] This loophole explicitly authorizes federal law enforcement officials, including airport screeners and border personnel, to consider race and ethnicity in the course of "matters of national security, border integrity or the possible catastrophic loss of life."[2] The result is to ban racial profiling in counterterrorism efforts of everyone except Arabs, Muslims, and South Asians, because the profiling of these communities is almost always on the purported basis of national security.

The national security exception is particularly troubling in light of the federal government's abuses in its antiterrorism investigations and prevention activities, as documented by the Office of the Inspector General (OIG), the internal watchdog of the Department of Justice (DOJ). Having reviewed the cases of 762 noncitizens (almost all of whom are believed to be Arab, Muslim, or South Asian) detained during the first eleven months after September 11, the inspector general found that the FBI and Immigration and

Naturalization Service (INS, now known as Immigration and Customs Enforcement) "made little attempt to distinguish" between immigrants who had potential ties to terrorism and those who were merely swept up by chance. The OIG found further that the INS failed to serve the detainees with timely notice of the charges against them, DOJ improperly detained many even after immigration judges had ordered them removed, and many were subjected to "unduly harsh" conditions of detention, which included "a pattern of physical and verbal abuse." Two conclusions can be drawn from the report. First, in each of these putative terrorism detentions, the government has failed to allege a single concrete terrorism connection. Not one detainee has been charged with terrorist activity. Second, by treating all Arabs, Muslims, and South Asians caught up in the federal dragnet as presumptively terrorists, the government violated the due process rights of hundreds, if not thousands, of immigrants merely because they looked like terrorists.

Although airplane and airport incidents have been egregious, the government's practice of secret arrests has been even more troubling. Within days after the terrorist attacks, the federal government began a nationwide dragnet, arresting and detaining between twelve hundred and two thousand Arabs, Muslims, and South Asians. Many of these individuals were held as material witnesses or on minor immigration violations, and neither their names nor the nature of the charges against them have been disclosed to the public. Even the exact number of such arrests is unknown, because the government has refused to release it. As the OIG report makes clear, many of the people caught up in this investigative sweep had no connection to terrorism. Rather, they were Arab, Muslim, and South Asian men encountered coincidentally in the course of the government's September 11 investigation. In a separate program instituted after September 11, the government called in for "voluntary" interviews with the FBI eight thousand Arab, Muslim, and South Asian men, some of whom were deported thereafter.

The government's most robust racial profiling practices have come in the immigration arena, most often on a theory of preventive law enforcement. To prevent future terrorist attacks, the government has committed to using every available tool, including the immigration laws. Where noncitizens are concerned, immigration law provides the government with far greater latitude to engage in preventive practices than does the criminal law. The Supreme Court has long held that deportation is not punishment and therefore immigration proceedings are civil rather than criminal. The rules of evidence do not apply, and the government may use secret evidence against the noncitizen. In light of these strategic advantages, it is not surprising that among the thousands of arrests that have taken place in the "war on terrorism," only a handful have come in connection with terrorism criminal prosecutions, while hundreds, if not the majority, have been based on ordinary immigration violations.

The government's racial profiling in immigration enforcement stands out with stunning clarity in official statistics, which show a dramatic increase in the numbers of immigrants from Muslim countries apprehended by the INS. In a one-year period, the number of deportable Pakistanis apprehended increased 228 percent. The number of Saudis increased by 239 percent, Algerians by 224 percent, Egyptians by 83 percent, and Moroccans by 76 percent. The increase in the number of immigrants from Muslim countries removed (as opposed to merely apprehended) during this time is similarly dramatic: 129 percent for Pakistanis, 113 percent for Saudis, 111 percent for Algerians, 199 percent for Egyptians, and 229 percent for Moroccans. Although many variables

contribute to the number of immigrants from a particular country apprehended in a given year, a clear trend favors immigration enforcement against Arabs, Muslims, and South Asians, even at a time when the total number of immigrants apprehended and deported has decreased significantly.

The ostensibly private killings and other bias incidents discussed earlier are clearly forms of hate violence, but governmental racial profiling should be understood as such as well. Indeed, physical violence against Arabs, Muslims, and South Asians and their racial profiling are best understood as different facets of the same social, political, and cultural phenomena. Each is constitutive of the other: We might view physical hate violence as the end product of racial profiling's flawed logic, just as racial profiling may be viewed as a form of violence—whether psychic or physical—flowing from bias.

The Construction of Muslim-Looking People and the Logic of Fungibility

Individual acts of hate violence and governmental racial profiling have helped create a new racial construct: the Muslim-looking person.[3] The logic of post–September 11 profiling turns on equating being Muslim (or Arab or Middle Eastern) with being a terrorist. For the perpetrator of post–September 11 hate violence, the error lies in assuming that because all of the September 11 terrorists were Arab and Muslim, all Arabs and Muslims must be terrorists themselves or terrorist sympathizers. The logic of governmental profiling is only slightly more nuanced because (1) all of the September 11 terrorists were Arab and Muslim, (2) most Arabs are Muslims, and (3) the terrorists claim religious motivation for their actions, (4) all Arabs and all Muslims are likely to be terrorists.

Like other instances of racial profiling, this construct relies on a reductive equation of certain perceived identity characteristics with specific suspect conduct. Under earlier profiling regimes, for example, African American and Latino appearance was equated with criminality, Latino appearance with illegal border crossing, and Asian appearance with treason. In each case, the result is to treat all people appearing to share a certain identity characteristic as fungible with some object—real or imagined—of suspicion.

Despite its expression in religious terms and its purported concern with violent activity, the Muslim-looking construct is neither religion nor conduct based. Rather, the profile has considerable, if not predominant, racial content and is preoccupied with phenotype rather than faith or action. As with previous regimes of profiling, this one results in gross overbreadth because the regime's ascription of identity characteristics dictates the application of the profile. The racial dimension of the construct allows it to capture not only Arab Muslims, but Arab Christians, Muslim non-Arabs (such as Pakistanis or Indonesians), non-Muslim South Asians (Sikhs, Hindus), and even Latinos and African Americans, depending on how closely they approach the phenotypic stereotype of the terrorist. "Looking," not "Muslim," is the operative word in "Muslim-looking."

The profiling effected by hate violence depends on two different assumptions of fungibility. The first associates all Muslims with the terrorists who perpetrated the September 11 attacks. The second identifies all exotic-looking people as Muslims. The end result is to view Muslim-looking people as stand-ins for the terrorists themselves. The logic of

these twin fungibilities is, of course, devoid of logic at all and appears to stem from fear, ignorance, and preexisting racisms rather than any rational decision making.

Governmental profiling is similarly flawed in its logic. One might argue that governmental profiling is based on neither religion nor race but national origin. While the government's targeted immigration enforcement has relied nominally on national origin rather than race, the government's application of these purportedly national-origin-based policies has ensnared countless individuals who are not citizens of the government's list of designated countries. Many Muslim-looking Canadians such as Maher Arar have been caught up in the government's dragnet and deported to countries like Syria.[4] The Muslim-looking profile may be heterogeneous to some degree, featuring racial, religious, and national-origin characteristics, but race, and to a lesser extent religion, predominates over national origin in frequent and troubling ways. Moreover, governmental profiling has relied on assumptions of fungibility in much the same way that hate violence after September 11 has.

At common law, the heat of passion defense is available only if there has not been a cooling-off period of sufficient duration between the provocation and the subsequent homicide. Only when such a period does not intervene is the provocation deemed adequate to merit mitigation. The law bases this doctrinal requirement on the assumption that "[f]or the reasonable man, at least, passion subsides and reason reasserts its sway as the provoking element grows stale."[5] More than eleven years after the September 11 attacks, it remains to be seen whether and to what extent reason will reassert its sway. What is clear is that passion, and not reason, has driven much of the governmental and individual engagement in the war on terrorism, and that such passion, shared by many and endorsed by law, has been asserted to justify violence to the bodies and psyches of Arabs, Muslims, and South Asians. However comprehensible rash and unthinking behavior might have seemed in the immediate aftermath of the terrorist attacks, the time now elapsed is a sufficiently long cooling-off period such that anger, fear, and betrayal can no longer constitute governing principles for the nation, its government, or its citizens. Instead, the passage of time and the distance we have gained from the emotional confusion created by the terrorist attacks demand that we engage in a more considered analysis of how best to confront the very real threats facing the country today.

The predictions made immediately after September 11 that Arabs, Muslims, and South Asians would encounter a backlash of hate violence reflected an implicit understanding of the uncontrollable power of emotion in times of crisis. But it is not just emotion, or more properly emotionalism, in its generic sense that was understood as a predictable reaction to the terrorist attacks. Rather, it was a racially targeted emotion lacking rational support. It would be one thing if, in the aftermath of the attacks, large numbers of people committed random acts of violence, but it is quite another when the vector of that violence has racial direction. This can be distilled even further to a recognition of the enduring operation of racism, even at a time when many people (and courts) are reluctant to acknowledge any significant role of race in contemporary society. Violence against Arabs, Muslims, and South Asians and their resulting reracialization remind us of the persistence of race and racism in American law, culture, and society. So ingrained is the American recourse to racial explanation that it has taken the form not of deliberate decision making but of impulse, reflex, and passion. Society's

ready understanding of the crimes of racial violence following September 11 demonstrates how far our nation is from recognizing and addressing the operation of race. We will have made meaningful progress in healing our persistent racisms when, in the aftermath of national tragedy, racial scapegoating is not expected.

NOTES

1. U.S. Dep't of Justice, Guidance Regarding the Use of Race by Federal Law Enforcement Agencies (June 2003), http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.

2. *Id.*

3. See Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 Mich. J. Race & L. 1441, 1443–44 (2002); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575, 1576, 1580 (2002) (describing a new category, persons who appear to be Arab, Muslim, or Middle Eastern).

4. See Anthony DePalma, *Canadian Immigrant Arrested at J.F.K. Is Deported to Syria*, N.Y. Times, Oct. 12, 2002, at A14; Daniel J. Wakin, *Tempers Flare After U.S. Sends a Canadian Citizen Back to Syria on Terror Suspicions*, N.Y. Times, Nov. 11, 2002, at A9; see also Sheema Khan, *An Outrage Against Canada*, Toronto Globe & Mail, Oct. 16, 2002, at A17 (describing Arar case and collecting stories of other Canadian citizens caught in the U.S. immigration system after September 11). The danger became so severe that the Canadian government took the extraordinary step of issuing a travel advisory for its citizens born in Iraq, Syria, Yemen, Pakistan, and Saudi Arabia who were contemplating travel to the United States.

5. See Model Penal Code §210.3 cmt. 5(a) at 59 (1962).

50. In Defense of the Black-White Binary

Reclaiming a Tradition of Civil Rights Scholarship

ROY L. BROOKS AND KIRSTEN WIDNER

One of the central tenets of several legal theories is that legal scholars, including black scholars, and civil rights law in general should reject the "black/white binary."[1] This binary, according to its critics, represents the view that "blacks constitute the prototypical minority group" in today's society or that "the black-white relation [is] central to racial analysis" today. Looking beyond the black ethos, critics of the paradigm see a hegemonic power structure in American society that allows insiders (essentially, straight white males) to dominate not only blacks and other people of color but also women and homosexuals. Thus these critics believe that each minority group should be treated pari passu—each belonging to a single group of outsiders.

We know of no respectable African American scholar who would argue that nonblack racial groups should be relegated to second-class civil rights treatment. Instead, these scholars simply focus on what Orlando Patterson refers to as "America's historic emphasis on black-white relations" (hereinafter referred to as the black-white binary). This historic emphasis provides important context in the ongoing political and academic discourse on race and does not diminish the very real and important needs and experiences of other subordinated groups.

Furthermore, by arguing that black scholars should abandon the black-white binary (i.e., not focus on white-on-black racial problems), critical theorists, most of whom are nonblack, are unintentionally disrespecting a venerable tradition of black scholarship. African American scholars as diverse as Derrick Bell, the father of critical race theory; Michael Eric Dyson and Cornel West, civil rights liberals; Glenn Loury, a civil rights moderate-conservative; and John Hope Franklin, perhaps the greatest African American scholar of the last half of the twentieth century (whose public disagreement with an Asian scholar over the black-white paradigm was highly publicized) not only write within this tradition but also have helped shape it. Equally essential to this scholarly tradition are the enduring works of the late Judge A. Leon Higginbotham, the nation's

A version of this chapter previously appeared as Roy L. Brooks and Kirsten Widner, *In Defense of the Black/White Binary: Reclaiming a Tradition of Civil Rights Scholarship*, 12 Berkeley J. Afr.-Am. L. & Pol'y 107 (2010). Originally published in the *Berkeley Journal of African-American Law & Policy*.

first scholarly African American judge, and the seminal writings of W.E.B. Du Bois, the nation's first (and still greatest) civil rights scholar. This tradition of African American scholarship laid the foundation for the NAACP's successful litigation strategy against school segregation.

In addition to civil rights scholarship, criticism of the black-white binary extends to civil rights law. Two authors posit the following scenario:

> Imagine, for example, that Juan Dominguez, a Puerto Rican worker, is told by his boss, "You're a lazy Puerto Rican just like the rest. You'll never get ahead as long as I'm supervisor." Juan sues for discrimination under a civil rights–era statute designed with blacks in mind. He wins because he can show that an African American worker, treated in a similar fashion, would be entitled to redress. But suppose that Juan's coworkers and supervisor make fun of him because of his accent, religion, or place of birth. An African American subjected to these forms of discrimination would not be able to recover, and so Juan would go without recourse.

We contend that the critics of the binary have misread the extant law. In general, courts consider that discrimination on the basis of a foreign trait, such as accent, is actionable under Title VII as discrimination based on national origin. Our most important civil rights laws apply to all racial groups, including whites, without any precondition that nonblack racial groups analogize their situation to that of blacks. The Reconstruction amendments to the Constitution—the Thirteenth, Fourteenth, and Fifteenth Amendments—which provide the foundation for modern civil rights law, the 1964 Civil Rights Act, and modern-day case law, all reach far beyond the black-white binary. Civil rights statutes enacted in the decades after the 1964 Civil Rights Act have been responsive to nonblacks, including the disabled, women, and older workers. Civil rights law recognizes multiple binaries rather than a single one.

African American scholars have not suggested that nonblack racial groups should be accorded second-class civil rights status. Rather, they embrace the multiple-binary approach reflected in civil rights law. That black scholars focus on white-on-black racial problems in their scholarship is natural given their experiences as black Americans and the tradition of black scholarship. The black-white binary makes very good sense to African Americans on the basis of their racial reality. Those who would reject the binary, and would have black scholars do likewise, have simply ignored this fact of life. Why can't binaries coexist in civil rights scholarship as they do in civil rights law?

Contrary to what they claim, critics of the black-white binary are, in reality, not arguing for the dissolution of all binaries but instead are arguing for a particular binary. They seek to replace the black-white binary in civil rights scholarship with an insider-outsider binary. The latter not only reflects a monolithic view of racial identity; it also subordinates African Americans by trivializing the black ethos and presuming to tell African American scholars what to write about.

Criticism of the black-white binary is, then, at bottom a claim regarding racial priority. While some critics of the binary might have hoped that the priority issue could be avoided by simply moving beyond the black-white binary, that simply has not been the case. Hence, the questions become: Does it make moral, historical, political, or

sociological sense to give priority to African Americans in the realm of civil rights when their interests clash with the interests of other civil rights groups? Have the descendants of slaves earned the right to claim priority because they have suffered the longest and still remain at "the very bottom of the well," to borrow a metaphor from critical theory? As former president Bill Clinton put it, "If we can address the problems between black and white Americans, then we will be better equipped to deal with discrimination in other areas." While saving until another day the construction of a formula that might facilitate the ranking of civil rights claims in particular situations, we argue that any such formula should not necessarily favor African Americans merely because they are at the very bottom of the well. However, such a formula should take into account the relative severity and duration of each group's deprivation of rights or equality in various situations.

Civil Rights Law

Devon Carbado correctly notes that "[t]he Black/White paradigm critique is almost always employed to suggest that non-Black people of color have been harmed by the Black/White paradigm. Critics argue that, as a result of the Black/White paradigm, antidiscrimination laws and antidiscrimination efforts more broadly do not always respond to racial harms Asian Americans, Latinas/os, and Native peoples experience."[2] As an illustration of this doctrinal subordination, Carbado points to three Supreme Court cases.

In the first case, *People v. Hall*, decided in 1854, the California Supreme Court reversed the murder conviction of a white defendant secured by the testimony of Chinese witnesses. The testimony violated a state statute that provided "no black or mulatto person, or Indian shall be allowed to give evidence for or against a white person." Despite the court's interpretation of the statute as including nonblacks in its scope, Carbado reads the court's reasoning as an affirmation of the black-white binary, stating, "Under the Court's view, the Chinese witnesses were, for purposes of California law, Black." Under California's racist statute, as construed by the court, the opposite of white was not black, mulatto, or Indian but "inferior races"—in other words, nonwhites—which it sought to exclude so as to protect the white superior race.

But even assuming a black-white binary existed in this case, that binary has not been brought forth into modern civil rights law. Soon after the Civil War, the witness statute and *People v. Hall* were overturned by both state law and federal law.

Carbado cites *Ozawa v. United States*, a 1922 Supreme Court case, next. Unlike the statute in *Hall*, the statute in question in this case was crafted in what Professor Carbado calls "Black/White racial terms"—this immigration statute limited naturalization to aliens who were "free white persons" and to aliens of African descent. As the Court noted, a "'White person,' as construed by this Court and by the state courts, means a person without negro blood." A person of Japanese descent who had been living in the United States for twenty years applied for and was denied naturalization under the statute because he was neither "a free white person" nor of African descent. Binary disadvantage here is clear—the law did not provide relief for a racial minority who does not fit within the black-white paradigm. But, again, the black-white binary in naturalization has no bearing on race relations today. This binary was abandoned in 1952 with the passage of the Immigration and Naturalization Act.

The final evidence of binary disadvantage presented by Professor Carbado is the Supreme Court's opinion in *Gong Lum v. Rice*. In this 1927 decision, the Court upheld a Mississippi constitutional provision that required separate schools for children of the white and colored races. Martha Lum, who argued that "she is not a member of the colored race nor is she of mixed blood, but that she is pure Chinese," was denied the right to attend an all-white high school in her town. The Court accepted the reasoning of the state supreme court—the state constitution "divided the educable children into those of the pure white or Caucasian race, on the one hand, and the brown, yellow and black races, on the other hand, and therefore . . . Martha Lum of the Mongolian or yellow race could not insist on being classed with the whites under this constitutional provision."[3] Professor Carbado sees a black-white binary at work here. Although the term "colored" was often used synonymously with the term "black" or "Negro" during Jim Crow, it took on a broader meaning in Mississippi. It incorporated several racial groups: "the brown, yellow and black races." Thus, the binary was colored-white, not black-white. Indeed, people of color were grouped together in opposition to whites—a grouping that has an interesting familiarity to critical theory today. But the more important point is that *Gong Lum* is no longer good law. Consequently, the discussion of a black-white binary based on this case is purely academic, even if it were correct.

There is no black-white binary in civil rights law today. To the extent that one existed in the past, it was the exception rather than the rule. The Reconstruction amendments, Reconstruction statutes, and the 1964 Civil Rights Act, arguably the most important civil rights statute in the history of our republic, were all crafted symmetrically rather than asymmetrically. The Thirteenth Amendment bans slavery in general, not just black slavery. The Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Fifteenth Amendment guarantees that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Similarly, the Civil Rights Act of 1866 (popularly known as Sections 1981 and 1982) gives contractual rights to "[a]ll persons within the jurisdiction of the United States" and property rights to the same class of persons. Furthermore, the Civil Rights Act of 1871 (also known as Sections 1983 and 1985(3)) provides a right of action to "[e]very person" whose federal rights are denied under the color of state law and to "any person or class of persons" victimized by a conspiracy to violate certain federally protected rights. Finally, the 1964 Civil Rights Act prohibits discrimination not just on the basis of being black but on the basis of the broader categories of "race, color, religion, sex, or national origin." Although inspired by the African American struggle for racial equality, these laws reach beyond any supposed black-white binary.

Professor Richard Delgado suggests that the courts require Latinos/as (and other racial minorities) to analogize their experiences to those of blacks as a precondition for gaining the benefit of these civil rights laws—a requirement that hinders the assertion of Latino/a civil rights claims. However, the law does not require other racial minorities to analogize their situations to blacks but rather to show that they have been discriminated against because of their relationship to a category larger than blacks. Many cases illustrate this point. In *Saint Francis College v. Al-Khazraji*, the Supreme Court held that Arabs are entitled to protection under an important civil rights statute, Section 1981,

not because they were deemed to be "black" or "black-like," but because they were considered to be a racial group when Section 1981 was enacted after the Civil War. Using similar reasoning, the Court extended the same protection to Jews in *Shaare Tefila Congregation v. Cobb* and to whites in *McDonald v. Santa Fe Trail Transportation Co*. Affording these groups civil rights protections contradicts Delgado's argument because their experiences are far from being analogous to those of African Americans.

Similarly, Latinos/as or Hispanics, who receive civil rights protection, are not "black" or "black-like." While blacks in the United States constitute a single race and many ethnicities (e.g., Nigerian, Jamaican, and African American, or slave descendant), Latinos/as constitute a single ethnicity and many races (some have white skin, while others have dark skin; some look indigenous to the Americas while others look Asian). All have a shared heritage, including a common language. Also, some disadvantages, such as the lack of English language proficiency, are not race based but ethnicity based. Therefore, certain employment practices based thereon are actionable not because the lack of language proficiency is analogous to disadvantages suffered by African Americans but rather in spite of such analogy. In an attempt to speak to the unique needs of Latinos/as and other language minorities, Title VII of the 1964 Civil Rights Act employs a language binary. Thus, Latinos enjoy civil rights based on language, which is a protection that most African Americans, because they are not a language minority, do not enjoy.

In fact, most of the civil rights statutes enacted since the 1964 Civil Rights Act have embraced binaries other than the black-white binary. These binaries include disabled-able, women-men, immigrant–U.S. born citizen, and older-younger. Even though the experiences of African Americans might have inspired these provisions, none is black specific or deprives Latinos/as or any other nonblack racial group of civil rights protection. No racial minority loses legal protection as a result of a supposed black-white binary, because civil rights law includes multiple binaries.

African American Scholarship

Well-respected African American scholars who write within the black-white binary, such as Derrick Bell, Charles Ogletree, Cornel West, and Glenn Loury, support civil rights law's recognition of multiple binaries. Critical theorists argue that black scholars should abandon the black-white binary for several reasons. Three of the most compelling are (1) when African-American scholars focus on their own racial group, they ignore the histories of other racial groups and distort our understanding of civil rights history and racism; (2) the civil rights interests of African Americans and other racial groups (especially Latinos/as) converge, creating a natural alliance that is undermined by a focus on the black-white binary; and related to that, (3) "black uniqueness"—"the notion that Black people are and historically have been the racially subordinated amongst the racially subordinated"—is untenable.

Ignoring Other Racial Histories

The idea that African Americans should incorporate other racial histories in their scholarship so as not to ignore those histories is thinly supported. Asian and Latino/a scholars, for example, do not need African American scholars to validate their work, which is

exceptionally good. Similarly, although incorporating other racial histories into African American scholarship may enrich one's perspective on racism, this exercise is typically not a prerequisite for understanding civil rights or the black ethos—nor is it necessary for addressing black issues.

Authors who write about their own racial experiences are not necessarily signaling ignorance about other racial experiences. These writers are merely taking advantage of their unique position to get the story out more accurately and with greater insight. As Harold Cruse put it in his seminal work *The Crisis of the Negro Intellectual*, if African American intellectuals do not focus on "Negro life," who will?

Natural Alliance

Delgado argues that binary thinking can harm the group whose interest it places at the center. It can, for example, pit one disadvantaged group against another to the detriment of both. This opposition can impair a group's ability to forge useful coalitions and to learn from other groups' successes and failures. What minority groups should do instead, Delgado argues, is set up a secondary market in which they negotiate selectively with each other. This market would take the form of exchanging support for issues important to various groups, creating win-win solutions whenever possible. Thus, a nonbinary framework allows racial minorities to approach whites in full force.

Although Delgado's arguments are not without merit, they are based on an unproven assumption that identities among racial minorities are sufficiently monolithic so as to make interracial alliances natural. "The idea would be," Professor Delgado asserts, "for minority groups to assess their own preferences and make tradeoffs that will, optimistically, bring gains for all concerned." However, as Professor Carbado points out, "Non-Black people of color have not always been interested in identifying themselves with the Black or marginalized side of the Black/White paradigm. In fact, there are moments in American history when certain Asian Americans and Latinas/os have attempted to achieve equality by asserting that they are not Black or like Blacks, and/or that they are White." Costs as well as advantages attend occupancy of both ends of the polarity—the black (or subordinated) end as well as the white (or privileged) end—and nonblack racial groups have often been able to avoid the costs and exploit the advantages. Self-interest is a powerful motivating force.

Thus, it may be, as Professor Delgado maintains, that all binaries, including the black-white binary, are narrow nationalisms calculated to cut the most favorable possible deal with whites—a possibility that African Americans can ill afford to ignore. Therefore it is important to explore this possibility more closely to get a sense of how risky it would be for African Americans to abandon the black-white binary—which spawned the scholarly tradition and political strategy that together have been responsible for destroying Jim Crow and forging a racial consciousness from which all racial groups have benefited.

When one looks closely at the natural-alliance theory—more accurately, the presumed-alliance theory—one comes to the unhappy conclusion that the theory founders on the shoals of racial reality. In a world of limited resources, achieving progress in one group's agenda can come at the expense of that of another. The game is, indeed, often zero sum. The racial dynamic between blacks and Latinos/as, the latter being the most persistent critics of the black-white binary, well illustrates this point.

Consider education. Blacks and Latinos/as both hope to see dramatic improvements in the quality of schools their children attend. For blacks, this means increasing educational funds to their schools and providing curricular services that address issues of racial pride, self-esteem, and the other unique needs of African American students, especially those of young black males. Likewise, for Latinos/as, improving the quality of education for their children means focusing on the special needs of those children, including bilingual education and expanded coverage of Latin American history, which is often tied to immigration concerns. With the nationwide crisis in public school funding, the pool of state and federal funds as well as other resources available to meet these goals is extremely limited. Consequently, funds earmarked for one group may have to be diverted from another.

Historical relations between these two groups are also an obstacle to building an effective alliance. Latinos/as have used laws that sprang from white-on-black oppression to further their own civil rights agenda, taking advantage of the marginalized end of the binary but not always returning the favor by supporting African Americans in their own struggles. Further, Latinos/as have at times exploited the privileged end of the black-white binary, not just gaining a "harmless" group benefit but also actively oppressing African Americans. For example, Nicolas Vaca observes that, in southern Florida, African Americans, "trapped in Miami's Latino vortex," view

> themselves not only as indigenous to the region but also as the leaders and thus rightful beneficiaries of the advances made during the civil rights movement of the 1960s. However, beginning in the 1960s with the arrival of Cubans in significant numbers, they stood witness to a transformation of Miami that eventually engulfed them in a Latino maelstrom.[4]

As one African American resident of Miami observed, while white Americans "are racists by tradition and . . . at least know that what they're doing is not quite right, . . . Cubans don't even think there is anything wrong with it."

The racial conflict between African Americans and Latinos/as is not confined to Miami. In California, African Americans and Latinos/as have clashed over myriad issues. For example, blacks have persistently charged that unauthorized Mexican immigrants take jobs away from them, because white employers feel more comfortable hiring even unauthorized Latinos/as than they do African Americans. A report issued by the General Accounting Office shows that janitorial firms in downtown Los Angeles have almost entirely replaced the unionized African American workforce with a nonunionized one dominated by immigrants.

Because of the employment implications of undocumented immigration, the NAACP, as well as the AFL-CIO, supported the employer sanctions provision under the Immigration Reform and Control Act of 1986. As one NAACP official said, the sanctions were a way "to keep undocumented aliens from taking the food from black children." African Americans "were competing more directly with Latinos than with any other ethnic group."

In addition, consider political struggles between African Americans and Latinos/as in Los Angeles. A case in point is the 2001 mayoral race, in which blacks voted for a white candidate instead of a Latino whom they believed to be more interested in strengthening Latino/a political and economic power than in improving the plight of blacks. For

similar reasons, the NAACP objected to the inclusion of Latinos/as in the 1975 Voting Rights Extension. As a black columnist put it, "Though we pride ourselves on our leadership role in civil rights, paradoxically, we guard the success jealously. 'We're the ones who marched in the streets and got our heads busted. Where were they? But now they want to get in on the benefits.'"

Similar differences mark African Americans and other racial minorities. For example, some Asians have sought to exploit the privilege pole of the black-white binary at the expense of African Americans. As Professor Frank Wu observes, "Racial groups are conceived of as white, black, honorary whites, or constructive blacks." He also reminds us that some Asians have benefited from their "honorary whiteness" and in so doing might have "perpetuat[ed] the problem of race."

This is not to say that African Americans and other racial groups have never successfully collaborated or can never form mutually beneficial coalitions. As Professor Juan Perea correctly points out, *Keyes v. School District No. 1, Denver, Colorado*, a school desegregation case, provides an example of interest convergence. Likewise, *Mendez v. Westminister School District of Orange County*, a Mexican American school desegregation case, shows that African Americans can support Latino/a interests when these converge with African American interests. But the crucial question is what happens when the interests clash rather than converge. As Latinos/as continue to gain political strength and as both Latinos/as and Asians continue to become more integrated into the mainstream culture (becoming more "white"), will they find it more advantageous to forge coalitions with whites, whose experiences and interests they now share, rather than with African Americans, whose experiences and interests have become opposed to theirs? For critical theorists' rejection of the black-white binary to be truly persuasive, they will have to answer these questions.

Black Uniqueness

Critical theorists reject the black-white binary in large part because they reject the notion that African Americans have always been and continue to be the most racially subordinated group in America. Professor Delgado, for example, argues that all racial minorities must avoid "the [s]iren [s]ong of [u]niqueness." According to Delgado, the seductive idea of uniqueness can "predispose a minority group to believe that it is uniquely victimized and entitled to special consideration from iniquitous whites." However, this argument runs contrary to history, as documented by a large body of research. Although rarely stated in public, substantial empirical evidence suggests that African Americans are unique and, hence, warrant separate (but not necessarily dominant) attention. Consider slavery and Jim Crow, the subordination of African Americans versus Native Americans, lynching, and what can be termed the lost American dream.

Slavery and Jim Crow

To begin with, African Americans are the only group to arrive in this country not on but under Plymouth Rock. African Americans have encountered and continue to encounter unique disadvantages that stem from the very way they were brought into American society. Unlike most immigrants who came to the United States voluntarily,

blacks were imported in huge numbers as slaves. Although slavery had existed for thousands of years, the Atlantic slave trade was not slavery as usual:

> Slavery in the Americas introduced the troubling element of race into the master/slave relationship. For the first time in history, dark skin became the social marker of chattel slavery. And, as a means of justifying this new face—a black face—given to an ancient practice, the slavers and their supporters created a race-specific ideology of condemnation.[5]

This new form of slavery was so much a part of colonial America that the founders addressed it in multiple provisions of the U.S. Constitution. Thus, the subjugation of African Americans was written into the fabric of our nation from the very beginning—a situation that no other group has faced.

Critical theorists often dismiss African American uniqueness by noting that other racial minorities have experienced many of the injustices blacks have faced. For example, Professor Perea asserts:

> Mexican Americans were also segregated in separate but unequal schools, were kept out of public parks by law, were refused service in restaurants, were prohibited from attending "White" churches on Sundays, and were denied burial in "White" cemeteries, among all of the other horrors of the separate but equal scheme.[6]

While it is true that all racial minorities, particularly Latinos/as, have been victims of white oppression, these racialized experiences are nonetheless quite different from what African Americans have experienced. In our view, the differences between African Americans and other racial minorities are so great as to outweigh the similarities.

Comparing Historical Experiences of African Americans and Native Americans

One could plausibly argue that Native Americans were more subordinated than African Americans in the past. The government's protracted Indian wars reduced the pre-Columbian Native American population from an estimated 1.2–5 million in what is now the United States to an estimated 600,000 by 1800. Yet this atrocity came more as the result of war and disease and whites' desire for territory than through racism. Native Americans were held in higher esteem by our government.

Though the American government has routinely broken its treaties with various tribes and Native Americans have continued to experience discrimination on a variety of fronts, we should not focus on how much suffering Native Americans have faced relative to African Americans. Ultimately, the question we should be asking is whether each group has had a unique experience that warrants separate consideration. An examination of the history and political posture of each group shows the answer to be yes. Native Americans' organization in sovereign tribes with government-granted land gives them a uniqueness that is better served by a binary approach.

A prime example can be seen in the child welfare arena. Although both African Americans and Native Americans have had high percentages of children removed from

their families of origin on allegations of abuse and neglect, the needs and responses of each group to this problem have been very different. Native Americans have seen as many as 25 to 35 percent of Indian children removed from families and placed in predominantly non-Indian foster homes. Arguing that such practices constituted a threat to their culture and sovereignty, Native Americans sought and won protection through the passage of the Indian Child Welfare Act (ICWA). This act strengthened tribal governments' role in child welfare cases by requiring that Indian children be placed in foster or adoptive homes that reflect Indian culture.

Facing a similar problem of overrepresentation of their children in foster care, African Americans, however, sought a very different legal solution based on their unique needs. African American families were discouraged from becoming foster and adoptive parents while agencies were simultaneously trying to match children with adoptive families of the same race. This dual discrimination caused African American children to linger in foster care longer than other children. The congressional solution to this, the Multiethnic Placement Act (MEPA) of 1994, forbade discrimination against adoptive and foster families on the basis of race, forbade the delay or denial of adoption for a child on the same basis, and required agencies to increase efforts to recruit diverse placement resources.

Clearly, MEPA and ICWA take nearly opposite approaches. The latter is race conscious, requiring consideration of ethnic and culture background for placement, while the former is race neutral, requiring that race not interfere with placement. These different approaches would not be possible without a binary approach that respected the uniqueness of each group.

Lynching

An example of the great differences between the racialized experiences of African Americans and other racial minorities can be seen in the area of lynchings. Professor Perea asks, "How many of my present readers are aware that Mexican Americans, like Blacks, were lynched frequently?" In raising this question, Professor Perea is either suggesting that African Americans were not the principal targets of lynching (in which case he is wrong) or conflating lynchings and hangings (thus increasing the number of Mexican American lynchings). In either case, he unwittingly trivializes African American history. Both arguments are related and therefore can be addressed simultaneously.

There is a rather large qualitative difference between lynchings and hangings. The latter were ad hoc occurrences most closely associated with the old West, where a tradition of frontier justice prevailed and where Mexican Americans lived in large numbers. Though there were some shared racial motivations for lynchings and hangings—"acting 'uppity,' taking away jobs, making advances toward a white woman, cheating at cards, practicing 'witchcraft,' and refusing to leave land that Anglos coveted"—the motivations for the lynching of African Americans went much further. Lynching was part of an ongoing, systemic campaign of racialized and ritualized violence and intimidation designed to perpetuate a prior system of racial subordination under which only African Americans lived.

Yet another difference between lynchings and hangings is what happened before and after the killing. When African Americans were lynched, they were not just choked to

death by a rope hanging from a tree. Unlike Mexican American hanging victims, African Americans were typically tortured, dismembered, castrated, or burned by white mobs before or after the actual hanging. Thus, lynchings, unlike hangings, manifested a level of racial hatred toward African Americans that few, if any, other racial groups witnessed in such a systemic fashion. With few exceptions, Mexican Americans and whites in the cowboy West were hanged; African Americans—particularly in the South—were lynched.

The Lost American Dream

A racial pecking order places Latinos/as over African Americans. Although both groups are virtually even in areas of poverty, earnings, and education (except for high school dropout rates, discussed in more detail below), African Americans are doing considerably worse than Latinos/as in several other key areas. For example, African Americans are only 13 percent of the U.S. population but represent 39 percent of the local jail population, whereas Latinos/as are a little more than 13 percent of the population and 15 percent of the local jail population. Thus, the African American local jail rate is almost three times that of the Latino/a population. Similarly, the total incarceration rate (which includes local jails plus state and federal prisons) for African Americans between ages twenty-five and twenty-nine is a shocking 12.6 percent compared to 3.6 percent for Latinos/as, a difference of more than threefold.

The high school dropout rate is the one area of American life in which both Latinos and Latinas, especially the former, are doing worse than their African American counterparts. High school dropout rates have decreased slightly for all races since 1993. However, the "black, not Hispanic" dropout rate (about 15 percent) is significantly higher than the "white, not Hispanic" rate (about 8 percent), while the "Hispanic" dropout rate is easily the highest of all the races (between 30 and 35 percent). According to a 1998 Senate study, the Hispanic dropout rate is relatively high because discussions of the dropout problem have too often been "submerged in discussions of dropouts in general, the education of ethnic minorities in general, or politicized debates about immigration, language, and bilingualism." Asians and Pacific Islanders have the lowest dropout rate of all the races (less than 5 percent), which may partially explain why their average income is the highest of all the races, including whites.

With the exception of high school dropout rates, overall demographic data tend to demonstrate that African Americans are often at the very bottom of the well. Even more telling than the statistics is the indisputable fact that African Americans have suffered 240 years of human bondage, 100 years of Jim Crow, and several generations of living with the lingering effects of such pain and devastation. Although these facts do not mean that the African American experience should define all civil rights scholarship and law, they certainly indicate that the African American ethos is unique and worthy of individualized attention.

Thus, although critical theorists profess to reject the black-white and all other binaries, in the end, they are simply creating a new binary—the insider-outsider binary—in place of the black-white one. Although criticalists acknowledge individual groups' unique experiences, the insider-outsider binary is so all consuming in existing scholarship that the notion that each outsider group suffers its own form of subordination is

rendered meaningless by requiring each group to submit to the very same binary analysis. Critical theorists wish to jettison all binaries with the exception of one—their preferred binary, their own formalism: the insider-outsider binary.

Thus, we must demur to Professor Perea's thoughtful contention that he is not "merely substituting another, nearly equally oppressive paradigm for the Black/White binary paradigm" because he is not "advocating a Black/White/Latino/a paradigm which would give Latinos/as more visibility but would render even more invisible . . . other racialized groups."[7] Although Perea is right, he is arguing the wrong point. The issue is not whether he and other critical theorists are merging specific racial groups to form a new binary. The issue, instead, is whether he and other crits are forming a new binary, period. And the answer to that question is an emphatic yes. The criticalists are creating a new binary that unintentionally trivializes the black ethos and subordinates African Americans.

This statement does not mean that critical theorists have bad intentions. Motivated by the desire to create a diverse America in which everyone and every group gives up a little autonomy to create a harmonious whole, critical theorists would honor all groups for their uniqueness and subordinate none. But merging all racial groups hurts not only African Americans but also other racial groups. This does not mean that blacks, browns, and other racial groups cannot or should not form coalitions. But it does mean that racial problems facing particular groups must be analyzed separately to arrive at an accurate, undiluted understanding of the problems before we attempt to form coalitions.

Criticisms of the black-white binary are, thus, claims to racial priority. Critical theorists are challenging the idea that African American civil rights interests should be given priority over the claims of other outsider groups, especially nonblack racial groups. While some scholars suggest that the descendants of slaves have earned the right to claim priority because they have suffered the longest and still remain at the very bottom of the well, in our view the ranking given to conflicting civil rights claims should turn on the relative severity and duration of the groups' deprivation on the specific issue under consideration. Hence, African American civil rights interests should take priority only in those instances in which African Americans are statistically worse off than other racial groups. For example, the Latino civil rights interest in quality education would possibly trump the competing African American interest in formulating a solution to the high school dropout problem because Latino/a students have the highest rates of all racial groups and double that for blacks. Identifying the worst off in society is only one of many factors to consider in determining the prioritization of racial claims.

NOTES

1. Richard Delgado, *Derrick Bell's Toolkit—Fit to Dismantle That Famous House?*, 75 N.Y.U. L. Rev. 283 (2000); Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 Calif. L. Rev. 1213, 1253 (1997) (also Chapter 45, this volume).

2. See Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. Rev. 1283, 1310 (2002).

3. Gong Lum v. Rice, 275 U.S. 78, 82 (1927).

4. Nicolas C. Vaca, The Presumed Alliance: The Unspoken Conflict Between Latinos and Blacks and What It Means for America 108, 110 (2004).

5. Roy L. Brooks, Atonement and Forgiveness: A New Model for Black Reparations 20 (2004).

6. Perea, *supra* note 1, at 1250.

7. Perea, *supra* note 1, at 1255.

51. Racial Classification in America

Where Do We Go from Here?

KENNETH PREWITT

The public face of America's official racial classification is its census and has been so since the first decennial enumeration in 1790. The initial classification turned on two civil status distinctions: free or slave and taxed or untaxed. Applying these distinctions in the census generated a count of three ancestry groups (European, African, and [untaxed] Native American), which set the foundation for all racial classifications to come. From that starting point, the division of the population by race has recurred in every decennial census, down to the most recent.

Across two centuries, particular categories have come and gone in response to an ever-shifting mix of political, scientific, and demographic considerations. In 1820, the category "free colored persons" was added to the census. In 1850, influenced by a pseudo race science, the census separately counted mulattoes, a category it retained until 1930. In 1870, Chinese were first counted, and in 1890, Japanese. In 1920, Filipinos, Koreans, and Hindus appeared on the census form. Following Hawaii's statehood, in 1960, Hawaiians were added, though Alaskan statehood did not result in an effort to specifically identify Aleuts and Eskimos for another twenty years. Subcontinent Indians were counted as Hindu in three censuses (1920–1940) but as white in the next three. In 1980, they were counted as Asian, a status they retain today. Until 1930, when they got their own census category, Mexicans were counted as white. The government of Mexico contested that change, and Mexicans went back to being counted as white until 1970, when Hispanic origin became a separate category—this time defined in terms of language and ethnicity rather than race.

The Office of Management and Budget (OMB) standards first issued in 1977 contained four primary racial groups: Asian or Pacific Islander, American Indian or Alaskan Native, black, and white. These standards held that all federal statistics on race should, at minimum, include those four groups as well as one ethnic group, Hispanic, whose members would also belong to one of the four racial groups.

A version of this chapter previously appeared as Kenneth Prewitt, *Racial Classification in America: Where Do We Go from Here?*, 134 Daedalus 5 (Winter 2005). Originally published in *Daedalus: Journal of the American Academy of Arts and Sciences*.

What political and policy purposes lie behind this continual shifting of the race categories?

In 1790, slaves were included in the census count (the three-fifths clause) because slaveholding states had made this a nonnegotiable condition for joining the Union. The result was a power bonus for Southern states in the new Congress and in the Electoral College. This bonus, as John Quincy Adams put it, led to "the triumph of the South over the North—of the slave representation over the purely free."[1] The nation's first decision about how to classify the population racially had immense policy consequences that lasted well into the twentieth century.

Without discarding the three-fifths clause, a new era of racial classification began in 1820, when the free colored were counted separately from slaves and free whites. This modification allowed citizenship and related civil rights to hinge on color rather than on condition of servitude, a policy that heralded nearly a century and a half of race-based policies focused on making it difficult, if not impossible, for nonwhites to vote, own property, marry across racial lines, enter various professions, seek advanced education, or do much else.

Meanwhile, imperialism and immigration were radically transforming the nation's demographic base. Wars and the purchase of territory added Mexicans, Native Alaskans, Caribbean Islanders, and Hawaiians to the U.S. population. Permissive immigration policies supplied factory, farm, and mine workers from China, Japan, and eastern and southern Europe. The newcomers were grudgingly tolerated, and policies were designed to keep them in their place. The low point came in the 1920s, when the eugenics movement convinced the government to stop immigration of the racially undesirable. Census data were used to design the restrictive immigration laws.[2]

The long practice of applying racial and ethnic categories to policies of civic exclusion began to crumble with World War II, when members of every racial and ethnic group in America fought side by side to defend democracy.

A key early step came in a 1947 report from President Truman's Committee on Civil Rights, which used statistics to compare health access and educational opportunities for whites and blacks, giving quantitative underpinnings to the committee's broad argument that blacks were suffering denial of civil rights.

Across every sector of American life two political questions began to push forward: Which racial groups are underrepresented? Does underrepresentation point to discriminatory barriers targeted at racial, ethnic, or national-origin groups?

When statistical proportionality came of age in the 1960s, a new policy era was born. Social justice policies formulated in response to numerical findings were widely accepted by the end of the 1960s, as the ideal of equal opportunity fueled a demand for more equal outcomes and as the negative goal of nondiscrimination turned into the proactive policy of redress that came to be called affirmative action.

Civil rights court cases turned on racial differences in employment patterns, wage rates, college enrollments, and electoral outcomes. In a pivotal employment discrimination case, *Griggs v. Duke Power Co.* (1971), the Supreme Court reasoned that Title VII of the Civil Rights Act required the "removal of artificial, arbitrary, and unnecessary barriers to employment" and proscribed "practices that are fair in form, but discriminatory in operation." This reasoning shifted the emphasis in enforcement from individual

motivation to statistically demonstrated consequences, from prejudice to institutional racism. Statistical disparity worked its way into policy and law.

Drawing on the categories employed in a 1950 government form, the Equal Employment Opportunity Commission (EEOC) in 1964 identified four minority groups: Negro, Spanish American, American Indian, and Asian. The EEOC's record keeping institutionalized the Civil Rights Act and in the process fixed in administrative practice a racial classification based on the four groups that had been most prominent in fighting racial discrimination for more than a century.

The 1970 census modified the EEOC classification by changing Spanish American or Hispanic from a racial to an ethnicity designation. The OMB formalized this classification when, in the 1977 standards, it directed that Hispanic be considered an ethnicity. Hispanics were also instructed to identify on the census with one of the primary race groups, now American Indian/Native Alaskan, Asian, black/Negro, and white. Other racial, ethnic, linguistic, descent, and national-origin groups (for example, Korean, Haitian, Arab) would appear in official statistics only as subcategories of the primary races (in this example, Asian, black, and white, respectively).

The classification adopted in 1977 and used in the 1980 and 1990 censuses seemed secure and capable of discharging its purposes in policy arenas. But by the middle of the 1990s, the political landscape was transformed by demographic changes, by the rise of multiculturalism, and by the multiracial movement. New political demands called into question the existing racial and ethnic categories—and also the public purposes they were thought to serve.

As noted above, the earlier OMB standards linked Hawaiians and Pacific Islanders with the more general Asian race. The persistent Senator Daniel Akaka from Hawaii and the constituency he led saw matters otherwise. They felt the census should recognize Hawaiian and Pacific Islanders as a separate racial category. After the OMB held public hearings and examined research showing that Hawaiian and Pacific Islanders did differ from Asians more generally, it agreed to the separate category. This decision was in keeping with the rationale that classification should facilitate racially just policies. And so in the mid-1990s the official primary race groups went from four to five.

The ease with which this change took place was consistent with the government's position that "classifications should not be interpreted as being scientific or anthropological in nature. . . . They have been developed in response to needs expressed by both the executive branch and the Congress."[3] In the absence of science, classification decisions respond to strong voices expressing themselves in the political process. Native Hawaiians, a population group that had suffered discrimination and had the (statistical) scars to prove it, became the latest of the nation's official races.

That being so, how can we decide on the proper number of races? Is five the right number? Why not six or seven? And what is the right number of ethnic groups? Why only one?

Leading up to the 2000 census, pressure built to reclassify persons of Middle Eastern origin from white to their own primary race category. This effort was unsuccessful in part because the advocacy groups could not agree on whether the category should be Middle Eastern, a geographic designation, or Arab American, an ethnoracial designation. (The post-9/11 treatment of Arab Americans has since led many to doubt the political wisdom of a separate identification for this population group.)

Other advocates urged a different disaggregation of the white category, pointing out, for example, that Greek Americans and Anglo-Saxons did not belong in the same general category. The failure of various efforts (other than the Native Hawaiians/Pacific Islanders) to add to the primary racial classification can be traced to incoherent arguments, insufficient political muscle, and failure to statistically document claims of significant past and continuing discrimination.

In the future, however, if the advocates of such efforts make more compelling arguments and apply more muscle and more convincing data, on what grounds will the federal statistical system declare that enough is enough—that four was wrong, but five is right?

There is no science to turn to, and in its absence it is difficult to arrive at a public consensus on how many racial and ethnic groups populate America. The edifice of racial and ethnic measurement that emerged from the civil rights period was, as social scientists like to say, undertheorized.

The increase in the number of primary racial groups in the United States by 20 percent in the 1990s went largely unnoticed because a noisier battle was raging. The politics of affirmation marched into the middle of census taking, waving the multiracial banner. Those tidy discrete census categories, whatever their number, missed a huge sociological truth: sex occurs across as well as within racial groups. The census had recognized this 150 years ago when it first counted mulattoes, and then in 1890, when quadroon and octoroon briefly entered the measurement system in service of the policy argument that racial mixing diluted the mental and moral fiber of the nation. Later the census put the "Other" category into the race question in an effort to accommodate multiracialism. But by the 1990s, advocates were pressing for an explicit recognition of multiracialism in federal statistics.

It is telling that the advocates of multiracialism barely made reference to civil rights. Instead, they brought to the fore demands for affirmation, recognition, choice, and identity. In congressional testimony, Project Race held that "not all Americans fit neatly into one little box" and that it is only right that "multiracial children who wish to embrace all of their heritage should be allowed to do so." The Association of Multiethnic Americans, though recognizing that the multiple-race option would make it harder to enforce civil rights law, nevertheless insisted on "choice in the matter of who we are, just like any other community." This testimony found it ironic that "our people are being asked to correct by virtue of how we define ourselves all of the past injustices of other groups of people."[4]

Of course, correcting past injustices was what the traditional civil rights organizations were all about: talk of choice and identity thus threatened their mission. Self-expression, they insisted, was not a good reason to revise the government's scheme of racial and ethnic categories. In its testimony, the NAACP pointed out that the current racial classification was fashioned "to enhance the enforcement of anti-discrimination and civil rights law," and the NAACP worried that "the creation of a multiracial classification might disaggregate the apparent numbers of members of discrete minority groups, diluting benefits to which they are entitled as a protected class under civil rights laws and under the Constitution itself." The National Council of La Raza, the powerful Hispanic organization, weighed in. It acknowledged that though concerns about self-expression were understandable, the purpose of racial classification is "to enforce and

implement the law, and to inform lawmakers about the distinct needs of special historically disadvantaged populations."[5]

The issue was joined. What is the policy purpose of racial and ethnic classification—to express identity or to enforce antidiscrimination law? Perhaps reflecting the fading power of the civil rights arguments so compelling forty years earlier, "mark one or more" was introduced under the OMB's revised standards to the racial classification system in time for the 2000 census.

This 1997 decision put to rest the view that race is a bounded and durable trait. It challenged the basic premises of racial classification that had held sway in the United States for two centuries. And it explicitly introduced claims for expressive affirmation into ethnoracial classification. Though using the census to express identity was itself not new, officially accepting this as a rationale was.

At the same time, "mark one or more" created a new—and not entirely stable—statistical reality. In census data, it allowed for fifty-seven multiple-race combinations that, when added to the six single-race answers (white, the four minority races, and other), generated sixty-three possible racial identifications. Because for most purposes this classification is cross tabulated by Hispanic or non-Hispanic, the census now recognizes 126 ethnoracial groups.

The number of categories could be expanded still further. If a future census were to allow for mixed Hispanic or non-Hispanic descent (if in the census you can have a black mother and an Asian father, why not a Hispanic mother and a non-Hispanic father?), the number of ethnoracial groupings would jump from 126 to 189.

Even at the more modest 2000 level of 126 ethnoracial groups, we now know that the "mark one or more" census statistics have a reliability problem; often the same individual will give different answers at different times. This problem emerged when researchers matched answers to the race question in the 2000 census by household with answers in a follow-up quality survey a year later. Although the overall proportion giving a multiple-race answer was reasonably constant, the internal shifting proved unexpectedly high. Forty percent of those who gave multiple-race responses changed their minds by the time of the follow-up survey. And many who gave single-race answers in the census declared a multiple-race identification in the follow-up survey. For example, nearly half (45 percent) of the single-race Hawaiian/Pacific Islanders in the census reported in the survey that they were really more than one race after all.

From the perspective of self-expression, such shifting around is reasonable. The proponent of a Bill of Rights for Racially Mixed People wants "the right to change my identity over my lifetime—and more than once."[6] Popular culture daily reminds us that the blending and changing of identities has become fashionable among the young (those under eighteen marked more than one race in the census at twice the rate of those over that age). The race question in official statistics is thus being treated less as a demographic fact than as something closer to an attitude toward oneself.

Of course race has always had a subjective dimension but, as Melissa Nobles notes, "in the past, race appeared more fixed because there was a range of constraints—political, intellectual, and social. Undoubtedly, some unknown number of Americans questioned race and color as concepts and as identities, but there was not much public space for such questioning." Race in census taking was until 1960 assigned by enumerators, whose judgment in such matters was constrained by instructions as well as by social and

political realities. But today we ask individuals themselves for their views and, Nobles continues, "there are no laws, social mores, intellectual agreements, or general consensus about what constitutes a racial identity."[7]

Self-classification poses potential problems within the policy arena—especially for litigation-prone race policy. Because only 6.8 million Americans (2.4 percent) gave multiple-race responses in the 2000 census, the agencies that enforce nondiscrimination law could devise collapsing rules that prevented disruptions to existing policy. Data reliability is not yet a major problem, but it will become one as the size of the multiple-race population grows. This growth will occur as rates of out-marriage among children of recent immigrants from Asia and Latin America approach those reached by Italians and Poles in the mid-twentieth century and as multiracial identification, especially among the young, finds increasing acceptance.

It is not far-fetched to expect opponents of race-sensitive policies to seize on the low reliability of racial statistics and other data problems as a way to discredit the information that is meant to document continuing racial and ethnic discrimination.

Beyond the radical alterations to measurement introduced in the 2000 census, a changing demography challenges the current classification. How will new groups of immigrants arriving in large numbers find their way into a classification system designed for a different demographic and policy moment?

Hispanic immigrants pose this question sharply. They have never found a comfortable home in the federal government's scheme of racial and ethnic classification. Labeling them an ethnic group does not work well, particularly for Mexican Americans who blend European with Native Indian descent. Many have tried to finesse the resulting awkwardness by taking advantage of the residual "other" line on the census form. Nearly half of the Hispanics did so in 2000, most of them Mexican Americans who were claiming their nationality as a race, a race not recognized in the official statistics.

Immigrant groups that cannot retreat to an ethnic category on the census form can be even more hard-pressed to locate themselves in the standard classification system. The recently arrived Islamic Ethiopian differs in culture, language, religion, and even skin color and facial features from those Americans who trace their origin to slaves brought from Africa's Gold Coast. Many of today's African immigrants have no wish to be counted as blacks, and some African American leaders do not welcome them in any case.

The Census Bureau currently has five Race and Ethnic Advisory Committees representing the minority groups recognized in official statistics. If new immigrant groups want a say in matters of racial classification, they must either find their way into this preexisting structure or argue for their own advisory committee. To deny them their own committee underlines the inconsistency between saying, as the Census Bureau does, that self-identification determines racial choice but that one's choice has to fit into predetermined categories. New immigrants add a complexity and uncertainty to ethnoracial classification and to the policies that flow from it.

My cursory survey of American history suggests that there have been three loosely construed policy regimes facilitated by the nation's changing schemes of racial classification. The first used census counts to give slave-owning states extra seats in Congress and extra votes in the Electoral College, shaping power and policy for decades. The second used the data to exclude from civic life various racially defined groups. The third policy

regime, fully instituted only in the 1960s, has used census data to reverse the policies of the second regime by extending civil rights to all equally, regardless of race.

Are we perhaps on the threshold of a new regime? The advent of the "mark one or more" option on the 2000 census suggests that the United States may well be at another historic juncture—and so does the trend of recent Supreme Court decisions.

By the mid-1980s, the Supreme Court was limiting the impact of the reasoning advanced in its 1971 decision in *Griggs v. Duke Power Co.* In 1987, Justice Antonin Scalia argued that statistical disparities indicating discrimination are at most evidence of "societal discrimination" and are not remediable under antidiscrimination law. Although in the minority in that case, Scalia was soon to express similar views for the majority. Writing for the majority in a 1995 ruling, he asserted that "government can never have a 'compelling interest' in discriminating on the basis of race in order to make up for past racial discrimination."[8] And in 2003, the Court upheld the right of universities to consider race in admissions only by ignoring remedial racial justice arguments in favor of a diversity rationale—and then only after the University of Michigan had defended its policies on qualitative, rather than quantitative, grounds. In an exchange with the Court, university officers said that though critical mass advanced the educational goal of diversity, that notion was not reducible to numbers. This "you know it when you see it" claim is a long way from the "you know it when you've measured it" argument embraced in the 1970s.

So where do we go from here? Despite the efforts of conservatives like Ward Connerly, who in 2003 funded a California proposition to prevent that state from collecting any racial or ethnic data, I do not think we are headed toward a policy regime that is color blind and that will prevent the government from collecting data about race, ethnicity, or national origin. Powerful constituencies, notably in the public health and education fields, join with civil rights groups to contest such policy changes. They will prevail because the politics behind the color-blind movement are viewed, fairly or not, as a throwback to the policies of exclusion that the majority of Americans have firmly rejected.

At the same time, it is increasingly doubtful that policies aimed at making America more inclusive will center, as they did in the 1970s, on numerical remedies using statistical disparities as evidence of discrimination or on affirmative action. Where, then, on the continuum from no numbers to only numbers will race-sensitive policy be fashioned? Two factors feature in an answer to this question.

First, the demand for recognition, choice, and identity expression as heralded by the multiple-race advocates will continue to reverberate in statistical policy making, especially as new immigrant groups find political voice. This will lead less to claims for strict statistical proportionality than to demands for visibility and representation. For example, if Vietnamese children make up a quarter of a local school's student body, parents will expect there to be at least a few Vietnamese teachers. New African immigrants will point to their growing population numbers and ask why they are not better represented in political office.

Second, there remains a key question that reliable statistics alone can answer rigorously: How well are different groups doing? Here the focus increasingly will turn from large to smaller groups. If Hawaiians can break free from the Asian category, why can't

the new African immigrants break free from the black category or indigenous Central Americans from the Hispanic category?

These groups are not large on the national scene, but they cluster in ways that make them noticeable in many towns and cities across the country. It is in these local jurisdictions that questions arise regarding health care, performance in the classroom, and access to the ballot box.

Whether for purposes of self-expression or to detect barriers based on race, ancestry, ethnicity, or color, the United States will continue to have a racial and ethnic classification system. But is the one now in place the right one? In my view, not exactly—though of course there is no one right classification.

Sound reasons counsel hesitation in recommending measurement changes. Disrupting statistical series, especially in an area that has just had a disruption, is no small matter. Neither is the methodological challenge of assessing the consequences for data quality of even small changes, such as how a question is worded or where it is placed on a form. Few questions are more difficult to get right than those inquiring of race or ethnicity. Political consequences at the margins could increase or decrease a group's numbers as recorded in previous statistics.

Yet neither racial measurement nor policy that relies on it is in a settled state—and this provides a historical opportunity for fresh thinking, starting with the term "race" itself. A strong moral case argues for jettisoning the term "race" altogether. Relevant data can be collected without ever using the term that echoes a discredited eighteenth-century science that took physiological markers as indicative of moral worth and intellectual ability. The government doesn't have to ask what racial group we belong to; it could simply ask what population group we belong to. This change, too long postponed, would break with hierarchical assumptions historically attached to fixed racial categories.

If this is considered too radical a change, the government should acknowledge that the term "race" is anachronistic by using it interchangeably with "ethnicity." The census should replace the current question on race and ethnicity with one that is subtly but significantly different:

What is this person's race or ethnic group? Mark one or more:
American Indian or Alaskan Native
Asian
Black/African American
Native Hawaiian/Pacific Islander
Spanish/Hispanic/Latino
White

Such a revised question would minimally disrupt statistical series. It would retain "mark one or more" and the victory for choice that option represents. It would allow the government to enforce the Voting Rights Act and other civil rights laws that center on the 1977 classification. It would improve data quality by not forcing many millions of the nation's Hispanics to make the kind of racial choice that has driven them to the "Other" category. Commenting on the question format used in the 2000 census, the Census Bureau itself recognizes that "many Hispanics do not relate to the categories in the race question."[9]

Although the bureau is field testing five new formats for collecting race and ethnicity data, the revision I am suggesting is not among them. I do not find the reasons given for this omission persuasive, and I strongly believe statistical as well as moral justifications argue for a format that, optimally, discards the term "race" altogether or that at least does not hold to the statistically meaningless distinction between the terms "race" and "ethnicity." The OMB and the Census Bureau have a historic opportunity to back away from the presumptively immutable color-coded categories inherited from Linnaeus and his students writing in the middle of the eighteenth century.

The revised question could be paired with a second, open-ended question: *What is this person's ancestry, nationality, ethnic origin, tribal affiliation?*

In the long run, this question or one similar to it should replace the race and ethnicity question altogether. That change would truly reflect that these are matters of self-identification and that self-identification is inconsistent with forcing people into prescribed categories. But from the perspective of racial justice, it is premature to discard the official categories now used to administer antidiscrimination laws.

The open-ended question nevertheless points us to the policy frontiers of the twenty-first century. Details of the sort provided by the open-ended question would show whether specific groups, especially recent immigrant groups, are experiencing discriminatory barriers to jobs, schooling, or home ownership—barriers that a nation committed to a policy of inclusiveness is obligated to remove. Strong reasons counsel retaining official statistics that can detect patterns of discrimination, and our classification scheme needs to catch up with the ways in which discrimination occurs across a very diverse population.

Many thoughtful Americans, including me, wish that antidiscrimination law were not necessary. We want a society that is truly color blind. But if we are ever to create such a society, we need to know what is actually happening to various population groups across the country. Accepting inclusiveness as a central policy narrative for the nation requires statistics robust enough both to keep track of whether groups historically excluded are overcoming the legacy of official discrimination and to indicate whether more recently arrived groups are being unfairly held back. More than two centuries after the Constitution started the nation down the road of racially classifying its population, compelling reasons argue for designing the most policy-relevant classification scheme possible. On moral and methodological grounds, the classification used in census 2000 can and should be improved.

NOTES

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2. Margo J. Anderson, The American Census: A Social History, ch. 6 (1988).

3. 1977 Statistical Policy Directive No. 15, cited in Federal Register 59 (110) (June 9, 1994), 29834.

4. Federal Measures of Race and Ethnicity and the Implications for the 2000 Census: Hearings Before the Subcommittee on Government Management, Information, and Technology, April 23, May 22, and July 25, 1997. Serial No. 105-57 (1998), 309, 324.

5. *Id.*, 382, 286.

6. Maria P. P. Root, ed., The Multiracial Experience: Racial Borders at the New Frontier 7 (1992).

7. Melissa Nobles, personal communication, Aug. 30, 2004.

8. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995).

9. Phyllis Singer and Sharon Ennis, Census 2000 Content Reinterview Survey: Accuracy of Data for Selected Population and Housing Characteristics as Measured by Reinterview, U.S. Census Bureau, Census 2000 Evaluation B.5, Sept. 24, 2003, at xxiii.

From the Editors

Issues and Comments

Should Latinos, as Ian Haney López argues, demand treatment as a separate race, or is this a case of me-tooism that is unfair to blacks, who have done all the work? (Or have they?) If the civil rights movement is led, at a given time in history, by people of one sort—say, blacks—should the others fall into line with good grace, and is it divisive to call attention to differences and varying needs and hopes? If an author writes a book—or a litigator decides to specialize—on the problems of a single minority group, what is wrong with that? Is it laziness? A natural desire for the familiar? An understandable, maybe commendable, effort? Does our paradigm of race need to expand to incorporate America's increasingly multiracial society, and will we all be the better for adopting the new paradigm? Or will this dilute attention and weaken the movement?

What about the case for African American exceptionalism—the notion that blacks have suffered more than other groups; have contributed more blood, effort, and thought to civil rights movements; and have a longer history and are therefore entitled to be considered the main, paradigmatic racial minority group today? Do Roy Brooks and Kirsten Widner have a point?

Should the U.S. census have more categories or fewer? Are Latinos a race or an ethnicity? Who should decide these questions?

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PART XI

CULTURAL NATIONALISM AND SEPARATISM

A THEME THAT RECURS insistently in much critical race writing is the idea of cultural nationalism. Almost a defining motif of the movement, nationalism insists that people of color can best promote their own interests through separation from the American mainstream. Nationalist activists and community organizers hold that black and brown communities should develop their own schools, colleges, businesses, and security forces. Nationalist scholars hold that white-coined antidiscrimination law is unlikely to be as expansive as the situation warrants.

Some believe that preserving diversity will benefit not just minority communities but the majority-race one as well. Rooted in W.E.B. Du Bois's philosophy and the Black Panther, Black Muslim, and Chicano movements of the 1960s and 1970s, cultural nationalism retains enormous vitality today in left and critical movements.

Part XI begins with an excerpt from Richard Delgado's original "Rodrigo's Chronicle," in which the author's young alter ego puts forward his audacious assessment of Western culture, including his view that the dominant culture needs the ideas and talents of people of color more than the other way around.

A selection by Paul Butler advances a hip-hop theory of punishment grounded in the values of the black community. Ian Haney López shows how protest and repression led the Latino community to a new self-concept and identity. Kevin Brown and Jeannine Bell call attention to how universities have been admitting large numbers of foreign-born and mixed-race blacks and relatively few whose families trace their histories to the period of slavery.

Finally, Kenneth Nunn argues that Eurocentric law and culture are aggressive, materialistic, and hierarchical and that African Americans would do well to eschew them entirely and create more humane rules and traditions.

52. Rodrigo's Chronicle

RICHARD DELGADO

Enter Rodrigo

"Excuse me, Professor, I'm Rodrigo Crenshaw. I believe we have an appointment." Startled, I put down the book I was reading and glanced quickly first at my visitor and then at my desk calendar. The tall, rangy man standing in my doorway was of indeterminate age—somewhere between twenty and forty—and, for that matter, ethnicity. His tightly curled hair and olive complexion suggested that he might be African American. But he could also be Latino, perhaps Mexican, Puerto Rican, or any one of the many Central American nationalities that have been applying in larger numbers to my law school in recent years.

"Come in," I said. "I think I remember a message from you, but I seem not to have entered it into my appointment book. Please excuse all this confusion," I added, pointing to the pile of papers and boxes that had littered my office floor since my recent move. I wondered: Was he an undergraduate seeking admission? A faculty candidate of color like the many who seek my advice about entering academia? I searched my memory without success.

"Please sit down," I said. "What can I do for you?"

"I'm Geneva Crenshaw's brother. I want to talk to you about the LSAT, as well as the procedure for obtaining an appointment as a law professor at an American university."

As though sensing my surprise, my visitor explained, "Shortly after Geneva's accident, I moved to Italy with my father, Lorenzo, who was in the Army. After he retired, we remained in Italy, where he worked as a civilian at the same base where he had been serving. I finished high school at the base and then attended an Italian university, earning my law degree last June. I've applied for the LL.M. program at a number of U.S. law schools, including your own. I want to talk to you about the LSAT, which all the schools want me to take and which, believe it or not, I've never taken. I'd also like to discuss my chances of landing a teaching position after I earn the degree."

We then discussed the LSAT, affirmative action, and the law school hiring market.

A version of this chapter previously appeared as Richard Delgado, *Rodrigo's Chronicle*, 101 Yale L.J. 1357 (1992). Originally published in the *Yale Law Journal*.

In Which Rodrigo Begins to Seem a Little Demented

"A recent article," Rodrigo said, "pointed out that nearly three-fourths of articles on equality or civil rights published in the leading journals during the last five years were written by women or minorities.[1] Ten years ago, the situation was reversed: Minorities were beginning to publish, but their work was largely ignored.[2] The same is true in other areas as well. Critical legal studies and other modernist and postmodern approaches to law are virtually the norm in the top reviews. Formalism has run its course."

"Perhaps," I said. "You don't see many articles in the classic vein today. In fact, I haven't seen one of those plodding, case-crunching, 150-page blockbusters with 600 footnotes in a top journal for a while."

"No one believes that way of writing is useful anymore. Some are writing chronicles. Others are writing about storytelling in the law, narrative theory, or 'voice' scholarship. The feminists are writing about changing the terms of legal discourse and putting women at the center. Even 'mainstream' writers—the serious ones, at any rate—have moved beyond mere doctrinal analysis to realms such as political theory, legal history, and interdisciplinary analysis. There is a whole new emphasis on legal culture, perspective, and on what some call 'positionality,' as well as a renewed focus on the sociopolitical dimension of judging and legal reasoning."

"I'm not up on all these postmodern approaches, Rodrigo," I said quickly, "although I have read your friend and countryman Antonio Gramsci who, as you say, got into trouble with the authorities.[3] I find his work quite helpful. And I gather that the current ferment in American law is one of the reasons why you are thinking of returning here for your graduate degree?"

"In part. But I was mainly responding to your earlier question about the irony of multiculturalism. However progressive certain mainstream scholars may be in their writing and analysis, the institutions they control still exclude and oppress minorities by manipulating the status quo and refusing to challenge their own informal expectations. The irony is that the old, dying order is resisting the new, rather than welcoming it with open arms."

Hmm. I thought of the words of a Bob Dylan song[4] but instead asked, "And just who, or what, do you think this new order is, Rodrigo?"

"Well, let me put it this way," Rodrigo explained. "You've heard, I assume, of double consciousness?"

"Of course. It's W.E.B. Du Bois's term.[5] It refers to the propensity of excluded people to see the world in terms of two perspectives at the same time—that of the majority race, according to which they are demonized, despised, and reviled, and their own, in which they are normal. Lately, some—particularly feminists of color—have invented the term 'multiple consciousness' to describe their experience."

"And you know that many members of minority groups speak two languages, grow up in two cultures?"

"Of course, especially our Hispanic brothers and sisters; for them, bilingualism is as much an article of faith as, say, Martin Luther King and his writings are for African Americans."

"And so," Rodrigo continued, "who has the advantage in mastering and applying critical social thought? Who tends to think of everything in two or more ways at the same time? Who is a postmodernist virtually as a condition of his or her being?"

"I suppose you are going to say us—people of color."

Rodrigo hesitated. "Remember that I have been sitting in Italian law libraries all these years, reading and learning about legal movements in the United States secondhand. I suppose it looks different to you here."

"It has scarcely been a bed of roses," I replied dryly.[6] "The old order, as you put it, has not welcomed the new voices with any great warmth, although I must agree that the law reviews seem much more open to them than my faculty colleagues. And your notion that it is we—persons of color—who have the edge in mastering critical analysis would strike most of my majority-race colleagues as preposterous. If double consciousness turns out to be an advantage, they'll either deny it exists or insist that they can have it too.[7] Aren't you just trying to invert the hierarchy, placing at the top a group that until now has occupied the bottom—and isn't this just as wrong as what the others have been doing to us?"

Rodrigo paused. "I see your point. But maybe this way of looking at things seems harsh only because it is so unfamiliar. In my circles everyone talks about the decline of Western thought, so finding evidence of it in law and legal scholarship doesn't seem so strange. I'm surprised it does to you. Are you familiar with the term 'false consciousness?'"[8]

"Yes, of course," I said (with some irritation—the impudent pup!). "It's a mechanism whereby oppressed people take on the consciousness of the oppressor group, adjusting to and becoming parties to their own oppression. And I suppose you think I'm laboring under some form of it?"

"Not you, Professor. Far from it. But when you rebuked me a moment ago, I wondered if you weren't in effect counseling *me* to internalize the views of the majority group about such things as hierarchy and the definition of a 'troublemaker.'"

"Perhaps," I admitted. "But my main concern is for you and your prospects. If you want to succeed in your LL.M. studies, not to mention in landing a professorship at a U.S. law school, perhaps you had better cool it for a while. Criticizing mainstream scholarship is one thing; everyone expects that from young firebrands like you. But this business about a more general 'decline of the West'—that's out of our field, frowned on as flaky rhetoric, and nearly impossible to support with evidence. Even if you did have evidence to support your claims, no one would want to listen to you."

"Yes, I suppose so," admitted Rodrigo. "It's not the story you usually hear. If I had told you that I'm returning to the United States because it's the best country on earth, with rosy prospects, a high quality of life, and the fairest political system for minorities, your compatriots would accept that without question. No one would think of asking me for documentation, even though that is surely as much an empirical claim as its opposite."

"You're right," I said. "The dominant story always seems true and unexceptionable, not in need of proof. I've written about that myself, along with others.[9] And you and I discussed a case of it earlier when we talked about minority hiring. But tell me more about your thoughts on the West."

"Well, as I mentioned, my program of studies at Bologna centered on the history of Western culture. I'm mainly interested in the rise of northern European thought and its contribution to our current predicament. During my early work I had hoped to extend my analysis to law and legal thought."

"I think I know what you will say about legal thought and scholarship. Tell me more about the big picture—how you see northern European thought."

"I've been studying its rise in the late Middle Ages and decline beginning a few decades ago. I'm interested in what causes cultures to evolve and then go into eclipse. American society, even more than its European counterparts, is in the early stages of dissolution and crisis. It's like a wave that is just starting to crest. As you know, waves travel unimpeded across thousands of miles of ocean. When they approach the shore, they rise up for a short time and then crest and lose their energy. Western culture, particularly in this country, is approaching that stage. Which explains, in part, why I am back."

I had already switched off my telephone. Now, hearing my secretary's footsteps, I stepped out into the hallway to tell her to cancel my appointments for the rest of the afternoon. I had a feeling I wanted to be undisturbed to hear what this strange young thinker had to say. When I returned, I saw Rodrigo eyeing my computer inquiringly.

Returning his gaze to me, Rodrigo went on, "I'm sure all the things I'm going to say have occurred to you. Northern Europeans have been on top for a relatively short period—a mere wink in the eye of history. And during that time they have accomplished little—except causing a significant number of deaths and the disruption of a number of more peaceful cultures, which they conquered, enslaved, exterminated, or relocated on their way to empire. Their principal advantages were linear thought, which lent itself to the development and production of weapons and other industrial technologies, and a kind of messianic self-image according to which they were justified in dominating other nations and groups. But now, as you can see"—Rodrigo gestured in the direction of the window and the murky air outside—"Saxon-Teuton culture has arrived at a terminus, demonstrating its own absurdity."

"I'm not sure I follow you. Linear thought, as you call it, has surely conferred many benefits.[10] And is it really on its last legs? Aside from smoggy air, Western culture looks firmly in control to me."

"So does a wave, even when it's cresting—and you know what happens shortly thereafter. Turn on your computer, Professor," Rodrigo said, pointing at my new terminal. "Let me show you a few things."

For the next ten minutes, Rodrigo led me on a tour of articles and books on the West's economic and political condition. His fingers fairly danced over the keys of my computer. Accessing databases I didn't even know existed, he showed me treatises on the theory of cultural cyclicity; articles and editorials from the *Economist*, *Corriere della Sera*, the *Wall Street Journal*, and other leading newspapers, all on our declining economic position; and material from the *Statistical Abstract* and other sources on our increasing crime rate, rapidly dwindling fossil fuels, loss of markets, and switch from a production- to a service-based economy with high unemployment, an increasingly restless underclass, and increasing rates of drug addiction, suicide, and infant mortality. It was a sobering display of technical virtuosity. I had the feeling he had done this before and wondered how he had come by this proficiency while in Italy.

Rodrigo finally turned off the computer and looked at me inquiringly. "A bibliography alone will not persuade me," I said. "But let's suppose for the sake of argument that you have made a prima facie case, at least with respect to our economic problems and to issues concerning race and the underclass. I suppose you have a theory on how we got into this predicament?"

"I do," Rodrigo said with that combination of brashness and modesty that I find so charming in the young. "As I mentioned a moment ago, it has to do with linear thought—the hallmark of the West. When developed, it conferred a great initial advantage. Because of it, the culture was able to spawn, early on, classical physics, which, with the aid of a few borrowings here and there, like gunpowder from the Chinese, quickly enabled it to develop impressive armies. And because it was basically a ruthless, restless culture, it quickly dominated others that lay in its path. It eradicated ones that resisted, enslaved others, and removed the Indians, all in the name of progress. It opened up and mined new territories—here and elsewhere—as soon as they became available and extracted all the available mineral wealth so rapidly that fossil fuels and other mineral goods are now running out, as you and your colleagues have pointed out."

"But you are indicting just one civilization. Haven't all groups acted similarly? Nonlinear societies are accomplishing at least as much environmental destruction as Western societies are capable of. And what about Genghis Khan, Columbus, the cruelties of the Chinese dynasties? The Turkish genocide of the Armenians, the war machine that was ancient Rome?"

"True. But at least these other groups limited their own imperial impulses at some point."

"Hah! With a little help from their friends," I retorted.

"Anyway," continued Rodrigo, "these groups produced valuable art, music, or literature along the way. Northern Europeans have produced next to nothing—little sculpture, art, or music worth listening to, and only a modest amount of truly great literature. And the few accomplishments they can cite with pride can be traced to the Egyptians, an African culture."[11]

"Rodrigo, you greatly underestimate the dominant culture. Some of its members may be derivative and warlike, as you say. Others are not; they are creative and humane. And even the ones you impeach have a kind of dogged ingenuity for which you do not give them credit. They have the staying and adaptive powers to remain on top. For example, when linear physics reached a dead end, as you pointed out, they developed relativity physics. When formalism expired, at least some of them developed critical legal studies, reaching back and drawing on existing strands of thought such as psychoanalysis, phenomenology, Marxism, and philosophy of science."

"Good point," admitted Rodrigo a little grudgingly, "although I've already pointed out the contributions of Gramsci, a Mediterranean. Frantz Fanon and your critical race theory friends are black or brown. And Freud and Einstein are, of course, Jews. Consider, as well, Cervantes, Verdi, Michelangelo, Duke Ellington, and the current crop of black writers—non-Saxons all."

"But northern Europeans, at least in the case of the two Jewish giants . . . ," I interrupted.

"True, people move," he countered.

"Don't be flip," I responded. "Since when are the Spanish and Italians exempt from criticism for 'Western' foibles? What about the exploitive capacity of the colonizing conquistadors? Wasn't the rise of commercial city-states in Renaissance Italy a central foundation for subsequent European cultural imperialism? Most ideas of Eurocentric superiority date to the Renaissance and draw on its rationalist, humanist intellectual, and artistic traditions."

"We've had our lapses," Rodrigo conceded. "But theirs are far worse and more systematic." Rodrigo was again eyeing my computer.

Wondering what else he had in mind, I continued, "What about Rembrandt, Mozart, Shakespeare, Milton? And American popular culture—is it not the envy of the rest of the world? What's more, even if some of our Saxon brothers and sisters are doggedly linear, or as you put it, exploitive of nature and warlike, surely you cannot believe that their behavior is biologically based—that there is something genetic that prevents them from doing anything except invent and manufacture weapons?" Rodrigo's earnest and shrewd retelling of history had intrigued me, although, to be honest, I was alarmed. Was he an Italian Louis Farrakhan?[12]

"The Saxons do all that, plus dig up the earth to extract minerals that are sent to factories that darken the skies, until everything runs out and we find ourselves in the situation we are in now." Then, after a pause, he said, "Why do you so strongly resist a biological explanation, Professor? Their own scientists are happy to conjure them up and apply them to us. But from one point of view, it is they whose exploits—or rather lack of them—need explaining."[13]

"I'd love to hear your evidence."

"Let me begin this way. Do you remember that famous photo of the finish of the hundred-meter dash at the World Games this past summer? It showed six magnificent athletes straining to break the tape. The first two finished under the world record. All were black."

"I do remember."

"Black athletes dominated most of the events, the shorter ones at any rate. People of color are simply faster and quicker than our white brothers and sisters. Even the marathon has come to be dominated by people of color. And, to anticipate your question, yes, I do believe the same holds true in the mental realm. In the ghetto they play the dozens,[14] a game that requires throwaway speed. The dominant group has nothing similar. And take your field, law. Saxons developed the hundred-page, linear, densely footnoted, impeccably crafted article—saying, in most cases, very little. They also brought us the LSAT, which tests the same boring, linear capacities they developed over time and that now exclude the very voices they need for salvation. Yet you, Mari Matsuda, Charles Lawrence, Gerald Torres, Gary Peller, and others toss off articles with ridiculous ease—critical thought comes easy for you, hard for them. I can't, of course, prove your friends are genetically inferior; it may be their mind-set or culture. But they act like lemmings. They go on building factories until the natural resources run out, developing thermonuclear weapons past when their absurdity is realized and everyone knows they cannot be used, and writing hundred-page law review articles that rehash cases even after everyone knows that vein of thought has run dry, and they fail even to sense their own danger. You say they are adaptive. I doubt it."

"Rodrigo," I burst in. "You seriously misread the times. Your ideas on cultural superiority and inferiority will obviously generate resistance, as you yourself concede. Wait till you see how they respond to your hundred-yard-dash example; you're sure to find *yourself* labeled as racist. Maybe we both are—half the time I agree with you. But even the other things you say about the West's predicament and its need for an infusion of new thought—things I strongly agree with—will fall on deaf ears. All the movement is the other way. This is a time of retrenchment. The country is listening to the conservatives, not to people like you and me."

"I know," said Rodrigo. "I've been reading about that retrenchment. We do get the *New York Times* in Italy, even if it comes a few days late."

"And so you must know about conservative writers like Allan Bloom, Thomas Sowell, Glenn Loury, Roger Kimball, Shelby Steele, E. D. Hirsch, and Dinesh D'Souza and the tremendous reception they have been receiving, both in popular circles and in the academy?"

"Yes. I read D'Souza on the flight over, in fact. Like the others, he has a number of insightful things to say. But he's seriously wrong—and hardly represents the wave of the future, as you fear."

"They certainly represent the present," I grumbled. "I can't remember a period—except perhaps the late 1950s—when I have seen such resistance to racial reform. The public seems tired of minorities, and the current administration is no different. The backlash is apparent in the university setting as well: African American studies departments are underfunded and the exclusionary Eurocentric curriculum is making a comeback."

"But it's ordinary, natural—and will pass," Rodrigo responded. "In troubled times, a people turns to the past, to its own more glorious period. That's why these neoconservative writers are popular—they preach that the culture need not change direction to survive but only do the things it did before, harder and more energetically."

"What our psychologist friends call 'perseveration,'" I said.

"Exactly. In my studies, I found that most beleaguered people do this, plus search for a scapegoat—a group they can depict as the source of all their troubles."

"An old story," I agreed ruefully. "D'Souza, for example, places most of the blame for colleges' troubles at the doorstep of those demanding minorities who, along with a few deluded white sympathizers, have been broadening the curriculum, instituting Third World courses, hiring minority professors, and recruiting 'unqualified' students of color—all at the expense of academic rigor and standards.[15] He says the barbarians—meaning us—are running the place[16] and urges university administrators to hold the line against what he sees as bullying and a new form of racism."[17]

"Have you ever thought it curious," Rodrigo mused, "how some whites can see themselves as victimized by us—a pristine example of the sort of postmodern move they profess to hate. I suppose if one has been in power a long time, any change seems threatening, offensive, unprincipled, and wrong. But reality eventually intervenes. Western culture's predicament runs very deep—every indicator shows it. And there are straws in the wind, harbingers of hopeful change."

"Rodrigo, I'll say this for you—you've proposed a novel approach to affirmative action. Until now, we've struggled with finding a moral basis for sustaining what looked like breaches of the merit principle, like hiring a less qualified person over a more qualified person for racial reasons. But you're saying that white people should welcome nonwhites into their fold as rapidly as possible out of simple self-interest—that is, if they want their society to survive. This is something that they are not accustomed to hearing, to put it mildly. Do you have any support for *this* assertion?"

"Turn on your computer again, Professor. This won't take but a minute."

I obliged him and was treated to a second lightning display of technological wizardry as Rodrigo showed me books on Asian business organization, Eastern mysticism, Japanese schooling, ancient Egyptian origins of modern astronomy and physics, and even the debt our Founders owed the Iroquois for the political ideas that shaped our Constitution. He showed me articles on the Japanese computer and automobile industries, the seemingly more successful approach that African and Latino societies have

taken to family organization and the treatment of their own aged and destitute, and even the roots of popular American music in black composers' and groups' music.

"It's only a beginning," Rodrigo said, switching off my computer. "I want to make this my life's work. Do you think anyone will listen to me?"

NOTES

1. Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. Pa. L. Rev. 1349 (1992); see also Alex M. Johnson, Jr., *The New Voice of Color*, 100 Yale L.J. 2007 (1991).

2. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. Pa. L. Rev. 561 (1984).

3. See Antonio Gramsci, Letters from Prison (Lynne Lawner ed. & trans., 1973).

4. "You know they refused Jesus, too. / He said, 'You're not Him.'" Bob Dylan, *115th Dream*, on Bringing It All Back Home (Columbia/CBS Records 1965).

5. W.E.B. Du Bois, The Souls of Black Folk 16–17 (1903); see also Ralph Ellison, Invisible Man (1952). For contemporary explications of double consciousness, see bell hooks, Feminist Theory: From Margin to Center (1984).

6. E.g., Derrick Bell, *The Price and Pain of Racial Perspective*, The Journal (Stanford Law School), May 9, 1986, at 5.

7. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 Harv. L. Rev. 1745 (1989) (questioning whether a single minority voice exists or, if it does, whether it is limited to blacks).

8. See Georg Lukacs, History and Class Consciousness (Rodney Livingstone trans. 1971); Duncan Kennedy, *Antonio Gramsci and the Legal System* 6 ALSA Forum 32 (1982).

9. I thought of the recent spate of writing on narrativity and how law's dominant stories change very slowly. If legal culture does resist insurgent thought until it is too late—until it has lost the power to transform us—what does this bode for Rodrigo? See, e.g., Gramsci, *supra* note 3.

10. I thought of countless examples. Just that morning I had read about a new medical breakthrough developed at an American research university. Only two weeks ago I had had my car engine rebuilt by a mechanic who (I hope) was well versed in linear thought. The day before I had baked a batch of brownies following a ten-step recipe.

11. 1 Martin Bernal, Black Athena (1987); 2 Martin Bernal, Black Athena (1991).

12. I thought of recent writings condemning the sin of "essentialism." E.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581 (1990). The writings of early anthropologists (and a few latter-day pseudoscientists) purporting to find race-based differences in intellectual endowment also came to mind. See *infra*.

13. See, e.g., Stephen J. Gould, The Mismeasure of Man 30–72 (1981); Nancy Stepan, The Idea of Race in Science (1982); Richard Delgado et al., *Can Science Be Inopportune?*, 31 UCLA L. Rev. 128 (1983).

14. A game involving rapid-fire repartee, in which the objective is to insult or wound one's antagonist more often, elegantly, and completely than he or she is able to insult you.

15. Dinesh D'Souza, Illiberal Education 2–23 (1991) (listing areas of liberal excess in admissions policy in class and on campus), 94–122 (criticizing Afrocentric curricular reforms), 124–56 (decrying university hate-speech rules).

16. *Id*. at 256–57 (activists set the agenda, timorous administrators usually go along).

17. *Id*. at 51 (white and Asian students see themselves as victims), 131 (white students feel "under attack"), 84 (academics feel intimidated), 146, 152–56 (censorship), 200 (complaints of truculent minority students).

53. Much Respect

Toward a Hip-Hop Theory of Punishment

PAUL BUTLER

Imagine the institution of punishment in the hip-hop nation. Can hip-hop inform a theory of punishment that is coherent, that enhances public safety, and that treats lawbreakers with respect? My thesis is that hip-hop can improve the ideology and administration of justice in the United States.

For some time the debate about why people should be punished has been old school: Each one of four theories of punishment—retribution, deterrence, incapacitation, and rehabilitation—has risen to prominence and then lost its luster. Hip-hop offers a fresh approach. It first seems to embrace retribution. The "unwritten law in rap," according to Jay-Z, is that "if you shoot my dog, I'ma kill yo' cat . . . know dat / For every action there's a reaction."[1]

Next, however, comes the remix. Hip-hop takes punishment personally. Many people in the hip-hop nation have been locked up or have loved ones who have been. Punishment is an exercise of the state's police power, but it also implicates intimate family relationships. Shout-outs to inmates—expressions of love and respect to them—are commonplace in the music and visual art. You understand criminal justice differently when the people that you love experience being "[l]ocked down all day, underground, neva seein' the sun / Vision stripped from you, neva seein' your son."[2]

The hip-hop theory of punishment acknowledges that when too many people are absent from their communities because they are being condemned by the government, prison may have unintended consequences. Retribution must be the object of punishment, but it should be limited by important social interests. In a remarkable moment in American history, popular music is weighing the costs and benefits of punishment. As we listen to the radio, watch music videos, dance at clubs, or wear the latest fashion, we receive a message from the "black CNN."[3] Hip-hop exposes the current punishment regime as profoundly unfair. It demonstrates this view by, if not glorifying law breakers, at least not viewing all criminals with the disgust that the law seeks to attach to them.

A version of this chapter originally appeared as Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 Stan. L. Rev. 983 (2004). Originally published in the *Stanford Law Review*.

Hip-hop points out the incoherence of the law's construct of crime and attacks the legitimacy of the system. Its message can transform justice in the United States.

The second-best-selling genre of music in the United States, hip-hop already has had a significant social impact. The hip-hop culture transcends rap music: It drenches television, movies, fashion, theater, dance, and visual art. Hip-hop is also big business: Estimates of its contribution to the U.S. economy range to the billions. Increasingly, hip-hop is also a political movement.

Hip-hop foreshadows the future of the United States—one in which no racial group will constitute a majority. It is the most diverse form of American popular culture. The most commercially successful hip-hop artists in the United States are black, though white and Latino acts are popular as well. The consumers are mainly nonblack. The producers are Asian, black, Latino, and white—and combinations of all those. The Neptunes, among hip-hop's most acclaimed producers, consist of Chad Hugo, a Filipino American, and Pharrell Williams, an African-Korean American.

Indeed, the borders of the hip-hop nation are not concurrent with those of any nation-state. The culture is international, with particularly strong variants in Africa, Brazil, the Caribbean, Western Europe, Southeast Asia, and Japan.

At the same time that an art form created by African American and Latino men dominates popular culture, African American and Latino men dominate American prisons. Unsurprisingly then, justice—especially criminal justice—has been a preoccupation of the hip-hop nation. The culture contains a strong descriptive and normative analysis of punishment by the people who know it best.

Bold, rebellious, often profane, the music has its detractors as well as fans. One need not like hip-hop, however, to appreciate its potential to transform. Imagine, for example, that television situation comedies consistently critiqued the government's foreign policy, that country music ridiculed the nation's health care, or that fans at professional sports events were warned that the government was exploiting them. We would anticipate a strong response from the state. These scenarios are hard to imagine because most of American popular culture is explicitly apolitical.

Hip-hop culture, by contrast, is often explicitly political. Its politics are not always easy to determine, and some issues feature a great diversity of opinion. On the fairness and utility of American criminal justice, however, the hip-hop nation speaks as one. It makes a strong case for a transformation of that system: It describes, with eloquence, the problems with the current regimes and articulates, with passion, a better way. Its message is one that we should heed for reasons both moral and utilitarian. In the contemporary history of the United States, it is hard to recall another dominant form of popular culture that contains such a strong critique of the state.

Popular Culture and Criminal Law

Culture and law stand in a symbiotic relationship. Culture shapes the law, and law is a product of culture. Television, for example, has profoundly informed our perceptions of criminal justice in the United States. Most Americans can recite the Miranda warnings, not because they have been arrested but because television cops advise television "bad guys" of their constitutional rights several times a day.

Television news programs are replete with stories about crime. The message conveyed is that street crime is a major threat to our well-being. The main perpetrators, the news programs suggest, are African American and Latino men. Politicians respond to the supposed crisis by getting tough on crime, which includes building more prisons, instituting more severe sentences, imposing harsh punishments on recidivists, eliminating the discretion of judges to reduce punishment, and federalizing many crimes. One effect of these laws is the disproportionate incarceration of African Americans and, to a lesser extent, Latinos.

Some scholars and activists have suggested that the effect of the cultural depiction of crime is that many Americans harbor exaggerated concerns about being victimized by black and Latino men. Some lawmakers seem to exploit these concerns for political reasons. One result is that some punishment seems driven by racial stereotypes.

The most frequently cited contemporary example is harsher federal penalties for crack cocaine than powder cocaine. Crack is powder cocaine that is cooked with baking soda until it forms small solid pieces. Crack is smoked rather than inhaled. It is less expensive than powder cocaine and has a briefer intoxicating effect.

A star basketball player, Len Bias, died as a result of a cocaine overdose in 1986. He was widely presumed to have ingested crack, although no evidence linked his death to one form or another of the drug. Bias was African American, and crack cocaine was thought to be the preferred form in the black community. His death focused the media's attention on crack cocaine. Congress responded with one of the most severe punishment schemes for a drug in American history, including mandatory sentence for possession of crack cocaine, but not the powder variety. The punishment for sellers was especially harsh. To receive the same sentence as a crack distributor, a powder distributor must possess one hundred times the quantity of cocaine. For example, the distributor of five grams of crack, which is enough for twenty-five doses and has a street value of approximately $500, receives the same sentence as the distributor of five hundred grams of powder, which is enough for three thousand doses and is worth $40,000.

Little scientific evidence supports the greater dangerousness of crack cocaine and certainly none for the hundred-to-one federal differential. The U.S. Sentencing Commission has proposed that the distinction be reduced. Change has come slowly, however, in part because of the strong cultural bias against crack cocaine.

This point is not new or particularly surprising. In a democracy we would expect culture to inform law. The potential of hip-hop culture, however, to influence law seems less obvious—perhaps because hip-hop is a product of youth culture and perhaps because it seems to celebrate defiant and even outlaw values and behavior. I hope to demonstrate that the culture, while rebellious, can inform a principled, rules-based theory of punishment.

Austin Sarat has described punishment as "liv[ing] in culture through its pedagogical effects. It teaches us how to think about categories like intention, responsibility, and injury, and it models the socially appropriate ways of responding to injuries done to us."[4] Hip-hop offers a fresh way of analyzing persistent unresolved problems in criminal law theory, including determination of cause, the relationship between responsibility and blame, and the appropriate response of the state to lawbreaking. Considering the growing influence of hip-hop culture and the personal experience of many citizens of the hip-hop nation with criminal justice, its perspective deserves examination.

Hip-Hop 101

Hip-hop began in one of the poorest and most crime-ridden jurisdictions in the United States: the South Bronx, New York, during the 1970s. It was a place of a desperate, hard-knock creativity, as evidenced by the way its citizens talked, dressed, and danced. Even the teenagers who drew graffiti on the subway thought of themselves as artists, though the police had a different point of view.

A man who spun records for parties, DJ Kool Herc, experimented with using two turntables to play copies of the same record. Using the turntables like a musical instrument, he made his own songs from other people's recordings. Sometimes Herc would speak rhythmically to his beats (a technique borrowed from his Jamaican heritage). He taped these raps for boom boxes, and the music became popular all over New York City.

Herc's work inspired other DJs, including Afrika Bambaataa, a Black Muslim also of Jamaican descent. Bambaataa expanded Herc's musical tracks from disco and house music to virtually any recorded sound, including rock music and television shows. DJs battled (engaged in artistic competition) at city parks, and dancers performed in an athletic, bone-popping style called break-dancing.

For the purposes of my thesis, four things are noteworthy about the creation of hip-hop. First, many artists took an instrumentalist view of the law. The trespass law did not deter the graffiti artists, the copyright law did not stop the DJs from sampling any music they wanted, and the property law did not prevent DJs from "borrowing" electricity from street lamps at public parks. Second, the culture centered on recycling or remixing rather than creating out of whole cloth. Third, virtually every hip-hop artist renamed himself or herself; "slave" or "government" names were seldom used to describe the artists and many of the new monikers conjured criminal law themes: Big Punisher, Bone Thugs-N-Harmony, Canibus, Missy "Misdemeanor" Elliot, Mobb Deep, Naughty by Nature, OutKast, and Public Enemy. Fourth, rappers were compared, almost from the beginning, to African griots, who also communicated wisdom (or in the hip-hop lexicon, "dropped science") with drum beats and words.

In 1979, the Sugarhill Gang's "Rapper's Delight" became the first hip-hop song to become a national hit. Rap was immediately appropriated by white artists; the next year the New Wave group Blondie produced "Rapture," which reached the top of the charts. In the mid-1980s, groups like Run-DMC, the Beastie Boys (a white group that became the best-selling and most critically acclaimed hip-hop act of the time), and Salt-n-Pepa (the first female hip-hop act of significance) created popular songs that attracted the attention of MTV, which started, somewhat reluctantly, to show rap videos.

In the late 1980s, rap music took two divergent directions. Many artists addressed political issues, "resulting in the most overt social agenda in popular music since the urban folk movement of the 1960s."[5] A classic album of this era is Public Enemy's *It Takes a Nation of Millions to Hold Us Back*.

The other direction of rap, however, drew more attention and sales. Gangsta rap, which unapologetically depicted outlaw conduct in the inner city, became popular. The group NWA (Niggaz With Attitude) received widespread media attention for its controversial song "Fuck da Police."

Hip-hop music continues to exemplify this dichotomy between the politically correct and the world, real or imagined, of some artists. The *Washington Post* has described

"two faces of hip-hop," one a "conscious" side "where political, social and cultural issues are hashed out in verse."[6] The other side is "the bling-bling, the music that embraces the glamorous life, the live-now-I-got-mine attitude found in countless hits, and in flashy videos where hootchy mamas bounce their backsides and Busta Rhymes exhorts, 'Pass the Courvoisier.'"[7]

Conscious hip-hop is critically acclaimed, with Lauryn Hill's *The Mis-Education of Lauryn Hill* becoming the first such album to receive the Grammy award for Record of the Year in 1999. Since then Alicia Keys and OutKast have also won top honors.

Gangsta and bling-bling rap, on the other hand, have drawn criticism as being materialist, sexist, and homophobic, but these forms of hip-hop have their defenders as well. They assert that the lyrics are accurate reflections of some people's experiences or that the lyrics are not the most important, or artistic, element of the music.

Hip-Hop's Influence: From the Consumer Market to National Politics

The evolution that rap pioneers like Kool Herc and Afrika Bambaataa probably did not foresee is the extraordinary success of their art form with suburban consumers. Market studies indicate that about 75 percent of people who buy hip-hop music are nonblack. Over the last decade hip-hop music has surpassed country music in popularity. Hip-hop created the United States' first African American billionaire, Robert Johnson, who sold BET, a cable network that plays hip-hop videos, to Viacom, the corporation that owns MTV. It has had a major impact on fashion, with rap stars like P. Diddy and Jay-Z presiding over houses of fashion that produce top-selling men's wear that often pays homage to the garments that prison inmates wear—loose, baggy clothing. Hip-hop entrepreneurs have branched out into manufacturing and distributing products such as liquor, energy drinks, and gym shoes and have launched marketing and advertising firms.

Approximately seventy-five colleges and universities offer courses in hip-hop studies. Harvard University's famed Afro-American studies department recently hired a specialist in hip-hop because, according to Professor Henry Louis Gates, "it is one of the most important cultural phenomena in the second half of the twentieth century."[8] Hip-hop has its critics as well. The Harvard historian Martin Kilson, for example, writes that hip-hop denigrates African American achievements in civil rights.[9] John McWhorter of the University of California condemns it for being antiauthoritarian.[10]

Some members of the hip-hop nation have explicitly embraced politics. The most prominent is Russell Simmons, the multimillionaire co-owner of Def Jam who created a nonprofit organization, Hip-Hop Summit Action Network (HSAN), "dedicated to harnessing the cultural relevance of Hip-Hop music to serve as a catalyst for education advocacy and other societal concerns fundamental to the empowerment of youth."[11] One of HSAN's objectives is to register two million new voters for the 2004 presidential election.[12] In one measure of Simmons's influence, all but one of the major Democratic candidates for president in 2004 met with him. HSAN has emphasized reform of the criminal justice system, including the "total elimination of police brutality and the unjust incarceration of people of color and all others" as well as "the end and repeal of all repressive . . . laws, regulations and ordinances such as . . . federal and state mandatory minimum sentencing; trying and sentencing juveniles as adults; sentencing disparities

between crack and powdered cocaine use; [and] capital punishment."[13] It also pressed for the repeal of New York's Rockefeller drug laws, which require long prison sentences for drug crimes.

It is important not to overstate hip-hop's role as a political force in the United States. Compared to its cultural and economic power, hip-hop's political influence is not strong. In fact, hip-hop's primary constituent groups—young people and artists—are well known for their lack of participation in traditional electoral politics. Hip-hop's role in law and policy, at least for now, will be determined more by the strength of its vision than by its community's potency at the ballot box. This chapter posits that its vision, though undertheorized, has the potential to transform the United States into a safer, more just society.

Hip-Hop and Social Norms

What happens when many of the leaders of popular culture are arrested and incarcerated? For the hip-hop nation, this is not a theoretical question. So many of its most prominent artists have been arrested that the *Village Voice* recently asked whether the New York Police Department maintains a secret unit dedicated to hip-hop artists. Police in Miami admitted that they secretly watched and kept dossiers on hip-hop stars who visited that region.

The statistics about rap artists reflect those of young African American and Latino men. The reaction of artists in the hip-hop community to the mass incarceration of African Americans has been to interrogate the social meaning of punishment. In rap music, prison appears as a placement center for the undereducated, the unemployed, and, especially, aspiring capitalists who, if not locked up, would successfully challenge white elites. Big L, for example, complains that the police "wanna lock me up even though I'm legit / They can't stand to see a young brother's pockets get thick."[14]

Criminologists and legal scholars have recently emphasized the role of social norms in preventing crime. In the strongest form, the idea is that cultural (or subcultural) forces are more important than criminal law in determining conduct. We care more about how people in our communities label us than how the law does. The appropriate role of criminal law, then, is to support social mores that contribute to public safety. Criminal law fails when it subverts those norms. When, for example, incarceration is not sufficiently stigmatized, it loses its value as deterrence.

To say that hip-hop destigmatizes incarceration understates the point: Prison, according to the artists, actually stigmatizes the government. In a culture that celebrates rebelliousness, prison is the place for unruly "niggas" who otherwise would upset the political or economic status quo. In this sense, inmates are heroic figures. In "A Ballad for the Fallen Soldier," Jay-Z sends a "shout out to my niggas that's locked in jail / P.O.W.'s that's still in the war for real . . . But if he's locked in the penitentiary send him some energy / They all winners to me."[15]

While glorification of outlaws is certainly not limited to hip-hop, the culture's depiction of the criminal as a socially useful actor is different. Hip-hop justifies rather than excuses some criminal conduct. Breaking the law is seen as a form of rebelling against the oppressive status quo. Rappers who brag about doing time are like old soldiers who boast of war wounds.

The hip-hop slang for being arrested demonstrates the culture's view of the almost arbitrary nature of criminal justice: One "catches a case." The language connotes the same combination of responsibility and happenstance as when one catches the common cold.

Hip-hop suggests that American punishment is not mainly designed to enhance public safety or for retribution against the immoral. Rather, its critique of punishment echoes that of the philosopher Michel Foucault, who argued that prison is designed to encourage a "useful illegality" that benefits the state. For scholar Robin Kelley, "most rappers—especially gangsta rappers—treat prisons as virtual fascist institutions." In "All Things," Pep Love, of the rap collective Hieroglyphics, laments, "The pen is an inkwell, niggaz is slaves / Even if we not locked up, we on our way."[16] When popular culture presents prison as a rite of passage, punishment begins to lose its deterrent effect. If punishment is to be meaningful, it must be reinvested with stigma. We could accomplish this by using prison less frequently and more effectively. The next section suggests a way.

Punishment: The Remix

Every society has seen the need to punish. The hip-hop nation is no different. Three core principles inform its ideas about punishment. First, people who harm others should be harmed in return. Second, criminals are human beings who deserve respect and love. Third, communities can be destroyed by both crime and punishment.

How would these ideas contribute to a theory of punishment? The hip-hop nation, and especially its black and Latino citizens, are best situated to design a punishment regime. The philosopher John Rawls suggests that law is most just when it is made by people who don't know how they will fare under it. It is impossible, of course, to actually live in Rawls's imaginary world; as Rawls recognized, our instinct is to assess public policy from the standpoint of our individual interest. Since, however, minority members of the hip-hop nation are the most likely to be arrested and incarcerated for crimes—and also the most likely to be victims of them—they get closer to that than most of us.

Thousands of hip-hop songs consider crime and punishment. These voices are worth listening to—they evaluate criminal justice from the bottom up. If we listened, we would realize that Erykah Badu, Snoop Dogg, and Jeremy Bentham have a lot in common. Immanuel Kant and Jay-Z would get along well, but their differences would be instructive. Not all of the artists are brilliant theorists, although some of them are. They represent, however, a community that has borne the brunt of the world's two-hundred-year experiment with prison. That community knows much and has laid it down on tracks, and now attention must be paid.

We should not look to hip-hop culture for an entirely new justification of punishment. The art of hip-hop is in the remix. Thus some hip-hop overtly responds to trendy theories of punishment. The broken-window theory of law enforcement, for example, has had a profound impact on the ghetto and thus on hip-hop culture. Other elements of hip-hop can be interpreted as unconscious shout-outs to scholars of whom the artists probably are not aware. Foucault's influential history of the prison reverberates throughout hip-hop theory, as does the new criminal law scholarship on third-party interests in criminal law and the effects of mass incarceration. Hip-hop culture, though, is post-postmodern. In fact, some of its characteristics, especially its embrace of retribution, seem startlingly old-fashioned.

Let us consider a hip-hop theory of punishment by focusing on three classic problems in punishment theory. Why do we punish? What should we punish? How should we punish?

Why Punish?

Retribution and Respect in Hip-Hop

Hip-hop lyrics exhibit a strong conviction that wrongdoers should suffer consequences for their acts. In the words of Jay-Z, "Now if you shoot my dog, I'ma kill yo' cat / Just the unwritten laws in rap—know dat / For every action there's a reaction."[17] The culture abounds with narratives about revenge, retaliation, and avenging wrongs. The narrator in Eve's "Love Is Blind" kills the man who abuses her close friend. Likewise, Nelly warns, "[I]f you take a life, you gon' lose yours too."[18]

At the same time, hip-hop culture embraces criminals. In Angie Stone's "Brotha," for example, she sings, "[T]o everyone of y'all behind bars / You know that Angie loves ya."[19] To an incarcerated person Jay-Z seeks to "send . . . some energy" because "if he's locked in the penitentiary . . . / They all winners to me."[20] This kind of warm acknowledgment of the incarcerated is commonplace in hip-hop and virtually unheard of in other popular culture, which largely ignores the two million Americans in prison.

The most important civic virtue in the hip-hop nation is respect. One of the culture's contributions to the English language is the verb "dis," which means "to disrespect." To dis someone is worse than to insult them—it is to deny his or her humanity. Hip-hop vocabulary also includes the term "props"—to give props is to afford proper respect. The misogyny and homophobia in some hip-hop make it difficult to claim a universal value of respect for all persons. Virtually all hip-hop, however, connotes a respect for the dignity of lawbreakers.

How would a profound respect for the humanity of criminals change the way we punish them? It might require a more meaningful concept of proportionate punishment than the Supreme Court has currently endorsed. Harsh sentences for drug crimes, for example, are premised on utilitarian, not retributive, justifications. Such penalties have been the subject of much criticism in the hip-hop community. Police and lawmakers have defended them on the ground that they keep drugs out of low-income and minority communities. If this assertion is true, it would not persuade retributivists, who require proportionality even when disproportionate punishment is socially useful. The hip-hop nation probably would not punish drug users; if it did, its embrace of retribution means they would be punished significantly less than they are now.

The hip-hop nation sees benefits and burdens as allocated in an uneven and racialist manner. Through this lens, the "choice" of a poor person to sell drugs has a different and less blameworthy social meaning than that of a middle-class person to engage in, say, insider trading. In "Dope Man," Jay-Z raps, "I grew where you hold your blacks up / Trap us, expect us not to pick gats up / Where you drop your cracks off by the Mack trucks / Destroy our dreams of lawyers and actors / Keep us spiralin', goin' backwards."[21]

Hip-hop culture, like retributive philosophy, emphasizes the importance of moral autonomy and free agency. Both posit that people who freely choose to do wrong should be punished. Where hip-hop theorists and traditional retributivists diverge, however, is on how to determine responsibility for individual acts. Hip-hop culture emphasizes the

role of environment in determining conduct, whereas classic retributivist theory focuses on individual choice. In essence, hip-hop culture discounts responsibility when criminal conduct has been shaped by a substandard environment. OutKast, for example, asserts, "Knowing each and every nigger sellin', but can you blame / the fact the only way a brother can survive the game."[22]

[A] nigga wit' nothin' to lose
One of the few who's been accused and abused
Of the crime of poisonin' young minds
But you don't know shit 'til you've been in my shoes[23]

Hip-Hop Utility

Punishment has had a profound effect on some American communities. In some neighborhoods so many men are locked up that a male presence seems palpably absent. It approaches gross understatement to note that a community feels it when, as for African Americans, more young men are in prison than in college.

Hip-hop is concerned with the collateral effects of punishment. It acknowledges that even when punishment is deserved, there may be severe and unintended consequences, including damage to social networks. Makaveli, for example, notes that families suffer when incarcerated parents cannot provide for their children. He states, "My homeboy's doin' life, his baby momma be stressin' / Sheddin' tears when her son, finally ask that questions / Where my daddy at? Mama why we live so poor?"[24]

Should such consequences be considered when an individual offender is punished? The message from hip-hop is that such considerations are essential. Hip-hop culture advocates retribution—but not at all costs. If the consequence of making people pay for their crimes is the decimation of a community, then retribution recedes in importance.

A hip-hop construct of punishment would thus combine retributive and utilitarian justifications but differently than the prevailing mixed-theory model, which assumes that the aim of punishment is utilitarian, but with retributive limits. In the hip-hop construct, the objective of punishment would be retribution—but with utilitarian limits.

What and Whom to Punish?

If punishment is allocated properly, the statistics cited earlier suggest that half of the most dangerous or immoral Americans are black, even though African Americans make up only about 12 percent of the population. It means that black men pose such a threat that they must be locked up at a rate more than seven times that of white men, and that Hispanic men must be locked up at a disproportionate rate as well. The person who has confidence in the American criminal justice system probably has an unfavorable view of blacks and Latinos and a more positive view of whites.

The hip-hop nation rejects this view. It does not see morality or dangerousness as allocated along the race and class lines that the prison population suggests. A frequent theme in hip-hop is that the law does not correctly select the most deserving candidates for punishment. Specifically, it does not properly weigh the immorality posed and danger caused by white elites. On the other hand, it exaggerates the threat posed by the poor

and by minorities. From this perspective, blameworthy conduct by privileged white people or the government often goes unpunished.

Thus Ice-T jokes that "America was stole from the Indians / Show and prove, what was that? / A straight up nigga move."[25] Immortal Technique complains that "families bleed because of corporate greed."[26]

Hip-hop artists sometimes accuse the state of complicity in crime. In "Gun Music," Talib Kweli raps, "You know who killing it, niggas saying they militant / The only blood in the street is when the government spilling it."[27] In another song, Kweli provides an example: "[The police] be gettin' tips from snitches and rival crews / Doin them favors so they workin for the drug dealers too / Just business enforcers with hate in they holsters / Shoot you in the back, won't face you like a soldier."[28]

Of course, complaints that criminal law is selectively enforced against blacks and other minorities are familiar, and not only in hip-hop culture. Hip-hop's indictment of criminal justice goes further; it identifies bias in the way that crime is constructed as well as the way that it is policed.

Some hip-hop artists have suggested that lawmakers now define crime in a way that does not challenge powerful corporate interests—even when corporations cause harm, such as by marketing guns or tobacco. Sellers of other drugs, including arguably less harmful ones, are punished. Hip-hop suggests that some of the existing distinctions between legal and illegal conduct, and between crimes and torts, are unprincipled.

Ultimately, hip-hop acknowledges the poor consequences that drugs can have on individuals and communities. The culture is not as quick as some scholars to label drug crimes "victimless." Acknowledging these costs, however, does not inevitably lead to a belief that drug offenders should be punished. Because of the environmental factors that contribute to drug use and sales, the government's perceived complicity in the availability of drugs in the ghetto, its turning a blind eye to the sale of potentially harmful drugs like tobacco and alcohol, and the selective enforcement of the drug laws in minority communities, the hip-hop consensus seems to be against punishment of drug offenders.

How to Punish?

Hip-hop artists are suspicious of discretion exercised by people outside their community, especially white elites. In "99 Problems," Jay-Z wonders if he is stopped by the police because he is young, black, and wearing his hat low on his head.[29] Grand Puba recalls driving on the New Jersey turnpike:

> *[When a police officer] looked over, caught the shine from the rim of the Rover*
> *You know his next move [*sound of police siren*] pull it over*
> *I pulls over to the right-hand shoulder*
> *Look through the rearview he got his hand on his holster*
> *He had this look "how this black nigga get this car?"*
> *You know these cracker state troopers don't know rap stars.*[30]

Many artists also worry about discretion by sentencing authorities. This concern finds empirical support in studies showing that blacks and Hispanics receive more severe sentences than whites for the same crime.[31]

One response, from a hip-hop ethos, might be a requirement that punishment be imposed by people within the community. In the context of trials, one scholar observed that "the most obvious counterbalance to the bias of white jurors is the mandatory inclusion of black jurors in the decision-making process."[32] This recommendation could extend to sentencing. Thus, a defendant would have the right to jurors from his community, and these jurors would have sentencing authority.

This kind of reform has been a consistent theme in hip-hop. In "Escape from Babylon," Paris outlined a ten-point plan that included black juries for African American defendants.[33] Similarly, Nas has recommended that "the streets be the court—and corners hold the trial."[34]

"Representation" is an important theme in hip-hop culture. One "represents" by conducting himself or herself in a way that makes the community proud. Representation implies responsibility. In sentencing lawbreakers, representation of the hip-hop community would enhance the expressive value of punishment and give it a legitimacy it now lacks.

An instrument of punishment that is approximately two hundred years old, prison was designed to punish criminals in a more humane way than killing them or harming their bodies. How successful has the experiment been?

Hip-hop became popular during the same period that the prison population experienced its greatest expansion. From 1972 to 1997, the prison population increased by almost 600 percent—from 196,000 to 1,159,000 inmates. The rate of violent crime actually decreased during this time, but the number of people locked up for nonviolent offenses rose sharply.

The experiences of the two million people now incarcerated in the United States have been documented more in hip-hop than in any other medium. The portrait is ugly. To Nas, prison is "the belly of the beast" and "the beast love to eat black meat / And got us niggaz from the hood, hangin' off his teeth."[35]

The virtually universal view in the hip-hop nation is that punishing people by locking them in cages for years is a miserable public policy. Incarceration is cruel because it is dehumanizing. It is counterproductive because, as discussed earlier, it has been used so promiscuously in minority communities that it has lost its value as deterrence. As scholar Robin Kelley puts it, "Prisons are not designed to discipline but to corral bodies labeled menaces to society; policing is not designed to stop or reduce crime in inner-city communities but to manage it."[36]

The artists put it even more eloquently: In the words of Beanie Sigel, "I know what it's like in hell / I did a stretch in a triflin' cell . . . / Locked down all day, underground, neva seein' the sun / Vision stripped from you, neva seein' your son."[37] Immortal Technique says, "[S]leeping on the floor in cages starts to fuck with your brain / The system ain't reformatory, it's only purgatory."[38] DMX describes "the frustration, rage, trapped inside a cage."[39]

Hip-hop often depicts incarceration as driven by profit rather than public safety. Its analysis is that it is socially expedient to warehouse people whose problems are difficult or expensive to treat, especially when economic benefits accrue to the (largely white and rural) communities where prisons frequently are situated. The hip-hop perspective is reminiscent of Kant's critique of utilitarianism—that it is immoral to punish people as a means of benefiting society. According to some artists, that is the real meaning of

the punishment regime. Mos Def suggests a "prison-industry complex" that supports a "global jail economy."[40] Ras Kass explains, "It's almost methodical, education is false assimilation / Building prisons is more economical."[41]

As we have seen, hip-hop culture ascended to national prominence in the post–civil rights era. Hip-hop artists express some of the same concerns as do traditional civil rights activists about criminal justice. Both vigorously protest racial profiling by police. Unlike civil rights culture, hip-hop does not practice a politics of respectability. It is less bourgeois. It champions the human rights of criminals as enthusiastically as those of the falsely accused. It is as concerned with fairness for drug sellers as for law-abiding middle-class people stopped by the police for driving while black or driving while brown. Ultimately, hip-hop culture's reforms focus more on substantive than procedural issues (criminal law more than criminal procedure). Accordingly, hip-hop activists may be better equipped to protest the crack cocaine sentencing regime, felony disenfranchisement, or recidivist statutes than organizations like the NAACP. They are also more willing to use nontraditional tactics to change the laws.

This chapter is a beginning. It is an early attempt to fashion a hip-hop jurisprudence. Hip-hop culture includes a tradition of answer raps—of provocative responses to provocative words. I look forward to those responses.

NOTES

1. Jay-Z, *Justify My Thug*, on The Black Album (Roc-A-Fella Records 2003).

2. Beanie Sigel, *What Your Life Like*, on The Truth (Def Jam Records 2000).

3. The phrase comes from Chuck D, of the rap group Public Enemy.

4. Austin Sarat, When the State Kills: Capital Punishment and the American Condition 23 (2001).

5. *The History of Hip-Hop*, *supra* note 3.

6. Teresa Wiltz, *We the Peeps: After Three Decades Chillin' in the Hood, Hip-Hop Is Finding Its Voice Politically*, Wash. Post, June 25, 2002, at C1.

7. *Id*. The author Bakari Kitwana has also described "two sides" to hip-hop:

> Hip-hop has a positive impact, but also has a negative impact in terms of these anti-black images and this misogynistic attitude that comes from rappers who sell multi-platinum records. Like Jay-Z. But at the same time Jay-Z offers a message that the society is screwed up, that it's difficult out here, that the issues of unemployment and education are critical issues. The music is contradictory but the messages that society is sending us are contradictory too. I don't think that it's unusual; I think that's how life is.

Suzy Hansen, *Hip-Hop Nation*, Salon, July 19, 2002.

8. Sara Rimer, *Harvard Scholar Rebuilds African Studies Department*, N.Y. Times, July 16, 2003, at A16.

9. Martin Kilson, *The Pretense of Hip-Hop Black Leadership*, Black Commentator, July 17, 2003, http://www.blackcommentator.com/50/50_kilson.html (last visited Feb. 5, 2004).

10. John H. McWhorter, *How Hip-Hop Holds Blacks Back*, City J., Summer 2003, http://www.city-journal.org/html/13_3_how_hip_hop.html (last visited Mar. 28, 2004).

11. Hip-Hop Summit Action Network, *Mission Statement*, http://www.hsan.org/content/main.aspx?pageid=7 (last visited Jan. 10, 2013).

12. See Ta-Nehisi Coates, *Compa$$ionate Capitali$m: Russell Simmons Wants to Fatten the Hip-Hop Vote—and Maybe His Wallet, Too*, Village Voice, Jan. 7, 2004.

13. Hip-Hop Summit Action Network, *What We Want*, http://www.hsan.org/content/main.aspx?pageid=27 (last visited Jan. 10, 2013).

14. Big L, featuring Fat Joe, *The Enemy*, on The Big Picture (Priority Records 2000).

15. Jay-Z, *A Ballad for the Fallen Soldier*, on The Blueprint 2: The Gift & the Curse (Roc-A-Fella Records 2002).

16. Hieroglyphics, *All Things*, on Third Eye Vision (Hieroglyphics Imperium Records 1998).

17. Jay-Z, *supra* note 1.

18. Nelly, *Nellyville*, on Nellyville (Universal Records 2002).

19. Angie Stone, *Brotha*, on Mahogany Soul (J-Records 2001).

20. Jay-Z, *supra* note 15.

21. Jay-Z, *Dope Man*, on Volume 3: The Life and Times of S. Carter (Roc-A-Fella Records 1999).

22. OutKast, *Mainstream*, on ATLiens (LaFace Records 1996).

23. NWA, *100 Miles and Runnin'*, on 100 Miles and Runnin' (Priority Records 1990).

24. Makaveli, *White Man'z World*, on The Don Killuminati: The 7 Day Theory (Interscope Records 1996).

25. Ice-T, *Straight Up Nigga*, on O.G. Original Gangster (Warner Brothers Records 1991).

26. Immortal Technique, *Speak Your Mind*, on Revolutionary Volume 1 (Viper Records 2001).

27. Talib Kweli featuring Cocoa Brovaz, *Gun Music*, on Quality (MCA Records 2002).

28. Talib Kweli, *The Proud*, on Quality, *supra* note 27.

29. Jay-Z, *99 Problems*, on The Black Album (Def Jam Records 2003).

30. Brand Nubian, *Probable Cause*, on Foundation (Arista Records 1998).

31. See Marc Mauer, Race to Incarcerate 138–40 (1999).

32. Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 Mich. L. Rev. 1611, 1649 (1985).

33. Paris, *Escape from Babylon*, on The Devil Made Me Do It (Tommy Boy Records 1990).

34. Nas, *Nas Is Coming*, on It Was Written (Sony Records 1996).

35. DMX et al., *Grand Finale*, on Belly Soundtrack (Def Jam Records 1998).

36. Robin D. G. Kelley, *Kickin' Reality, Kickin' Ballistics: Gangsta Rap and Postindustrial Los Angeles*, in Droppin' Science: Critical Essays on Rap Music and Hip Hop Culture 118 (William Eric Perkins ed., 1996).

37. Beanie Sigel, *supra* note 2.

38. Immortal Technique, *Revolutionary*, on Revolutionary Volume 1, *supra* note 26.

39. DMX, *Who We Be*, on The Great Depression (Universal Records 2001).

40. Mos Def, *Mathematics*, on Black on Both Sides (Rawkus Records 1999).

41. Ras Kass, *Ordo Abchao (Order Out of Chaos)*, on Soul on Ice (Priority Records 1996).

54. Legal Violence and the Chicano Movement

IAN F. HANEY LÓPEZ

Until the late 1960s, the Mexican community in the United States thought of itself as racially white. That is not how Anglos thought of them, of course. Largely beginning with the nineteenth-century period of intense Anglo-Mexican conflict in the Southwest, Anglo society perceived Mexicans as racially separate and inferior. By the 1920s, the Mexican community responded to this negative racialization by insisting that they were white. Leaders of the community insisted that Mexicans were Caucasian and thus biologically white, deserving the same social status and civic position as the white group. To take one example, although the U.S. Census Bureau enumerated a "Mexican race" in 1930, the bureau bowed to political pressure from the Mexican community thereafter and in 1950 and 1960 counted that group as "White Persons of Spanish Surname." Despite these gains, in the late 1960s a large segment of the Mexican community reversed its racial self-conception, proclaiming a nonwhite identity. One of the hallmarks of the Chicano movement of that period was the assertion, still widely subscribed to today, that Mexicans form a separate race from whites.

How did this transformation occur? Why did an emphasis on nonwhiteness arise in the late 1960s, when the community had fervently claimed a white identity during the relatively more racist 1940s and 1950s and had even made some progress in garnering official recognition of Mexican whiteness? Was the claim of nonwhiteness a strategic choice, or did it reflect genuine conviction?

Social Movement Theory

The development of a nonwhite identity within the Mexican community arose with the Chicano movement, an episode of broad political and cultural mobilization that can be partly explained by social movement theory.

Various social movement theorists have identified the influence of black mobilization in the 1950s and 1960s on movements for women's liberation, gay and lesbian rights,

A version of this chapter previously appeared as Ian F. Haney López, *Protest, Repression, and Race: Legal Violence and the Chicano Movement*, 150 U. Pa. L. Rev. 205 (2001). Originally published in the *University of Pennsylvania Law Review*.

and disability rights. The Southern part of the black movement stressed the rhetoric of rights over the language of race. In the development of activism in the Mexican community, identity, and in particular racial identity, played a more important role than rights. For Chicanos, the most directly influential component of the African American fight for social rights was not the Southern organizing of the 1950s but the black power movement of the mid- to late-1960s. Black power exercised a direct influence on the Chicano movement because it established racial identity as the principal means of self-conception and group empowerment.

Black Power and the Chicano Movement

Even before the first high school walkouts in East Los Angeles in 1968, local Mexican youth had met with black power activists. High school students in East Los Angeles formed a group called Young Citizens for Community Action (YCCA) in 1966. The next year, YCCA opened La Piranya, a coffeehouse and cultural center where activists introduced their causes to the community. Among the various speakers who met with the young activists of East Los Angeles were black power militants H. Rap Brown and Ron Karenga, and Stokely Carmichael, one of the architects of black power as a political rallying cry. In addition to meetings with black power advocates, a few Mexicans cut their political teeth in black organizations. Elizabeth Sutherland Martínez, for instance, worked on civil rights in Alabama and in 1964 became the director of the Student Nonviolent Coordinating Committee office in New York. East LA Thirteen lawyer Oscar Acosta also apprenticed in the black struggle, spending four years working with the black civil rights movement while attending law school in San Francisco. These direct contacts between the black power movement and the leaders of the nascent Chicano struggle reflect the importance of personal networks—interpersonal relations within and between activist groups—in the rise of social movements.

Antiblack Prejudice

Yet the experiences, lessons, and strategies of the black power movement did not speak exactly to the particularities of Mexican existence. Regarding his experience in the civil rights movement Acosta remarked, "[I]t wasn't really me. I told people that it wasn't just black and white, that there were Chicanos, too." The frustration Acosta expressed raises a larger point. Mexicans embraced the black power movement's model of identity mobilization, but they did so from the distinct social position they occupied in the Southwest. Like the other imitator movements that followed on the heels of, and adapted so much from, the black fight for equality, the Chicano movement in East Los Angeles reflected many other influences as well.

Perhaps most significantly, the lessons of the black struggle were filtered through conceptions of Mexican identity already prevalent in that community. Recall that the Mexican American generation (the political generation active during the 1920s through the 1950s) saw themselves as a white group. This self-conception both drew on and led to prejudice against African Americans, which in turn hindered direct relations between those two groups. In 1964 Mexicans overwhelmingly helped pass California Proposition 14, a voter initiative subsequently overturned on constitutional grounds, which

barred local governments from prohibiting discrimination in the housing market. As a contemporary commentator remarked, "Mexican-Americans apparently failed to realize that the measure was directed against them as well as against the Negro." As late as 1965 mainstream Mexican American civil rights organizations positioned themselves in opposition to black groups. For instance, shortly after the 1965 Watts riots in Los Angeles, the principal organizations of the Mexican American generation, including the League of United Latin American Citizens and the GI Forum, sent President Lyndon Johnson a resolution that pointedly contrasted their assimilationist orientation with the militancy of the black community. "The organizations argued that since Mexican-Americans did not believe in or engage in civil disobedience or violent confrontation, they were good citizens, loyal to the democratic system, and should be included in antipoverty programs."

Thus, to make use of the black experience, members of the Mexican community had to overcome both a strong assimilationist commitment and a strain of bias against African Americans. Their ability to do so came in part because the social turmoil of the late 1960s highlighted the failure of the Mexican American generation to achieve social and political equality, despite more than three decades of effort.

Mexican Activism Beyond, and Before, the East Los Angeles Movement

The waning influence of Mexican American assimilationist ideology both allowed and resulted from the increasing influence of black activism in the Mexican community. However, other factors also pushed members of the Mexican community in Los Angeles toward an oppositional stance rooted in race. In particular, activism among Mexicans in other parts of the Southwest helped to catalyze the Los Angeles Chicano movement.

For instance, in the fall of 1965, César Chávez organized Mexican laborers in the first major strike against agribusiness in California's Central Valley. The farmworkers' struggle—union activity carried out on a nonracial and nonviolent basis—developed into the largest, and arguably the only nationally prominent, mobilization of Mexicans in this period. Chávez's efforts inspired a wave of activism in Los Angeles and across the Southwest. Chávez traveled and spoke widely to garner support for the farmworkers and to encourage a more widespread political mobilization, appearing several times at rallies in Los Angeles. Two of Chávez's organizers moved to that city to work on *La Raza*, the leading movement newspaper there. Even Acosta felt Chávez's influence: a visit with Chávez during his fast in April 1968 helped Acosta decide to dedicate himself to the full-time defense of Chicano movement activists.

Two other Mexican movements also contributed to Chicano militancy in Los Angeles. In contrast to the nonviolence exemplified by Chávez and the farmworkers, the land grant movement in New Mexico led by Reies López Tijerina provided a model of violent, armed protest. In rural New Mexico in the early 1960s, López Tijerina began to organize his followers around the issue of land titles, arguing that much of the land held by the federal government as national forest had been acquired by fraud from the region's Hispano inhabitants. Under the banner of La Alianza Federal de Mercedes (the Federal Alliance of Land Grants), López Tijerina's early strategies included legal arguments over the meaning of the Treaty of Guadalupe Hidalgo, appeals to the Mexican government for assistance, and political pressure on elected and judicial officials. By

1966, however, these tactics segued into mass demonstrations, including the occupation of national forest land. In one dramatic action in October 1966, López Tijerina and La Alianza occupied portions of the Kit Carson National Forest, took two law enforcement officers hostage, tried them for trespassing, and sentenced them to jail, before "mercifully" suspending the sentence and releasing them. Then, on June 5, 1967, while awaiting trial on the 1966 action, López Tijerina and armed members of La Alianza stormed the county courthouse in Tierra Amarilla, New Mexico, to make a citizen's arrest of a district attorney they considered abusive. A gun battle ensued, twenty hostages were held for about an hour, and a jailer and a state police officer were wounded. After almost one hundred years of quiescence, the actions of López Tijerina and La Alianza represented a resurgence of armed opposition to Anglo domination and provided Mexicans across the Southwest with a model of authentically Mexican militancy.

The Chicano movement in East Los Angeles also gained impetus from a Denver, Colorado, organization called the Crusade for Justice led by Rodolfo "Corky" Gonzales. Gonzales initially sought to improve the situation of Mexicans by following the route prescribed by the Mexican American generation. However, by 1965, after stints as a precinct captain for the Democratic Party and as the director of Denver's War on Poverty, Gonzales came to favor increased activism. In 1966 he founded the Crusade for Justice, an organization that spoke not to rural farmworkers or disenfranchised land holders but to disenchanted Mexican urban youth. Gonzales more than any other brought the question of identity to the forefront of political mobilization. Whereas Chávez stressed labor and López Tijerina focused on land, Gonzales placed Mexican identity at the center of his organizing. Gonzales was the first prominent activist to attempt to rehabilitate the term "Chicano," theretofore often used pejoratively by Mexicans and Anglos alike. Gonzales's 1967 poem *I Am Joaquín/Yo Soy Joaquín* "became the epic story of the Chicano experience."

The farmworkers, La Alianza, and the Crusade all contributed directly and dramatically to the development of Chicano activism in East Los Angeles. When students first marched in protest outside Garfield High School in early March 1968, their chants included not just salutes to leaders of the Mexican revolution such as Pancho Villa and Emiliano Zapata but also shouts of "¡Qué Viva!" to the names César Chávez, Reies López Tijerina, and Corky Gonzales.

I contend that twenty years and more of black activism revealed deep links between community protest, legal repression, and racial identity and that those in the Chicano movement drew on these conceptual connections as the notion of a Chicano race evolved.

I have argued elsewhere that law constructs race. (See Chapter 24.) The Chicano experience suggests that where legal violence against racialized communities is routine, that practice not only draws on but spurs racial constructions. Specific studies should explore the dynamics of racial formation vis-à-vis different communities at various times. Sadly, though, we can be confident that such studies will demonstrate that legal violence contributes to racial construction, of both nonwhites and whites.

55. Demise of the Talented Tenth

The Increasing Underrepresentation of Ascendant Blacks at Selective Higher Education Institutions

KEVIN BROWN AND JEANNINE BELL

> The Negro race, like all races, is going to be saved by its exceptional men. The problem of education, then, among Negroes must first of all deal with the Talented Tenth; it is the problem of developing the Best of this race that they may guide the Mass away from the contamination and death of the Worst, in their own and other races.
>
> **—W.E.B. Du Bois, "The Talented Tenth"**[1]

An examination of the racial and ethnic makeup of black students in higher education shows that black-white biracials and black immigrants constitute increasing percentages of blacks on college campuses, including in selective higher education programs. Thus, the percentage of "ascendants"—U.S.-born descendants of the original slaves—at many selective higher education institutions may be considerably less than many realize.

Since the 1960s, acceptance of interracial marriages in the United States has increased. Surveys in the 1960s showed that about 92 percent of whites would not consider marrying an African American. As late as 1965, 48 percent of whites in a national poll indicated approval of criminal antimiscegenation laws. In the South, the feeling was even stronger, with 72 percent of whites approving of such laws. By the late 1990s, tolerance for interracial marriage had increased significantly; a 1997 Gallup poll revealed that 77 percent of blacks and 61 percent of whites approved of interracial marriages.

The growing social acceptance of interracial marriages has increased the number of biracial couples. In 1960 about 1.7 percent of married blacks had a white spouse. In 1990 this percentage had risen to about 6 percent. Since 1990 the percentage of interracial marriages by blacks has continued to increase. In the 2000 census, 9.7 percent of married black men and 4.1 percent of married black women reported a spouse of another race.

The data demonstrating increasing interracial marriages and cohabitation strongly suggest that the percentage of black-white biracial students on college campuses is likely to continue to increase in the near future. According to the 2000 census, the median age of mixed-race blacks is only 16.3 years compared to black alone at 30.4 and the U.S.

A version of this chapter previously appeared as Kevin Brown and Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Education Institutions*, 69 Ohio St. L.J. 1229 (2008). Originally published in the *Ohio State Law Journal*.

average of 35.4. Whereas mixed-race blacks constitute 8.4 percent of blacks under age 18, they are only 3.7 percent of those between ages 18 and 64 and only 2 percent of those ages 65 and older.

Evidence shows overrepresentation of black-white biracials at selective colleges and universities as well. While 14.3 percent of the black-only population over age 25 had attained at least a bachelor's degree, 23.8 percent of black-white biracials had done so. This higher educational attainment is unsurprising considering that the test scores of black and multiracial children raised in white homes are higher than those raised in black homes.

Immigration of blacks from different parts of the world has also dramatically changed the ethnic makeup of the black population on college and university campuses. In 1960, foreign-born blacks made up less than 1 percent of the black population in the United States, totaling just over 125,000 individuals. By 1990, that percentage had increased to almost 5 percent and the numbers increased almost twelvefold, to 1,455,294. According to the 2000 census, almost 2.2 million foreign-born blacks made their homes in the United States, constituting approximately 6.1 percent of the black population. Of foreign-born blacks in the United States, 41 percent entered between 1990 and 2000, 32 percent entered between 1980 and 1989, and 28 percent entered before 1980. The percentage of foreign-born blacks has continued to grow since 2000. By 2005, the number had increased to 2.8 million, approaching almost 8 percent of the black population.

According to recent Census Bureau statistics, 3.7 percent of the black children in K–12 schools were born outside the country, and 13.3 percent had at least one parent born elsewhere. Both of these percentages are approximately double the rate for whites and increase with levels of education. More than 12 percent of all black undergraduates at United States colleges and universities were born outside the United States, a rate three times that of whites. In a recent year, 20.9 percent of black undergraduates had at least one parent born outside the United States and 18.7 percent were born outside this country, compared with only 6.3 percent for white students. In addition, 27.4 percent of the black graduate students had at least one foreign-born parent.

Black immigrants from Africa averaged the highest percentage of college graduates of any group in the United States. Their graduation rate was also higher—43.8 percent, compared to 42.5 percent for Asian Americans; 28.9 percent for immigrants from Europe, Russia, and Canada; and 23.1 percent for the U.S. population as a whole. The African immigrants' average education attainment level of 14 years also exceeds that of whites and Asians at 13.5 and 13.9, respectively.

The Underrepresentation of Ascendants in Selective Education Programs

Since selective colleges, universities, and graduate programs do not break down their applicants on the basis of race and ethnicity, it is difficult to obtain accurate statistics classifying black students into the categories suggested above. Many administrators, admissions committees, and faculties may not be aware of the percentage of their black students who are nonascendants. Nevertheless, the decreasing percentage of ascendants enrolled in selective higher education programs has drawn the attention of scholars and researchers. In 2003, Harvard professors Henry Louis Gates, Jr., and Lani Guinier noted

that the children of mixed-race couples or African and Caribbean immigrants together made up two-thirds of Harvard's black undergraduate population. In a 2003 study of data from the National Longitudinal Survey of Freshmen, 17 percent of the black freshman reported themselves to be of mixed-race ancestry.

Why might this be so? On economic measures, foreign-born black immigrants fare better than native-born blacks do. The median household income of immigrant blacks exceeds that of native-born blacks. Africans have a median income of $42,900; Caribbean blacks, $43,650; native-born blacks, $33,790.

Studies of the behavior of the parents of biracial children found that such parents allocated resources differently than monoracial parents. This study, which compared more than 1,500 biracial families with monoracial families, revealed that, with one exception, biracial families provided resources that "typically exceed those offered by parents coming from one or both of the corresponding monoracial groups." In other words, the significant advantages biracial children enjoy may translate into higher academic performance measures.

While only 13 percent of black eighteen- or nineteen-year-olds are first- or second-generation immigrants, they made up 27 percent of the freshmen at highly selective colleges and universities. The percentage of first- and second-generation black immigrants was even higher (35.6 percent) at the ten most selective schools and higher still (40.6 percent) at the four Ivy League schools (Columbia, Princeton, Penn, and Yale). According to Dr. Michael T. Nettles, vice president for Policy Evaluation and Research at the Educational Testing Service, "If Blacks are typically 5 and 6 percent of the population at elite colleges, then the representation of native U.S. born African Americans might be closer to three percent."[2] As Professor Guinier wrote in a *Boston Globe* column, "Like their wealthier white counterparts, many first- and second-generation immigrants of color test well because they retain a national identity free of America's racial caste system and enjoy material and cultural advantages, including professional or well-educated parents."[3]

Salient Differences Between Ascendants and Nonascendants in the Historical Struggle Against Racial Subordination in the United States

It is important not to overstate differences between ascendants and black-white biracials or black immigrants in the collective struggle to eradicate racial subordination in the United States. Individual predilections and experiences are always critical in determining a person's social outlook, personality traits, and characteristics. Determining which individuals to admit to selective colleges, universities, and graduate programs entails deciding whom to admit on the basis of how applicants can be distinguished from one another. For example, if 98 percent of the knowledge and understanding among applicants is the same, then this 98 percent would be excluded for purposes of determining whom to admit and whom to deny. Only the differences among individuals matter. Thus, in determining admissions at the most selective higher education programs in our country, slight dissimilarities emerge as significant differences. In pondering underrepresentation

of ascendants in higher education programs, it is critical that we address differences not among individuals but among racial/ethnic groups of blacks in the United States.

Black-White Biracials and the Emergence of a Distinct Identity

Most admissions applications allow black-white biracials to identify as black. This procedure, however, is increasingly in conflict with the racial identity of many such individuals. Research suggests that they may understand their racial identity in a variety of ways. In addition to a singular identity (either exclusively black or exclusively white), which some research subjects chose, other options include a border identity (exclusively biracial), a protean identity (sometimes black, sometimes white, sometimes biracial), and a transcendent identity (no racial identity). Research suggests that individuals also choose identities based on social networks or appearance.

The ability to create a new racial identity may encourage some black-white biracials to decide not to self-identify with ascendants, a group of people who are still viewed negatively in our society. One study, not surprisingly, found that multiracial students at a predominantly white university who were black and another race did not identify as strongly with being black as monoracial blacks. The study found that biracial black students were less likely to feel close to other black students and more likely to report extreme or considerable alienation from black students on campus. While 54 percent of monoracial black students reported that all or most of their close friends on campus were other black students, none of the biracial students did so. Some 40 percent of the biracial black students described negative experiences with other blacks compared to only 12 percent of the monoracial black students. A second study of 177 college students from Detroit who had one black and one white parent found that over 60 percent of these students developed what the study called a "border identity." They saw themselves as neither black nor white but a hybrid.

Implications of the Overrepresentation of Black-White Biracials

From the perspective of the historical struggle against racial oppression in the United States, many black-white biracials face divided loyalties regarding their relationship with ascendants. Since at least one of their parents is white, they are likely to have more intimate contact with members of the majority community than the ascendants. They will have families, relatives, and friends from their white side concerned with their betterment. As a result, they will funnel a greater portion of their energy, earnings, and time away from the black community compared to ascendants.

Many black-white biracial children, like many ascendant children, grow up in single-parent households. Since the majority of black-white interracial marriages include a black male and a white female, biracial children are much more likely to have a white mother and a black father. Thus, if they grow up in a single-parent household, it is likely to be that of the white mother. As a result, they are likely to receive a cultural orientation that deemphasizes their connection to the historical struggle against racial oppression in the United States, and they may feel less obligated to participate in that struggle.

Successful ascendants may be better role models for other ascendant youth than black-white biracials. Mainstream American society, for its part, may view some black-white biracials as a separate group from the ascendants. They may also seem more polite, less hostile, more solicitous, and easier to get along with than ascendants. The result is that successful black-white biracials may do less to combat negative stereotypes of ascendants and could possibly even reinforce those stereotypes.

Some black-white biracials may not advance the diversity objectives outlined by the Supreme Court in *Grutter* to the same extent as ascendants. Many will not have experienced growing up as a racial minority and will be less willing to identify with the history of discrimination suffered by blacks in the United States. Thus, many black-white biracials are less likely than ascendants to offer unique contributions to the character of education at a selective higher education program, such as in lively, spirited, and enlightening classroom discussions. Ascendants are also likely to contribute more to cross-racial understanding than many black-white biracials. These unique contributions were the reasons the University of Michigan Law School sought to enroll a critical mass of students from groups historically discriminated against.

All of the reasons above suggest that, in general (but with recognition that there will certainly be important individual differences), ascendants are likely to contribute more toward attenuating the historical effects of racial oppression in the United States than black-white biracials. In addition, they are more likely to advance the objectives of diversity in higher education. We do not ignore that many blacks with a white parent such as Frederick Douglass, Barack Obama, and Halle Berry have been critical in the struggle against racial oppression in the United States and are important leaders in the black community. Our concern is not with the inclusion of black-white biracials in higher education but with the growing underrepresentation of ascendants. Black-white biracials will always play important roles in American society, but selective higher education programs need to also address the growing underrepresentation of ascendants.

NOTES

1. W.E.B. Du Bois, *The Talented Tenth*, in A W.E.B. Du Bois Reader 31, 31 (Andrew Paschal ed., 1971).

2. Quoted in Ronald Roach, *Drawing upon the Diaspora, Diverse: Issues in Higher Education*, Aug. 25, 2005, at 39, 40.

3. Lani Guinier, Editorial, *Our Preference for the Privileged*, Boston Globe, July 9, 2004, at A13.

56. Law as a Eurocentric Enterprise

KENNETH B. NUNN

> The white man . . . desires the world and wants it for himself alone. He considers himself predestined to rule the world. He has made it useful to himself. But here are values which do not submit to his rule.
> —**Frantz Fanon, *Peau Noire, Masques Blancs***[1]

Several schools of legal thought now acknowledge law's relationship to culture. But what is often overlooked is that the law is the creation of a particular *type* of culture. Law, as understood in European-derived societies, is not universal. Compared to the world's other cultural traditions, Western European culture is highly materialistic, competitive, individualistic, and narcissistic, placing great emphasis on the consumption of natural resources and material goods. In addition, European culture tends to take aggressive, domineering stances toward world inhabitants. Consequently, the driving force behind racism, colonialism, and group-based oppression is European and European-derived culture. That culture has produced a legal tradition that, while offered as universal, is distinctly its own. John Henry Merryman describes "legal tradition" as "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system and about the way law is or should be made, applied, studied, perfected and taught." According to Merryman, the civil law, common law, and socialist law traditions "are all of European origin." These legal systems, which make up the bulk of what is referred to as "the law," all "express ideas and embody institutions that have been formed in the European historical and cultural context."[2]

I argue that law is a Eurocentric enterprise—part of a broader cultural endeavor that attempts to promote European values and interests at the expense of all others. Law carries out a Eurocentric program as it organizes and directs culture. It does this by reinforcing a Eurocentric way of thinking, promoting Eurocentric values, and affirming—indeed celebrating—the Eurocentric cultural experience. A contrasting point of view, sometimes known as Afrocentricity, requires the scholar to interrogate knowledge from a position that is grounded in African values and the African ethos. An African-centered perspective reveals the normally hidden relationship between white supremacy and law in the Western cultural context.

A version of this chapter previously appeared as Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 Law & Ineq. 323 (1997). Originally published in *Law and Inequality: A Journal of Theory and Practice*.

The Critique of Eurocentricity

From an African-centered cultural perspective, racism, sexism, classism, and other problems endemic to Western societies are not the product of misguided or venal individuals. Nor are they solely the result of material conditions or predictable social processes. These problems result from the fundamental nature of European society and culture. That is, racism, sexism, and the like flow from the worldview and conceptual system that are at the core of European culture. It is the core cultural dynamics of Western societies that produce social structures in which male traits, material possessions, and white racial characteristics are so highly privileged.

At the center of European culture lies a complex of values that are profoundly materialistic. European culture is materialistic in both the ontological sense that the nature of reality is perceived in material terms and in the sociological/axiological sense that the acquisition of objects is the primary social goal. I use "Eurocentricity" to refer to a conceptual system or worldview that is grounded in materialism and that exhibits an epistemology, aesthetics, and ethos based in material values. Since the Eurocentric perspective conceives of reality in material terms, the resources available for well-being and survival are perceived to be finite. This perception that life is a zero-sum game leads to the development of social behaviors that are highly competitive and aggressive. Because competition is so critically important to the Eurocentric mind-set, individualism and the accumulation of material things are promoted. As Afrocentric scholar Linda James Myers points out:

> If we accept the materialist perspective even our very worth as human beings becomes fragile and diminished, for it teaches that one's worth is equal to what one owns, how one looks, the kind of car, house, education one has, and so on.[3]

Consequently, Eurocentric culture produces a general sense of insecurity, "an incessant need to control, dominate, or *be better than* others."[4]

Dichotomous Reasoning: Eurocentric culture embraces a reasoning style that is dichotomous. That is, the world is known and described through the comparison of incompatible opposites. Virtually all reality is split into paired opposites. According to Marimba Ani, "This begins with the separation of self from 'other,' and is followed by the separation of the self into various dichotomies (reason/emotion, mind/body, intellect/nature)."[5] Dichotomous reasoning leads to either-or conclusions and makes it difficult to process information holistically. The dichotomous reasoning found in Eurocentric cultures may be contrasted to the diunital form of reason prevalent in African and other non-European cultures. Diunital reasoning leads to both-and conclusions and permits the consideration of information that is not neatly categorized or compartmentalized.

Employment of Hierarchies: Having subjected the material world to a process of fragmentation, the Eurocentric mind organizes the resulting dichotomies into hierarchies of greater and lesser value. Within dichotomies, one pole is valued as superior to its opposite. Thus reason is considered to be superior to its opposite, emotion, "that is, when 'reason' rules 'passion.'" All reality is described in hierarchical terms; consequently, the

Eurocentric mind perceives everything as better or worse than something else. In this way, grounds are established for relationships based on power, "for the dominance of the 'superior' form or phenomenon over that which is perceived to be inferior."[6]

Analytical Thought: Analytical reasoning is the familiar cognitive style within Eurocentric cultural spheres. In it, an item or issue under consideration must first be broken down into its constituent parts before each is then separately examined. While important information may be gleaned through analytical reasoning, "some things . . . cannot be divided without destroying their integrity."[7] In Eurocentric societies, analytical reasoning is used to the exclusion of, and not in addition to, synthetic reasoning processes. Thus, interrelationships are more difficult to perceive, and the fragmentation and seeming disconnection of reality are encouraged.

Objectification: In Eurocentric culture, the world beyond the self is viewed as a collection of objects to be controlled. Indeed, in Eurocentric cultures "[t]he most valued relationship is between person and object."[8] Self-worth is often viewed in terms of the objects one has under control.

Abstraction: Closely related to the process of objectification is a tendency in Eurocentric thought toward abstraction. Distillations of ideas take precedence over ideas in context. While abstraction can be a valuable tool in any society, in Eurocentric societies it becomes separate from and more important than the concrete experiences from which it originates. Since the abstract is separated from the concrete, its validity cannot be questioned. Thus, abstraction becomes a tool of control. "Its role is to establish epistemological authority and, of course, other kinds of authority can then be derived from and supported by it."[9] The preference for written forms of communication over oral forms also derives from Eurocentric culture's reification of the abstract.

Extreme Rationalism: Eurocentrism holds that the universe can be explained wholly in rational terms. This means that to the Eurocentric mind everything is connected in an ordered and structured way, organized around the principles of cause and effect so as to "explain all of reality as though it has been created by the European mind for the purposes of control."[10]

Desacralization: Nature objectified and rationalized leads to the illusion of a despiritualized universe. The Eurocentric worldview allows no room for the operation of sacred forces. Nature is reduced to a mere thing that may be manipulated to suit mankind. Even when allowed in Western philosophies, God is banished to a separate spiritual realm and has no effect on daily affairs.

The attributes listed here grow from and are infused by the Eurocentric materialist perspective. They do not comprise the totality of European culture; nor are they absent in other cultures. When manifested in a culture that is primarily materialistic, the attributes operate collectively to form a matrix of behavior and belief that is unique. This is not to say that every individual in European culture thinks and acts according to this paradigm or that members of other cultural traditions do not. Every person who resides

within a Eurocentric society, however, will be predisposed to behave and think in Eurocentric ways simply because of the mode of socialization and the reward structure present in the society. In this way, Eurocentricity reaches out to delineate and direct everything the Eurocentric society produces within the realms of art, science, economics, and social life. All social and cultural productions—even the society's concept of the law—will reflect the materialism, aggression, and individualism that Eurocentricity generates.

Law, Hegemony, and Control

Law contributes to Eurocentric hegemony in three concrete ways. First, law controls the beast by organizing and directing white institutions and cultural practices. Second, law polices white culture. That is, it operates to help determine which ideas and practices are valued in that culture and which can be identified as threats subject to the use of coercion or force. Third, law works to legitimate white institutions and practices by helping to place the imprimatur of universality on European practices and champion the desirability and inevitability of white dominance.

Law functions as the central nervous system of a vast body of social and economic regulation. It is the command and control mechanism for the modern state and the means through which new enterprises and activities are designed and implemented. What law does in this instrumental function is order the world around us. It gives us the illusion of structure and provides a means of control. Of course, the form of this structure will be determined by the cultural determinates—the *asili*[11]—of the society that makes the law. Robert Gordon explains this in a way that is heavily weighted with Eurocentric assumptions:

> "Law" is just one among many such systems of meaning that people construct in order to deal with one of the most threatening aspects of social existence: the danger posed by other people, whose cooperation is indispensable to us . . . but who may kill us or enslave us. It seems essential to have a system to sort out positive interactions . . . from negative ones. . . . In the West, legal belief-structures, together with economic and political ones, have been constructed to accomplish this sorting out. The systems, of course, have been built by elites who have . . . tended to define rights in such a way as to reinforce existing hierarchies of wealth and privilege.[12]

Law was used at each step in the conquest and enslavement of African and other native peoples. Nothing was done without its guiding hand. Whenever the European American majority in the United States desires to ostracize, control, or mistreat a group of people perceived as different, it passes a law—an immigration law, a zoning law, or a criminal law. The instrumental function of the law, then, is central to ensuring that the world is structured and organized according to Eurocentric principles. It is the "how" that permits the construction of prisons to contain black bodies, the establishment of giant corporations to exploit black labor, and the founding of schools to spread white ideology. In this way, Eurocentricity manages itself, guides its activities, and accomplishes its goals.

However, the law is not merely instrumental; it is also coercive. In fact, the law's instrumental character depends on its ability to command obedience. How does the coercive nature of law play out in the context of a Eurocentric state? Breaking the law is a predicate for the legitimate use of force. Moreover, the boundary that separates law-abiding from lawbreaking, where not consciously manipulated, may be set through cultural processes. As a result, law in a Eurocentric society determines when certain cultural practices are outside the bounds of the acceptable and subject to coercion, in the form of either force or social pressure to conform:

> [W]hen and if the African American community threatens to move or actually moves beyond its functional invisibility; when it attempts to escape its role definition, acts on its own volition and thereby escapes dominant group controls; when it challenges the legitimacy and relative autonomy of the White American community, that community responds repressively.[13]

The law, then, sets the boundaries for acceptable forms of resistance to white oppression and dominance. Black resistance can go but so far; it cannot infringe on the law of white Eurocentric societies. If it does, the resisters will be identified as legitimate targets for coercion. Law thus polices the society it helps to create. Law organizes white society; then it helps maintain that society through both physical and ideological coercion. In addition, the law "provides hegemonic services" to the institutions and practices of European and European-derived cultures by granting them a sense of legitimacy and superiority over nonwhite institutions. Consequently, the best choice for people of color who choose to resist white dominance is to reject the law, to become "out/laws," since "[b]y refusing to relate to Western order, these individuals . . . succeed in robbing [Europeans] of a potent tool for psychological and ideological enslavement."[14]

Law, Ideology, and the Politics of Eurocentricity

Contesting Eurocentricity is primarily a cultural struggle. It calls for the creation of a separate cultural base that values and responds to a different cultural logic than does Eurocentricity. Aime Cesaire, the great West Indian Pan-Africanist, understood the importance of the cultural struggle and its potential:

> [A]ny political and social regime that suppresses the self-determination of a people, must, at the same time, kill the creative power of the people. . . . Wherever there is colonization, the entire people have been emptied of their culture and their creativity. . . . It is certain, then, that the elements that structure the cultural life of a colonized people [must also] retard or degenerate the work of the colonial regime.[15]

Eurocentric doctrine, legislative bodies, courts, bar associations, and law schools limit the political program that African-centered cultural activists can undertake. African-centered political activity is circumscribed in part because of law's limited ability to address issues of concern to African-centered people. More significantly, law limits responses to Eurocentricity through its effects on those who would use it to accomplish

change. First, the law accomplishes ideological work as it embraces Eurocentric cultural styles and celebrates European historical traditions. The law and legal institutions, through the artful use of ritual and authority, uphold the legitimacy of European dominance. The constant self-congratulatory references to the majesty of the law, the continual praise of European thinkers, the unconscious reliance on European traditions, values, and ways of thinking all become unremarkable and expected. The law operates as a key component in a vast and mainly invisible signifying system in support of white supremacy. The law is even more capable of structuring thought because its masquerade that it is fair, evenhanded, and impartial is rarely contested. Consequently, the law works as an effective "tool for psychological and ideological enslavement."[16]

To the extent that African-centered activists stand up in white supremacy's courts and wear white supremacy's suits and ties and robes to make arguments that are couched in white supremacy's terms, they undercut their own movement. They reinforce the legitimacy of Eurocentricity in their own minds, in the minds of their constituency, and in the minds of their potential allies.

Second, to become adept at negotiating the labyrinth of the law takes time and energy. Attending law school and becoming a good lawyer are not easy. It takes time that a person grounded in African culture must spend away from his or her community. More critical, however, is that during this time, the person of color is subjected to an intense ideological program. Not only is law school one of the most conservative educational experiences possible; it is also one of the most racist. Additionally, black law students are forced to reason in the doctrinal and analytical way that Eurocentricity prefers. They are taught to think in narrow, rule-bound terms and to write in the detached, sparse, technical style that lawyers favor. These questions of aesthetics and pedagogical style distance black students from their culture and diminish their ability to conceptualize problems and craft solutions in ways that can contribute to the liberation of people of African descent.

Upon graduation from law school, the situation does not improve. Ironically, the higher one advances in the legal hierarchy, the less effective one can be. As one moves from student to law clerk to lawyer to judge, one has less ideological flexibility. People who are entrenched in the hierarchy risk their credibility or subject themselves to political or social pressure if they engage in open political or cultural activism. One can see this in the simple matter of cultural styles of attire. It is far easier for a law student or a law clerk to wear kente cloth, for example, than it is for an attorney or a judge. As persons advance in the legal hierarchy, then, their accountability to the European-dominated system becomes greater and their accountability to their communities of origin becomes less.

African people are no longer held in bondage by the chains of slavery but are held by the belief that their oppressed status on the margins of white world civilization is their rightful one. The cage of oppression that encircles the black race is psychological, not material. Law, with its great apparatus of justification, is a critical part of the invisible engine that silently subjugates Africa and Africans. Behind its facade of objectivity and universality, law organizes the world according to Eurocentric values, then defends and legitimates that organization while simultaneously limiting the ability of African-centered activists to contest white cultural domination. Because if they embrace the law, African-centered activists cannot even conceptualize, let alone confront, the true

dimensions of their struggle. To resist Eurocentricity, African people must interpret the law in light of their own cultural perspectives. This means the creation of an African-centered approach to law that is grounded in the concept of a nonmaterial, spiritually infused universe. To do this, law as we now know it can no longer exist. There can no longer be any separation between law and morality, between science and belief, between practicality and justice. Law's empire must be overthrown.

NOTES

1. Quoted in Jahnheinz Jahn, Muntu: African Culture and the Western World 23 (Marjorie Grene trans., Grove Weidenfeld 1990) (1958) (exploring the primary assumptions and principles on which African worldview and culture are based).

2. John Henry Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America 2, 5, 7, 9 (1969).

3. Linda James Myers, Understanding an Afrocentric World View: An Introduction to an Optimal Psychology 10 (1988).

4. *Id*.

5. See Marimba Ani, Yurugu: An African-Centered Critique of European Cultural Thought and Behavior 105 (1994).

6. *Id.* at 94, 106.

7. *Id*. at 76, 106.

8. Myers, *supra* note 3, at 10.

9. Ani, *supra* note 4, at 71–72.

10. *Id*. at 107.

11. Using different terminology, Ani describes this process as the influence of the *asili* (the ideological thrust or core of a culture) on the *utamawazo* (the cognitive style or "culturally structured thought" exhibited by a culture). See *id.* at xxv, 105. Eurocentric societies are governed by an *asili* that is essentially power seeking. *Id*. at 105. She states that "[t]he [socio-cultural] forms that are created within the European cultural experience can then be understood as mechanisms of control in the pursuit of power." *Id*.

12. Robert W. Gordon, *New Developments in Legal Theory*, in The Politics of Law: A Progressive Critique 288 (David Kairys ed., 1982).

13. Amos N. Wilson, Black-on-Black Violence: The Psychodynamics of Black Self-Annihilation in the Service of White Domination 6 (1990).

14. Ani, *supra* note 4, at 415.

15. Aime Cesaire, *Culture et Colonisation*, in 3 Aime Cesaire: Oeuvres Completes 440–41 (1976).

16. Ani, *supra* note 4, at 415.

From the Editors

Issues and Comments

Do you agree with Rodrigo and Kenneth Nunn that Western civilization is in eclipse and that industrialized nations like the United States need an infusion of minority ideas at least as much as minorities need access to majority society? If so, is this a better basis for affirmative action—namely, majoritarian self-interest—than the ones you usually hear? Is cultural nationalism a mere stage, necessary perhaps for psychic and spiritual salvation for blacks and other minorities but something that communities of color should abandon as soon as they become self-sufficient? Does it constitute racism in reverse? Are activism and a sense of outrage necessary, as Ian Haney López posits, for the development of class consciousness?

Does the criminal justice system need a complete overhaul, perhaps along the lines that Paul Butler suggests or just some minor tweaking to avoid racial profiling and drug laws that fall disproportionately heavily on minorities? And if universities admit talented blacks who are from, say, Kenya or who have a single white parent, what is wrong with that? They are just as black as anyone whose ancestors arrived on a slave ship, are they not?

See also the articles in Parts VIII and XIV, particularly those by Regina Austin, Lisa Ikemoto, and Monica Evans on insurrection and criminality in communities of color.

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PART XII

INTERGROUP RELATIONS

HOW DO DIFFERENT minority groups of color relate to each other, and what rules, hopes, and ambitions do they bring to these encounters? Blacks and browns, for example, have many issues in common. Both groups generally favor strong enforcement of the nation's antidiscrimination laws and support affirmative action in hiring and higher education. African Americans may be cool, however, about immigration—an issue dear to the hearts of Latinos—because of the fear that new immigrants will compete with them for blue-collar jobs, demand costly changes in public schools, and vote for Latino, rather than black, candidates for the school board.

Some Latinos and Asians point out that an unstated black-white binary paradigm guides much of our thinking about race and that as a result the principal minority group our statutes and scholarship have in mind is black. Other groups enter into our thinking and planning only insofar as they succeed in accommodating themselves to this paradigm—that is, in asserting their similarity to blacks. Issues like accent discrimination, nationality, and immigration status end up receiving scant attention. The view that this situation does not occur or that if it does, it is justified by history is sometimes called "black exceptionalism" and is a point of great contention in leftist civil rights circles. Writers and activists who write about the black-white binary are sometimes accused of adding to intergroup tensions (see Part X).

Where in this picture does one place multiracial individuals such as golfer Tiger Woods, who have a parent of one minority race and another of a different one? The chapters in this part address a complex of related questions that come increasingly into play in a society that contains at least two fast-growing groups of color—Asians and Latinos.

57. Embracing the Tar Baby

Lat-Crit Theory and the Sticky Mess of Race

LESLIE G. ESPINOZA AND ANGELA P. HARRIS

Angela Harris:

I want to make an argument that I know will be provocative and disturbing—not because I believe it to be true but because I think it needs to be articulated in a clear and strong form for us to begin to critique it. The argument is for what I will call "black exceptionalism." The claim is, quite simply, that African Americans play a unique and central role in American social, political, cultural, and economic life and have done so since the nation's founding. From this perspective, the black-white paradigm that Juan Perea[1] condemns is no accident or mistake; rather, it reflects an important truth.

The claim of black exceptionalism can be supported in at least two ways: by examining the historic and continuing centrality of African American ethnicity to American political and social life and by examining the centrality of antiblack racism to the patterns of domination we call white supremacy. Consider first the importance of African American ethnicity to the project of defining "America." American black people have lately christened ourselves African Americans and look back to an imagined Africa for history, names, customs, religious and intellectual traditions, and even a way of speaking. As "African Americans," we have not only claimed a motherland but also accumulated a pantheon of heroes; distinguished artistic traditions; a canonical history; distinctive ways of talking, moving, cooking, and laughing; and even a national anthem. Our pride in this distinctiveness is an ethnic one, arguably no different from any other group that imagines itself as a people. But African Americans also have a claim that is different in kind from not only those of white ethnic groups but those of other groups racialized as nonwhite. In the popular imagination, groups racialized as nonwhite each have their own particular stereotypical relationship to the American national project. Native Americans are thought to have vanished long ago, leaving behind only their noble spirituality for non-Indians to admire and appropriate at will. Asian Americans and Latinos are imagined as eternal strangers, people who carry the border of American territorial power and cultural integrity within them. But African Americans, for all our

A version of this chapter previously appeared as Leslie Espinoza and Angela Harris, *Embracing the Tar-Baby: LatCrit Theory and the Sticky Mess of Race*, 85 Cal. L. Rev. 1585 (1997); 10 La Raza L.J. 400 (1998). Originally published in the *California Law Review* and *La Raza Law Journal*.

talk about Mother Africa, are profoundly and unmistakably Americans. More to the point, Americans are distinctively African.

For example, the people who now call themselves whites originally developed that identity, and continue to maintain it most insistently, in contrast to blacks. Our slavery became their freedom: Our degraded labor produced their free labor; our political nonexistence, their political belonging. Our ugliness, our promiscuity, our simple natures reflected their beauty, continence, and refinement. Our simple joys and pleasures, our songs and dances and folktales (mocked and admired in their minstrelsy) enabled their sophistication and formed a basis for their nostalgia. Toni Morrison argues:

> For the settlers and for American writers generally, [the] Africanist other became the means of thinking about body, mind, chaos, kindness, and love; provided the occasion for exercises in the absence of restraint, the presence of restraint, the contemplation of freedom and of aggression; permitted opportunities for the exploration of ethics and morality, for meeting the obligations of the social contract, for bearing the cross of religion and following out the ramifications of power.[2]

Ralph Ellison concludes that for white Americans, the "Negro" eventually became "a human 'natural' resource who, so that white men could become more human, was elected to undergo a process of institutionalized dehumanization."[3] In these and other ways, American culture—to the very great extent that it is coextensive with whiteness—is founded on an image of blackness.

Moreover, America is distinctively African not just by way of contrast but also by active incorporation. It has often been noted that the profitability of rap music, including hard-core "gangsta rap," depends on its appeal not just to urban black kids but to suburban white kids. Black music has long been an important resource that white artists have turned to for inspiration. In the 1950s, many white artists became superstars by either re-recording black music for white audiences, as Pat Boone did, or drawing more indirectly on African American musical traditions, as Elvis Presley did. Indeed, rock 'n' roll, now associated primarily with white artists and white audiences, emerged from the African American blues tradition. In addition, jazz, which is sometimes called America's classical music, was developed by and brought to its highest pinnacle of sophistication by African American and white artists working within African American traditions.

More broadly, African American styles define what is hip and cool for many Americans, including white Americans. Suburban white kids seeking validation through identification with black culture even have a nickname: "wiggers." In Spike Lee's movie *Do the Right Thing*, a young Italian American man rattles off racist stereotypes about black people yet names African Americans as his favorite sports heroes, comics, and entertainers. In the past two decades, an extraordinary number of Hollywood action movies have featured heterosexual male buddies, one white and one black, who gradually learn to respect and love one another. White Americans distance themselves from black people but also admire them, imitate them, and crave their approval. Whether expressed in positive or negative terms, this obsession with blackness and black people is a central feature of American culture.

The centrality of blackness to American history and society is reflected in the law as well. As Juan Perea writes, American antidiscrimination law emerged in response to experiences of and with black people. The constitutional and statutory provisions of the First Reconstruction reflect the Radical Republicans' effort to bring the freed slaves into the polity; the statutory innovations of the Second Reconstruction emerged from a renewed effort to make that inclusion real. Moreover, the African American political and cultural resistance that finally forced these legal innovations has become a defining moment for American movements for social change. The moral claim to inclusion that African Americans made during the 1960s civil rights movement has become the rhetorical template for all subsequent versions. Abortion protesters now sing "We Shall Overcome"; gay and lesbian activists liken marriage restrictions to miscegenation laws. Indeed, observing the history of black struggle from the American Revolution to the present, some writers have concluded that "equality" itself is an "Anglo-African word."[4]

The claim of black exceptionalism does not rest only on the special role African Americans as an ethnic group have played in America's cultural, economic, political, and social history. It also acknowledges the unique position of blacks in the material and symbolic framework of American white supremacy. As I, a black person who looks black, gaze at my colleague Leslie, the Latina who doesn't look Latina, I wonder, "What can she really know about racism?" There is a kind of pain, to be sure, that is experienced by those whose outsider status isn't visible on their faces, those who are forever assumed by others to be in the club and then must be outed or out themselves ("Excuse me, you must think I'm white"). But in American social life, the operation of day-to-day white supremacy has always depended principally on color prejudice, which, in turn, has been most centrally associated with antiblack prejudice.

Color prejudice means the unique humiliation of knowing that one is seen by others as physically frightening, ugly, or loathsome. Focused on the body, it incorporates the powerful drives of sexuality: The recognition of physical distinctiveness permits currents of sexual repulsion and attraction, fear, loathing, and desire to twist themselves around the notion of race. One consequence of color prejudice and its location in the body, then, is the experience of black people of being reduced to their bodies. Another is that one's claim to individuality is constantly vulnerable to being erased. That well-to-do as well as poor black people are unable to catch taxis at night, are stopped by the police, and suffer from random racist violence has contributed to a sense of solidarity among all black people, based on the sense that color prejudice serves as a brutal leveler, erasing distinctions of class and status. Conversely, the mistrust and hostility often directed at light-skinned African Americans by dark-skinned have in part to do with the sense that what it means to be black is to have one's inferior status indelibly written on one's skin, hair, and features. In a perverse way, then, to be authentically African American is to be noticeably dark skinned, continually vulnerable to being raced as black.

Of course, I do not mean that all African Americans look black and no Latinos do. But color, the experience of being visually raced through one's skin tone, lies at the very core of what it means to be African American. Consider, for example, the names we have been given: darky, colored, black, Negro, nigger. Blacks—and whites—have, unique among American ethnic groups, centered their identities on a notion of putative skin

color, a phenomenon that attests to the centrality of color. For African Americans, but not for Latinos/as, ethnicity converges with the biological fiction of color.

Blackness is central to American white supremacy in another, deeper, way. Black people embody the *nigger* in the American imagination: a creature at the border of the human and the bestial, a being whose human form only calls attention to its subhuman nature. To be a nigger is to have no agency, no dignity, no individuality, and no moral worth; it is to be worthy of nothing but contempt. In the American collective unconscious, some nonwhites are more unequal than others. When compared with whites, Latinos, like Asian Americans and Native Americans, are all considered abnormal, exotically different, inferior, or somehow ominously superior. But when compared with one another, blackness is the worst kind of nonwhiteness. Words like "chink" and "spic" dehumanize. But they lack the horrific obliteration of *nigger*, a word reserved for black people. The paradigmatic image of the racial Other in American life has been the black body. Thus, learning to have fear, loathing, and contempt for niggers is central to American white supremacy in a way that racism against other nonwhites is not. Toni Morrison argues that, in the United States, learning to distinguish oneself from and express contempt for blacks is part of the ritual through which immigrant groups become "American."

Nor is this distancing limited to nonblacks. Many of us who grew up in middle-class, respectable African American homes can recall being told by parents or other relatives to stop "acting colored." The image we were all fleeing was the image of the nigger, the lower-class black person who talked too loudly in Black English, laughed too heartily, and was vulgar in appearance, word, and deed. A similar tension exists in many American communities between black Caribbean immigrants and native-born African Americans. The immigrants often ascribe to African Americans the stereotypical qualities of the nigger: lazy, shiftless, too many children, searching for government handouts, and always whining about racism. In this way, the nigger is kept alive, a source of contempt mixed with anxiety, shame, and self-hatred for blacks. The image of the nigger keeps individual racism alive, providing a powerful emotional engine for the institutions of white supremacy, from individual unconscious racism to notions of merit based on contrast with the nigger.

In the interests of interracial solidarity, the argument for black exceptionalism is usually not articulated in mixed company. I have set out the argument, not because I believe it to be right, but because I believe that Perea's direct challenge to the black-white paradigm and the power and promise of Lat-crit theory force it into the open. The claim of black exceptionalism presents both an intellectual and a political challenge to Lat-crit theory. As an intellectual claim, black exceptionalism answers Perea's criticism of the black-white paradigm by responding that the paradigm, though wrongly making other nonwhites invisible, rightly places black people at the center of any analysis of American culture or American white supremacy. In its strongest form, black exceptionalism argues that what white people have done to black people lies at the heart of the story of America; indeed, the story of race itself is that of the construction of blackness and whiteness. In this story, Indians, Asian Americans, and Latinos/as do exist. But their roles are subsidiary to, rather than undermining, the fundamental binary national drama. As a political claim, black exceptionalism exposes the deep mistrust and tension among American ethnic groups racialized as nonwhite.

Even after having issued my disclaimers, I feel queasy writing these words. Not only does black exceptionalism present a serious threat of political division; that I write about it in a symposium on Lat-crit theory is politically suspect. Trina Grillo and Stephanie Wildman have written perceptively about how people who are members of a dominant group expect always to be given center stage and will attempt to take back the center if they are momentarily denied it.[5] In these circumstances, I am a member of the dominant group. Until very recently, African Americans have numerically dominated critical race theory. To turn the subject back to African Americans at the end of a symposium devoted to Latinos/as is a perfect example of taking back the center.

Nevertheless, I think I can justify this politically suspicious move, at least to myself. First, the claim of black exceptionalism represents something larger than the narrow interests of African Americans: It is an example of the conflicts that emerge from what Eric Yamamoto calls "differential racialization" and "differential disempowerment."[6] Lat-crit theory is emerging at a time when the United States is rapidly becoming more multiracial than ever before. As various examples of conflict among people of color suggest, contemporary race theory must come to terms with tensions among nonwhite groups as well as the ever-present tension with whites. Indeed, Lat-crit theory's attack on the black-white paradigm itself engages the problem of developing a multidimensional race theory. On its own terms, then, Lat-crit theory demands an understanding of white supremacy that goes beyond the binary of oppressed-oppressor.

Finally, the problem of black exceptionalism offers me a way to make sense of my presence in these pages, rather than simply feeling as if I don't belong here. I cannot speak as a Latina or for Latinos/as. But I can try and ask myself what Lat-crit theory requires of me as an African American. How is the way I am used to analyzing white supremacy changed by Lat-crit theory? How is my way of experiencing the world altered by trying to imagine it through Leslie's eyes? To what extent am I invested, as an individual and as a black person, in the black-white paradigm?

Leslie Espinoza:

Race is like a riddle. The answers seem obvious, yet with each one we find that race becomes even more puzzling, almost mysterious. We think we know race, yet none of the definitions seem to work. It is no accident that race is clear-cut and unknowable at the same time. Race works as an effective system of oppression because it is there and not there—is both a reality and a social construction. Race is quite like the tar baby.[7] You punch the tar baby, you think you have got him, but instead you become stuck. The more you try to exercise dominion, the more you are dominated. It may well be impossible to know what race is. Nevertheless, by critically examining what we call race, we may move closer to an operational understanding of what is experienced as real oppression.

I remember looking up at Angela. "What if I had a magic wand? What if I waved my magic wand and made all people the same color? Would there be such a thing as race?"

Angela paused. From deep inside, she replied, "Of course."

There is a horrific beauty about the system of oppression we call racism. For racism to exist, there must be race. Race is perceived in our society as easily knowable. It fits snugly into the modern Western way of knowing and naming the world. Race is all

inclusive; everyone has one. There is a scientific certainty to race. There are racial categories, much as there are the biological categories phyla and species and families. Each individual can name his or her own race. A few marginal outsiders have to name their race by reference to more than one category. However, even these messy cases conceive of their complexity categorically. Persons of mixed race break themselves into pieces, half this, a quarter that, tracing bloodlines that have an imagined recipe-like reality.

Knowability of racial categories is one of the myths of race. Racial categories have been taught as if the categories Negroid, Caucasoid, and Mongoloid had scientific bases. Today, the scientific terminology has changed to black, white, and Asian. Social categories of race have grown to include ethnic racial groupings, including what is usually referred to as Hispanic. But what of Pacific Islanders? Are they a racial group or an ethnic group? And what of South Asians? Undoubtedly our categories expand to serve social and political needs.

This is the problem of race. It is both easily knowable and an illusion. It is obviously about, yet not about, color. It is about ancestry and bloodlines and not about ancestry and bloodlines. It is about cultural histories and not about them. It is about language and not about language. We strive to have a knowable, systematic explanation for race. We struggle with its elusivity. We name and refine our categories, and then inevitably we find too many exceptions, too many people who just do not fit. Race should be rational, yet it is not.

Tension and conflict within and between oppressed racial groups keep us from forming coalitions. Yet united action is the only hope for effectively changing the vast disparities in wealth between social strata in this country. Racial outsiders are stuck in the bottom of the well if they buy into the myth that equality means individual equality of opportunity. Opportunity has competition conceptually built into it. Equality is viewed as the responsibility of the individual to take advantage of opportunity. It is not understood as actual equality of basic material needs and it is not understood as something derived from group action.

Racism damages us. The material circumstances of outsiders are inferior. If you are African American, Latino/a, Asian, or otherwise an other, you are more likely to be poorly housed, poorly fed, poorly educated, poorly employed, and in poor health. Beyond what we eat and where we sleep, racism injures our ability to know ourselves. It is the spirit injury of which Patricia Williams writes.[8] It is a loss of identity.

We imagine ourselves as Spanish, as Mexican, as American, but none of these labels seems to fit. Indeed, Chicanos/as who travel to Spain or to Mexico are quickly reminded of how Americanized they are. Yet living in America, those same Chicanos/as are constantly reminded that they are not Anglo, not assimilated, and unassimilable. Who are we then? We are a culture that is Southwestern Chicano/a—or Puerto Rican, or Cuban American Miamian, or Central American American. We are a colonized people, convinced that we are immigrants in our own country. Chicanos/as belong to the land of the Southwest. The Anglos are attached to the land by law, the Treaty of Guadalupe Hidalgo. Similarly, Puerto Ricans are in New York and Boston because the United States is in Puerto Rico. Guatemalans are in Los Angeles because United Fruit and the CIA are in Central America. Cubans are in Miami because of a century of U.S. imperialism in Cuba. The most effective colonialism is that which colonizes the mind and the spirit.

This immigrant aspect of racial oppression has no counterpoint in the traditional black-white-racial paradigm. African Americans know which side of the border they are on. African American exceptionalism is tied to slavery. But consider Chicano/a exceptionalism. Like Native Americans, we are colonized. Unlike Native Americans, we have not had the symbolic recognition of our original sovereignty. I worry that this identity will be forgotten.

It is hard for immigrants to be visible when they can be deported. It is dangerous to resist when you worry about your right to exist. Chicano exceptionalism is different from African American exceptionalism. Who is more exceptional? When we ask that question, we are buying into the hierarchical system that oppresses us. Latinos/as are seen as immigrant interlopers; blacks are seen as intractable criminals. Does it really matter if resistance is met with deportation or with imprisonment? The important questions are: What is the nature of our oppression? Who benefits by it? And how can we resist?

NOTES

1. See Juan Perea, Chapter 45, this volume.
2. Toni Morrison, Playing in the Dark 47–48 (1992).
3. Ralph Ellison, Shadow and Act 29 (1964).
4. Celeste Michelle Condit & John Louis Lucaites, Crafting Equality (1993).
5. Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -Isms)*, 1991 Duke L.J. 397, 402 (also Chapter 40, this volume).
6. Eric K. Yamamoto, Chapter 61, this volume.
7. See Joel Chandler Harris, The Complete Tales of Uncle Remus 1 (Houghton Mifflin 1955).
8. See Patricia J. Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. Miami L. Rev. 127, 128 (1987) (describing racism as "spirit-murder").

58. Our Next Race Question

The Uneasiness Between Blacks and Latinos

JORGE KLOR DE ALVA, EARL SHORRIS, AND CORNEL WEST

The angry and confused discourse about American race relations often blindly assumes that the only major axis of racial division in America is black-white. Strangely ignored in the media backwash is the incipient tension between blacks and Latinos.

Each group constitutes an ever greater percentage of the total population; each is large enough to swing a presidential election. But do they vote with or against each other, and do they hold the same views of a white America that they have different reasons to distrust?

Knowing that questions of power and ethnicity are no longer black-and-white, *Harper's Magazine* invited three observers—a black, a Latino, and a white moderator—to open the debate.

Anglos May Be of Any Race

SHORRIS: We've just demonstrated one of the tenets of this conversation. That is, we have discussed almost exclusively the question of blacks in this society. But we started out saying we would have a black-brown dialogue. Why does that happen? And not only in the media. Why did it happen here, among us?

KLOR DE ALVA: Part of the answer, as Cornel was pointing out, is that blacks are the central metaphor for otherness and oppression in the United States. Secondly, in part I take your question, when focused on Latinos, to mean don't Latinos have their own situation that also needs to be described if not in the same terms, then at least in terms that are supplementary?

I'm not sure. The answer goes to the very core of the difference between Latinos and blacks and between Cornel and myself: I am trying to argue against the utility of the concept of race. Why? Because I don't think that's the dominant construct we need to address in order to resolve the many

A version of this chapter previously appeared as Jorge Klor de Alva, Earl Shorris, and Cornel West, *Our Next Race Question: The Uneasiness Between Blacks and Latinos*, Harper's Magazine, April 1996.

problems at hand. Cornel wants to construct it in the language of the United States, and I say we need a different kind of language. Do you know why, Earl? Because we're in the United States and blacks are Americans. They're Anglos.

WEST: Excuse me?

KLOR DE ALVA: They're Anglos of a different color, but they're Anglos. Why? Because the critical distinction here for Latinos is not race; it's culture.

WEST: Speaking English and being part of American culture?

KLOR DE ALVA: Blacks are more Anglo than most Anglos because, unlike most Anglos, they can't directly identify themselves with a nation-state outside of the United States. They are trapped in America. However unjust and painful, their experiences are wholly made in America.

WEST: But that doesn't make me an Anglo. If I'm trapped on the underside of America, that doesn't mean that somehow I'm an Anglo.

KLOR DE ALVA: Poor whites similarly trapped on the underside of America are also Anglos. Latinos are in a totally different situation, unable to be captured by the government in the "five food groups" of racial classification of Americans. The Commerce Department didn't know what to do with Latinos; the census takers didn't know what to do with Latinos; the government didn't know what to do with Latinos, and so they said, "Latinos can be of any race." That puts Latinos in a totally different situation. They are, in fact, homologous with the totality of the United States. That is, like Americans, Latinos can be of any race. What distinguishes them from all other Americans is culture, not race. That's where I'm going when I say that Cornel is an Anglo. You can be a Latino and look like Cornel. You can be a Latino and look like you, Earl, or like me. And so, among Latinos, there's no surprise in my saying that Cornel is an Anglo.

WEST: But it seems to me that "Anglo" is the wrong word.

KLOR DE ALVA: Hey, I didn't make it up, Cornel.

WEST: "Anglo" implies a set of privileges. It implies a certain cultural formation.

KLOR DE ALVA: I'm trying to identify here how Chicanos see "Anglos."

WEST: But I want to try and convince those Latino brothers and sisters not to think of black folk as Anglos. That's just wrong. Now, they can say that we're English-speaking moderns in the United States who have yet to be fully treated as Americans. That's fine.

KLOR DE ALVA: My friend, Cornel, I was speaking of one of the more benign Latino names for blacks.

WEST: Let's hear some of the less benign then, brother.

What Color Is Brown?

KLOR DE ALVA: Do you think of Latinos as white?

WEST: I think of them as brothers and sisters, as human beings, but in terms of culture, I think of them as a particular group of voluntary immigrants who entered America and had to encounter this thoroughly absurd system of

classification of positively charged whiteness, negatively charged blackness. And they don't fit either one: they're not white, they're not black.

SHORRIS: What are they?

WEST: I see them primarily as people of color, as brown people who have to deal with their blackness-whiteness.

SHORRIS: So you see them in racial terms.

WEST: Well, no, it's more cultural.

SHORRIS: But you said "brown."

WEST: No, it's more cultural. Brown, for me, is more associated with culture than race.

SHORRIS: But you choose a word that describes color.

WEST: Right. To say "Spanish-speaking" would be a bit too vague, because you've got a lot of brothers and sisters from Guatemala who don't speak Spanish. They speak an indigenous language.

KLOR DE ALVA: You have a lot of Latinos who aren't brown.

WEST: But they're not treated as whites, and "brown" is simply a signifier of that differential treatment. Even if a Latino brother or sister has supposedly white skin, he or she is still Latino in the eyes of the white privileged, you see. But they're not treated as black. They're not niggers. They're not the bottom of the heap, you see. So they're not niggers, they're not white, what are they? I say brown, but signifying culture more than color. Mexicans, Cubans, Puerto Ricans, Dominicans, El Salvadorans all have very, very distinctive histories. When you talk about black, that becomes a kind of benchmark, because you've got these continuous generations, and you've got very common experiences.

Now, of course, blackness comprises a concealed heterogeneity. You've got West Indians, you've got Ethiopians. My wife is Ethiopian. Her experience is closer to browns'. She came here because she wanted to. She was trying to get out from under a tyrannical, Communist regime in Ethiopia. She's glad to be in a place where she can breathe freely, not have to hide. I say, "I'm glad you're here, but don't allow that one side of America to blind you to my side."

So I've got to take her, you know, almost like Virgil in Dante's *Divine Comedy*, through all of this other side of America so that she can see the nightmare as well as the dream. But as an Ethiopian, she came for the dream and did a good job of achieving it.

KLOR DE ALVA: So you are participating in the same process as the other Americans, other Anglos—to use that complicated term—that same song and dance of transforming her into a highly racialized American black.

WEST: It wasn't me. It was the first American who called her "nigger." That's when she started the process of Americanization and racialization. She turned around and said, "What is a nigger?"

KLOR DE ALVA: And you're the one who explained it.

SHORRIS: How do you see yourself, Jorge?

KLOR DE ALVA: I'm an American citizen. What are you, Cornel?

WEST: I am a black man trying to be an American citizen.

KLOR DE ALVA: I'm an American citizen trying to get rid of as many categories as possible that classify people in ways that make it easy for them to be oppressed, isolated, marginalized. Of course, I'm a Chicano, I'm a Mexican American. But for me to identify myself that way is not much help. More helpful is my actually working to resolve the problems of poor folks in the United States.

If I were black, I would heighten the importance of citizenship. Why? Because every time we've seen huge numbers of immigrants enter the United States, the people most devastated by their arrival, in terms of being relegated to an even lower rung on the employment ladder, have been blacks.

SHORRIS: Are you defining "black" and "Latino" as "poor"?

KLOR DE ALVA: No, no. I'm not defining them that way at all.

WEST: What's fascinating about this issue of race is the degree to which, in the American mind, black people are associated with instability, chaos, disorder—the very things that America always runs from. In addition, we are associated with hypersexuality, transgressive criminal activity—all of the various stereotypes and images.

KLOR DE ALVA: No matter what kind of policy you set in place, there has to be something in it for everybody or the policy is not going to last very long. And I'm not even going to get into the issue that affirmative action has been essentially an African American thing, not a Latino thing.

WEST: But who have the major beneficiaries been? White women. And rightly so. More of them have been up against the patriarchy than black and brown people have been up against racism.

KLOR DE ALVA: Affirmative action has had the capacity to create a black middle class. Many of these folks also have been the dominant group in the civil rights arena and in other human rights areas. The net effect has been to create a layer, essentially of African Americans, within the public sphere that has been very difficult for Latinos to penetrate and make their complaints known.

WEST: That's true, and I think it's wrong. But at the same time, blacks are more likely to register protests than Latinos are. Black people are more likely to raise hell than brown people.

KLOR DE ALVA: But having been blocked from the public sector, I am concerned that Latinos turning to the private one will buy deeply into U.S. concepts of race and will be even less willing than Anglos to employ blacks. So for me, any new social or public policy must begin with dismantling the language of race.

One Night of Love

SHORRIS: We've been talking about conflicts. Let's stipulate, unless you disagree, that the advantage to the people in power of keeping those at the bottom at each other's throats is enormous. That's the case in all societies. So we have blacks and browns, for the most part, at the bottom. And they are frequently

at each other's throats. They're fighting over immigration, fighting over jobs, and so on. A group of young people comes to you and says, "Tell us how to make alliances, give us a set of rules for creating alliances between blacks and browns." What would you answer?

WEST: I'd appeal to various examples. Look at Ernesto Cortés and the Industrial Areas Foundation in Texas or the Harlem Initiatives Together in New York City, which have been able to pull off black-brown alliances of great strength, the "breaking bread" events of the Democratic Socialists of America. Or I'd talk about Mark Ridley-Thomas in South-Central Los Angeles and look at the ways in which he speaks with power about brown suffering as a black city councilman, the way in which he's able to build within his own organization a kind of black-brown dialogue. Because what you really see then is not just a set of principles or rules but some momentum at work.

SHORRIS: But how do you do that? What's the first step?

WEST: Well, it depends on what particular action you want to highlight. You could, say, look at the movement around environmental racism, where you have a whole host of black-brown alliances. With [California] Proposition 187 you had a black-brown alliance among progressives fighting against the conservatives who happened to be white, black, and brown. In the trade-union movement, look at the health-care workers union here in New York City. That's a very significant coordinated leadership of probably the most important trade union in the largest city in the nation. So it depends on the particular issue. I think it's issue by issue in light of a broad vision.

SHORRIS: What is the broad vision?

WEST: Democracy, substantive radical democracy in which you actually are highlighting the empowering of everyday people in the workplace and the voting booth so that they can live lives of decency and dignity. That's a deeply democratic sensibility. And I think that sensibility can be found in both the black and brown communities.

KLOR DE ALVA: Unless there's a dramatic shift in ideology, linkages between people who are identified as belonging to opposing camps will last only for the moment, like the graffiti I saw during the L.A. riots: "Crips. Bloods. Mexicans. Together. Forever. Tonite," and then next to that, "LAPD" crossed out and "187" underneath. That is, the alliances will work only as long as there's a common enemy, in this case the LAPD, whose death the graffiti advocated by the term "187," which refers here to the California Criminal Code [section] for homicide. As long as we don't have a fundamental transformation in ideology, those are the kinds of alliances we will have, and they will be short-lived and not lead, ultimately, to terribly much. Clearly, the progressive forces within the United States must be able to forge ideological changes that would permit lasting linkages. At the core of that effort lies the capacity to address common suffering, regardless of color or culture. And that cannot be done unless common suffering, as the reason for linkages across all lines, is highlighted in place of the very tenuous alliances between groups that identify themselves by race or culture.

SHORRIS: Let's see if anything happened in this conversation. Cornel, are you a black man?
WEST: Hell yes.
SHORRIS: Jorge, is he a black man?
KLOR DE ALVA: Of course not.

59. Afro-Mexicans and the Chicano Movement

The Unknown Story

TANYA KATERÍ HERNÁNDEZ

The 1968 student demonstrations in East Los Angeles and the criminal prosecutions that ensued display the Chicano movement's struggle against discrimination and the process by which Chicanos came to embrace a nonwhite racial identity. In the first criminal prosecution, known as the East LA Thirteen case, a grand jury indicted thirteen community leaders and college students for conspiring to encourage the high school protesters. The second criminal prosecution, known as the Biltmore Six case, followed a 1969 California state conference about the needs of Mexican students that resulted in a hotel fire. In both cases, the defendants focused on race, arguing that the absence of Mexicans on the grand jury indicting them resulted from discrimination and was thus a violation of the Equal Protection Clause. By using this argument, the defendants sought to construct a new racial identity for themselves: nonwhite and Chicano.[1]

Ian Haney López observes that Chicanos stressed their indigenous ties, in part, to distance themselves from associations with blacks in the United States.[2] Significantly, the denial of any association with blacks went hand in hand with the Chicanos' denial of the existence of Afro-Mexicans among them. Unfortunately, an absence of data verifying the existence of Afro-Mexican migration made it impossible for Haney López to assess any possible influence of Mexican concerns with Afro-Mexican ancestry on the development of a Chicano racial identity; yet this aspect of the Chicano movement could potentially reveal a deeper level of complexity and provide additional insight into their activities and motivations.

Haney López's ideas about the construction of Chicano racial identity help explain the reasons for the dearth of empirical data about Afro-Mexicans in the United States. His commonsense model of race demonstrates how the cultural silence and derision toward Afro-Mexicans in Mexico influenced the Mexican migrant script about race.

A version of this chapter previously appeared as Tanya K. Hernández, *Afro-Mexicans and the Chicano Movement: The Unknown Story—A Review of Ian F. Haney López's "Racism on Trial: The Chicano Fight for Justice,"* 92 Cal. L. Rev. 1537 (2004). Originally published in the *California Law Review*.

The Legacy of Afro-Mexican Invisibility and Discrimination in Mexico

The primary reason for the lack of data about Afro-Mexican Chicanos was the silence about Afro-Mexicans in Mexico itself. Mexican migrants incorporated this silence into their self-identity as a race in the United States. It was part of their commonsense understanding of race. Haney López defines this understanding as one that "stresses the nearly automatic quality of actions." He explains that once someone develops a commonsense understanding of race, she then filters the world through racial scripts that are "standard operating procedures" to which she "give[s] little or no thought."[3] Racism does not require discriminatory intent because the racial scripts operate on an unconscious level, making beliefs about other people seem natural and race neutral: less like prejudice and more like common sense. While Haney López developed his model to explain the conduct of California judges who consistently excluded persons of Mexican descent from grand juries, he intends that it explain racial dynamics in general. The model is, accordingly, expansive enough to help analyze why and to what degree Chicanos are ignorant of their own Afro-Mexican ancestry.

Legal scholar Taunya Lovell Banks provides a thorough account of Mexico's participation in the African slave trade and how the discourse of Mexico's *mestizaje* (racial mixture) purposefully ignored persons of African descent.[4] Like elsewhere in Latin America, Mexico's cultural fixation on whiteness facilitated a discourse that attributed all color variations in the population to the racial mixing between European colonizers and indigenous peoples. However, estimates from early census data indicate that over 20,000 Africans made their homes in colonial Mexico by 1570. Thus, Africans outnumbered the white Spaniards, the largest group of Europeans in Mexico at the time. By 1793, colonial Mexico's population of 370,000 blacks was the largest concentration of black people in all of Spanish America. Haney López notes that when California was under Spanish dominion in the 1800s, society divided along class and race lines that placed recent immigrants from Central Mexico of mixed African, European, and Native American ancestry with the poor at the very bottom of the social hierarchy. Yet Mexicans prefer to presume that the African heritage is merely part of the obscured past of slavery and that all blacks have long since assimilated into Mexican society.

In fact, people of identifiable African descent continue to live in Mexico, and they are voicing their concerns about the persistent bias and discrimination they face there. Even though the Mexican government discontinued counting the number of Afro-Mexicans on its census centuries ago, recent estimates find that the Afro-Mexican population constitutes up to 1 percent of Mexico's population of eighty million. When asked about their experiences by a scholar visiting from the United States, some Afro-Mexicans in Mexico voiced pride in being black and expressed the desire to build ties with other Mexican communities of African descent. At the same time, these respondents reported instances of harassment by local and state police. One young man studying for the priesthood in Oaxaca City stated, "I was detained for several hours and interrogated. They forced me to sing the national anthem to prove I was Mexican. Still they said, 'You are Cuban or Honduran, you are not Mexican.'" Such rigorous questioning of national identity by the police is commonplace for Afro-Mexicans.

This anecdote suggests the extent to which African ancestry is not only denigrated but also viewed as outside the Mexican identity: When several women were asked how they defined being Afro-Mexican, one stated that being black meant "people treat you badly and assume the worst about you" while another "spoke with tears in her eyes of the financial difficulties of simply surviving." Another woman stated, "The racism here continues as always because it's still the black women who wash clothes and clean up after the white women." Government-issued textbooks typically contain stereotyped and crude depictions of Afro-Mexicans as "'festive' dancers who happily raise cattle and corn" without actually describing their contributions to Mexican history.

Similarly, the Mexican media often depict Afro-Mexicans with negative stereotypes. For instance, in a television commercial for a paint company, a dark-skinned man, dressed in a white tuxedo to emphasize his darkness, states to the viewer, "[T]hey're working like niggers to offer you a white sale." When questioned about the offensiveness of the commercial, Marisela Vergada, the account executive at the large Mexican advertising firm that produced it, Alazraki Agency, responded, "It is simply an expression that everyone uses." Such racially offensive comments are ubiquitous, pervading the public domain with phrases such as "working like a black"; "getting black," to denote becoming angry; and "a supper of blacks," to describe a riotous gathering of people. Even Aunt Jemima pancake mix is marketed with the label "La Negrita" (the little black woman). In the public discourse the words "ugly" and "black" are synonymous. Most Mexicans disfavor darker-skinned marriage partners because of their desire for lighter-skinned children, who improve the race.

Antiblack sentiment also manifests itself in Mexican politics. During the 2001 electoral campaign of gubernatorial candidate Lázaro Cárdenas, voters criticized Cárdenas for having an Afro-Cuban wife, because they did not want black people in the state of Michoacán. Even though Cárdenas enjoyed great name recognition as the grandson of Mexico's most popular president, he managed to win by only 5 percentage points, largely because of his opponent Alfredo Anaya's antiblack platform. Anaya argued, "There is a great feeling that we want to be governed by our own race, by our own people." One of his supporters was even more blunt: "It's one thing to be brown. The black race is something different."

These antiblack sentiments should not be attributed solely to the influence of the U.S. racial paradigm. They are not primarily generated by Mexican exposure to U.S. race relations through globalization and transmigration. Mexico's own history from the colonial period forward created the historical legacy of racism. Long-standing antiblack bias has encouraged many light-skinned mestizos (persons of mixed-race ancestry) to simply identify as mestizos with indigenous and white ancestry, purposefully omitting mention of what is now called Mexico's third root—African ancestry. Even those with darker pigment and a more pronounced African phenotype who live outside isolated and predominantly Afro-Mexican communities are apt to self-identify simply as undifferentiated mestizos.

Given the history of repression and denial of Afro-Mexican existence in Mexico itself, how were Afro-Mexican immigrants treated in the United States and positioned in the Chicano movement for social justice in the 1960s? Scant literature regarding the Chicano movement even mentions the existence of Afro-Mexicans in the United States or even in Mexico for that matter. In fact, the Mexican migration data available to Haney

López consistently overlook the Afro-Mexican migrants and their role in the Chicano movement.

Afro-Mexicans in the United States

The result of Mexico's long history of discounting the existence of Mexicans of African descent is a deficit of knowledge about how Afro-Mexican migration to the United States influenced the status of Mexicans and later Chicanos. We do know that Afro-Mexicans migrated to the United States: today nearly a quarter of a million live here. Before the Chicano movement, most Mexican migrants emigrated from central and western Mexico. Because of the absence of any race-specific data documenting the migration patterns of Afro-Mexicans to the United States and California, one must indirectly confirm their presence in the United States by tracing the migration patterns of regions in Mexico with a high concentration of Afro-Mexicans, using a variety of different sources.

While data affirm that the majority of Mexican migrants were mestizos, it is realistic to presume that some Afro-Mexicans were part of the population counted as "dark."

Some present-day accounts of Mexican migration suggest that, upon immigrating to the United States, Afro-Mexicans experience for the first time their racial identity as something distinct from their national identity. On the other hand, one Afro-Mexican migrant has described how his racial identity as a person of African descent predated his migration to the United States: "When I am in the United States, I feel better because no one hassles me. If you are not doing anything wrong, the police leave you alone. Not in Mexico. . . . When I travel by bus to the United States, the Mexican police at checkpoints always have me step down from the bus to answer questions, but not the other passengers."

In California today, Afro-Mexicans express a sense of alienation from other Mexican Americans. One Afro-Mexican recounts that the Mexicans in her California neighborhood could not believe she was Mexican American.

What then would have been the treatment of Afro-Mexicans at the hands of other Mexicans in the United States during the construction of the Chicano movement? Did Afro-Mexicans encounter so much xenophobia that they were willing to forsake their racial identity to seek refuge in the safety and comfort brought by ethnic association with the larger Mexican American community? Undoubtedly, affirmatively asserting African ancestry is difficult within a Latin American culture that insists on promoting a national identity rooted in indigenous and European racial mixture; however, it would be wrong to assume that all Mexicans of African ancestry had no consciousness of their black identity in the 1960s.

Afro-Mexicans and the Chicano Movement

The most significant question in evaluating the role of Afro-Mexicans in the Chicano movement is how and to what degree did Afro-Mexicans influence the identity formation of Chicanos, who preferred to identify themselves in terms of native and Spanish ancestry? Haney López notes that some Chicano activists initially came to consider themselves as black because of their close affiliation and sense of solidarity with U.S. blacks in the black struggle for equality. But African ancestry was never considered a component of Chicano identity. In fact, "[b]y late 1969 and early 1970, lingering prejudice,

coupled with ideas that linked Mexican identity to indigenous ancestry, stemmed Chicano assertions of a functionally black identity."[5] Chicanos wanted to be free of the inferiority imputed to black people in the United States, so that while they "did not want to be white, neither did they want to be black." Accordingly, Chicanos would have had a strong incentive to continue the Mexican tradition of treating Afro-Mexicans as distinct, while denying the significance of their existence in the creation of a group-based identity. The Chicano movement sought to avoid the pejorative treatment that blacks received in the United States, as Haney López notes, in "an effort to respond to the problem of race in this country."[6]

Meanwhile, the Chicano movement highlighted its indigenous ancestry as part of a nationalistic strategy intended to unify all Chicanos in the United States. In doing so, the movement constructed a uniform Chicano identity that necessitated that Afro-Mexicans repress their blackness. This disregard for the racial and ethnic particularities of individual Latinos was not unique to the Chicano movement; it was a frequent dynamic in the larger effort to organize Latinos under the concept of Latino sameness and one historically used to unify Mexicans in Mexico as well as other Latin Americans in their respective countries. For instance, even though Afro-Mexican participation in the Mexican War of Independence surpassed that of the indigenous population, Afro-Mexican contributions to the war were obscured, because "insurgent politics were aimed at minimizing race to maximize unity."[7] Thereafter, the indigenous mestizo was historically depicted as the force behind the revolution as part of the nationalizing discourse of *mestizaje*.

Furthermore, the rampant discrimination that Mexicans in the United States reported in the 1960s was largely a result of targeting, because of their indigenous ancestry, by whites. This, in turn, further perpetuated the perception that Mexicans had of themselves as a nonwhite racial group. Anglo bias against all Mexicans, based on their ethnic heritage, compounded the legacy of Afro-Mexican invisibility and antiblack sentiment in Mexico. The indigenous focus of Anglo racism was thus the organizing principle for Chicano nonwhite racial identity. As Haney López states, "Had Mexicans not been treated as an inferior race, they would not have turned to a politics based on a non-White identity."[8]

How then did Afro-Mexican migrants navigate the racial politics of the Mexican American community and the United States as a whole? In one of the few documented accounts of an Afro-Mexican migrant in California in the 1960s, the migrant is described as recognizing his African ancestry but preferring to emphasize his Indian and white ancestry, despite having no accounts of his family's Indian heritage.[9] When his young children wonder why he has the hair and features of African Americans, their light-skinned mestiza mother asserts that his distinctive nose was a marker of his Roman heritage and that his hair was inherited from the Spaniards of mixed Arabic blood. However, when the children later meet even-darker-skinned relatives of their father, their mother's explanations fall apart. The attempt by light-skinned mestizo families to avoid a characterization as black is also evident in one Afro-Mexican's account of how he painstakingly combed his hair to minimize its African appearance and how his family had spent many years hiding the relatives with the more unmistakable African ancestry.

Light-skinned mestizos of African ancestry likely hid their ancestry from others and from themselves in the United States as a method of survival, just as many Afro-Mexicans

hid theirs during the Mexican Revolution. Yet this might not have shielded them from a negative public perception based on their appearance. Nor did their own ignorance or denial of their African ancestry mitigate the role that it played in their treatment. Thus, while a self-identified brown-race Chicano may perceive her biased treatment as rooted in a Chicano (read Indian) appearance, visible traces of African ancestry may actually explain the racism she experienced.

This would particularly be the case with unambiguously black-identified Afro-Mexicans. Indeed, Haney López notes that lighter skin color and European features differentiated the racial experiences of Mexican Americans. Given the central role that discriminating legal institutions, such as the police and the courts, played in informing the Chicano self-identity as nonwhite, it is logical that Mexicans of African ancestry would be especially drawn to a nonwhite identity centered on demands for social justice. While people, of course, did not easily fit within either one of these binary categories, Haney López notes that the personal experience of police abuse and other social bias increased the likelihood that some would embrace the nonwhite Chicano identity.

It is also possible that some, or many, Afro-Mexicans refused to embrace blackness to escape the near-universal denigration that this would bring but adopted a Chicano brown (nonwhite) identity instead. When Afro-Latinos similarly use the term "Latino" as a racial signifier separate and apart from blackness and any association with African Americans, Latinos who do affirmatively identify as Afro-Latinos find the following popular refrain applicable: "The darker the skin, the louder the Spanish."

NOTES

1. In his account of the role of law in the development of the Chicano social justice movement, Ian Haney López describes the Chicano movement as "an effort to respond to the problem of race in this country." Ian F. Haney López, Racism on Trial: The Chicano Fight for Justice 24 (2003). He demonstrates that the legal system was a locus for evolving notions of racial identity. The book follows the evolution of the movement: Mexicans had a long-standing history of separate and unequal treatment as a race in the United States; through the 1940s and 1950s they sought to overcome their denigration by attempting to assimilate and identify with whites; failing that, in the 1960s they constructed a new identity for themselves as Chicanos and nonwhite. Haney López problematizes the concept of Chicano identity, asserting that, as a social construct, its content was neither preordained nor fixed and, thus, was subject to influence and change brought on by group-based litigation struggles. *Id.* at 11. He documents how the experiences of young Chicanos, who often faced discrimination and violence at the hands of legal institutions, influenced a new self-perception as nonwhite and motivated their interest in a racial identification aligned with their indigenous ancestry as a brown people. In short, Haney López demonstrates how the Chicano movement remade Mexican racial identity. *Id.* at 157.

2. *Id.* at 212.

3. *Id.* at 115.

4. Taunya Lovell Banks, Mestizaje *and the Mexican* Mestizo *Self:* No Hay Sangre Negra*, So There Is No Blackness*, 15 S. Cal. Interdisc. L.J. 199 (2006).

5. Haney López, *supra* note 1, at 211.

6. *Id.* at 249.

7. Ted Vincent, *The Blacks Who Freed Mexico*, 79 J. Negro Hist. 257, 260 (1994).

8. Haney López, *supra* note 1, at 157.

9. Martha Menchaca, Recovering History, Constructing Race: The Indian, Black, and White Roots of Mexican Americans 5 (2001).

60. Beyond Racial Identity Politics

Toward a Liberation Theory for Multicultural Democracy

MANNING MARABLE

How do we transcend the theoretical limitations and social contradictions of the politics of racial identity? The challenge begins by constructing new cultural and political identities, based on the realities of America's changing multicultural, democratic milieu. The task of constructing a tradition of unity between various groups of color in America is a far more complex and contradictory process than any progressive activists or scholars have admitted, precisely because of divergent cultural traditions, multiple languages, and conflicting politics of racial identities among Latinos, African Americans, Asian Americans, Pacific Island Americans, Arab Americans, American Indians, and others. Highlighting the current dilemma in the 1990s is the collapsing myth of brown-black solidarity. Back in the 1960s and early 1970s, with the explosion of the civil rights and black power movements in the African American community, activist formations with similar objectives also emerged among Latinos. The Black Panther Party and the League of Revolutionary Black Workers, for example, found their counterparts among Chicano militants with La Raza Unida Party in Texas and the Crusade for Justice in Colorado. The Council of La Raza and the Mexican American Legal Defense Fund began to push for civil rights reforms within government and expanding influence for Latinos within the Democratic Party, paralleling the same strategies of Jesse Jackson's Operation PUSH and the NAACP Legal Defense Fund. With the growth of a more class-conscious black and Latino petty bourgeoisie, ironically a social product of affirmative action and civil rights gains, tensions between these two large communities of people of color began to deteriorate. The representatives of the African American middle class consolidated their electoral control of the city councils and mayoral posts of major cities throughout the country. Black entrepreneurship increased, as the black American consumer market reached a gross sales figure of $270 billion by 1991, an amount equal to the gross domestic product of the fourteenth-wealthiest nation on earth. The really important symbolic triumphs of this privileged strata of the African American community were not the dynamic 1984 and 1988 presidential campaigns

A version of this chapter previously appeared as Manning Marable, *Beyond Racial Identity Politics: Towards a Liberation Theory for Multicultural Democracy*, in Privileging Positions: The Sites of Asian American Studies, edited by Gary Y. Okihiro et al.

of Jesse Jackson; they were instead the electoral victory of Democratic moderate Doug Wilder as Virginia's governor in 1990 and the anointment of Ron Brown, former Jackson lieutenant who had turned moderate, as head of the Democratic National Committee. Despite the defeats represented by Reaganism and the absence of affirmative action enforcement, there was a sense that the strategy of symbolic representation had cemented this strata's hegemony over the bulk of the black population. Black politicians like Doug Wilder and television celebrity journalists such as black-nationalist-turned-Republican Tony Brown were not interested in pursuing coalitions between blacks and other people of color. Multiracial, multiclass alliances raised too many questions about the absence of political accountability between middle-class leaders and their working-class and low-income followers. Even Jesse Jackson shied away from addressing a black-Latino alliance except in the most superficial terms.

By the late 1980s and early 1990s, however, the long-delayed brown-black dialogue at the national level began to focus on tensions around at least four critical issues. First, after the 1990 census, scores of congressional districts were reapportioned to have African American or Latino pluralities or majorities, guaranteeing greater minority group representation in Congress. However, in cities and districts where Latinos and blacks were roughly divided, or especially in those districts that blacks had controlled in previous years but that Latinos now were in the majority, disagreements often led to fractious ethnic conflicts. Latinos claimed that they were grossly underrepresented in the political process. African American middle-class leaders argued that Latinos actually represented four distinct groups with little to no shared history or common culture: Mexican Americans, concentrated overwhelmingly in the southwestern states; Hispanics from the Caribbean, chiefly Puerto Ricans and Dominicans, most of whom had migrated to New York City and the Northeast since 1945; Cuban Americans, mostly middle- to upper-class exiles of Castro's Cuba who voted heavily Republican; and the most recent Spanish-speaking immigrants from Central and South America. Blacks insisted that Cuban Americans definitely were not an underprivileged minority and as such did not merit minority set-aside economic programs, affirmative action, and equal opportunity programs. The cultural politics of Afrocentrism made it difficult for many African Americans to recognize any common interest they might share with Latinos.

Immigration issues also lie at the center of recent Latino-black conflicts. Over one-third of the Latino population of more than twenty-four million in the United States consists of undocumented workers. Some middle-class African American leaders have taken the politically conservative viewpoint that undocumented Latino workers deprive poor blacks of jobs in the low-wage sectors of the economy. Bilingual education and efforts to impose language and cultural conformity on all sectors of society, such as English-only referenda, have also been issues of contention. Finally, the key element that drives these topics of debate is the rapid transformation of America's nonwhite demography. Because of relatively higher birth rates than the general population and substantial immigration, within less than two decades Latinos as a group will outnumber African Americans as the largest minority group in the United States. Even by 1990 about one out of nine U.S. households spoke a non-English language at home, predominantly Spanish.

Black middle-class leaders who were accustomed to advocating the interests of their constituents in simplistic racial terms were increasingly confronted by Latinos who felt

alienated from the system and largely ignored and underrepresented by the political process. Thus in May 1991, Latinos took to the streets in Washington, D.C., hurling bottles and rocks and looting over a dozen stores, after local police shot a Salvadoran man whom they claimed had wielded a knife. African American mayor Sharon Pratt Dixon ordered over one thousand police officers to patrol the city's Latino neighborhoods, and police used tear gas to quell the public disturbances. In effect, a black administration in Washington, D.C., used the power of the police and courts to suppress the grievances of Latinos—just as a white administration had done against black protesters during the urban uprisings of 1968.

The tragedy is that too little is done by either African American or Latino mainstream leaders who practice racial identity politics to transcend their parochialism and to redefine their agendas on common ground. Latinos and blacks alike can agree on an overwhelming list of issues—such as the inclusion of multicultural curricula in public schools, improvements in public health care, job training initiatives, the expansion of public transportation, housing for low- to moderate-income people, and greater fairness and legal rights within the criminal justice system. Despite the image that Latinos as a group are more economically privileged than African Americans, Mexican American families earn only slightly more than black households, and Puerto Rican families less. Economically, Latinos and African Americans both have experienced the greatest declines in real incomes and some of the greatest increases in poverty rates within the United States. From 1973 to 1990, for example, the incomes for families headed by a parent under thirty years of age declined 28 percent for Latino families and 48 percent for African American families. The poverty rates for young families in these same years rose 44 percent for Latinos and 58 percent for blacks.

Latinos continue to experience discrimination in elementary, secondary, and higher education, which is in many respects more severe than that experienced by African Americans. Although high school graduation rates for the entire population have steadily improved, those for Latinos have declined consistently since the mid-1980s. In 1989, for instance, 76 percent of all African Americans and 82 percent of all whites who were eighteen to twenty-four years old had graduated from high school. By contrast, the graduation rate for Latinos in 1989 was 56 percent. By 1992, the high school completion rate for Latino males dropped to its lowest level, 47.8 percent, since the American Council on Education began collecting such figures, in 1972. In colleges and universities, the pattern of Latino inequality was the same. In 1991, 34 percent of all whites and 24 percent of all African Americans eighteen to twenty-four years old were enrolled in college. Latino college enrollment for the same age group was barely 18 percent. As of 1992, approximately 22 percent of the non-Latino adult population in the United States possessed at least a four-year college degree. College graduation rates for Latino adults were just 10 percent. Thus on a series of public policy issues—access to quality education, economic opportunity, the availability of human services, and civil rights—Latinos and African Americans share a core set of common concerns and long-term interests. What is missing is the dynamic vision and political leadership necessary to build something more permanent than temporary electoral coalitions between these groups.

A parallel situation exists between Asian Americans, Pacific Americans, and the black American community. Two generations ago, the Asian American population was

comparatively small, except in states such as California, Washington, and New York. With the end of discriminatory immigration restrictions on Asians in 1965, however, the Asian American population began to soar dramatically, changing the ethnic and racial character of urban America. For example, from 1970 to 1990, the Korean population increased from 70,000 to 820,000. Since 1980 about 33,000 Koreans have entered the United States each year, a rate of immigration exceeded only by Latinos and Filipinos. According to the 1990 census, the Asian American and Pacific Islander population in the United States exceeds 7.3 million.

Some of the newer Asian immigrants in the 1970s and 1980s were of middle-class origins with backgrounds in entrepreneurship, small manufacturing, and in the white-collar professions. Thousands of Asian American small-scale, family-owned businesses began to develop in black and Latino neighborhoods, in many instances taking the place that Jewish merchants had occupied in ghettoes a generation before. It did not take long before Latino and black petty hostilities and grievances against these new ethnic entrepreneurial groups began to crystallize into deep racial hatred. When African American rapper Ice Cube expressed his anger against Los Angeles's Korean American business community in the 1991 song "Black Korea," he was also voicing the popular sentiments of many younger blacks:

So don't follow me, up and down your market
Or your little chop suey ass will be a target of the nationwide boycott
Juice with the people, that's what the boy got
So pay respect to the black fist
Or we'll burn your store, right down to a crisp
And then we'll see ya
'Cause you can't turn the ghetto into Black Korea.

Simmering ethnic tensions boiled into open outrage in Los Angeles when a black teenage girl was killed by Korean American merchant Soon Ja Du. Although convicted of voluntary manslaughter, Du was sentenced to only probation and community service. Similarly in the early 1990s, African Americans launched economic boycotts and political confrontations with Korean American small merchants in New York.

Thus in the aftermath of the blatant miscarriage of justice in Los Angeles in 1992—the acquittals of four white police officers for the violent beating of Rodney King—the anger and outrage within the African American community were channeled against not the state and the corporations but small Korean American merchants. Throughout Los Angeles, over 1,500 Korean American–owned stores were destroyed, burned, or looted. Following the urban uprising, a fiercely anti-Asian sentiment continued to permeate sections of Los Angeles. In 1992–1993, Asian Americans were harassed or beaten in Southern California. After a rail system contract was awarded to a Japanese company, a chauvinistic movement was launched to "buy American." Asian Americans are still popularly projected to other nonwhites as America's successful model minorities, fostering resentment, misunderstandings, and hostilities among people of color. Yet black leaders have consistently failed to explain to African Americans that Asian Americans as a group do not own the major corporations or banks that control access to capital. Asian Americans as a group do not own massive amounts of real estate, control the

courts or city governments, have ownership in the mainstream media, dominate police forces, or set urban policies.

While African Americans, Latinos, and Asian Americans scramble over which group should control the mom-and-pop grocery store in their neighborhood, almost no one questions the racist redlining policies of large banks, which restrict access to capital for nearly all people of color. Black and Latino working people usually are not told by their race-conscious leaders and middle-class symbolic representatives that institutional racism has also frequently targeted Asian Americans throughout U.S. history—from the recruitment and exploitation of Asian laborers, to a series of lynching and violent assaults culminating in the mass incarceration of Japanese Americans during World War II, to the slaying of Vincent Chin in Detroit, and to the violence and harassment of other Asian Americans. A central ideological pillar of whiteness is the consistent scapegoating of the Oriental menace. As legal scholar Mari Matsuda observes:

> There is an unbroken line of poor and working Americans turning their anger and frustration into hatred of Asian Americans. Every time this happens, the real villains—the corporations and politicians who put profits before human needs—are allowed to go about their business free from public scrutiny, and the anger that could go to organizing for positive social change goes instead to Asian-bashing.

What is required is a radical break from the narrow, race-based politics of the past that have characterized the core assumptions about black empowerment since the mid-nineteenth century. We need to recognize that both perspectives of racial identity politics, which are frequently juxtaposed, integration-assimilation versus nationalism-separatism, are actually two different sides of the same ideological and strategic axis. To move into the future will require that we bury the racial barriers of the past for good. The essential point of departure is the Reconstruction of the idea of whiteness, the ideology of white power, privilege, and elitism that remains heavily embedded in the dominant culture, social institutions, and economic arrangements of the society. But we must do more than critique the white pillars of race, gender, and class domination. We must rethink and restructure the central social categories of collective struggle by which we conceive and understand our own political reality. We must redefine blackness and other traditional racial categories to be more inclusive of contemporary ethnic realities.

To be truly liberating, any social theory must reflect the actual problems of a historical conjuncture with a commitment to rigor and scholastic truth. Afrocentrism fails on all counts to provide that clarity of insight into the contemporary African American urban experience. It looks to a romantic, mythical reconstruction of yesterday to find some understanding for the cultural basis of today's racial and class challenges. Yet that critical understanding of reality cannot begin with an examination of the lives of Egyptian pharaohs. It must begin by critiquing the vast structure of power and privilege that characterizes the political economy of postindustrial, capitalist America. According to the Center on Budget and Policy Priorities, during the Reagan-Bush era of the 1980s, the poorest one-fifth of all Americans earned about $7,725 annually and experienced a

decline in before-tax household incomes of 3.8 percent in the decade. The middle fifth of all U.S. households earned about $31,000 annually, with an income gain of 3.1 percent during the 1980s. Yet the top one-fifth of household incomes reached over $105,200 annually by 1990, with before-tax incomes soaring 29.8 percent in the decade. The richest 5 percent of all American households exceeded $206,000 annually, improving their incomes by 44.9 percent under Reagan and Bush. The wealthiest 1 percent of all U.S. households reached nearly $550,000 per year, with average before-tax incomes increasing by 75.3 percent. In effect, since 1980, the income gap between America's wealthiest 1 percent and the middle class *nearly doubled.* As the Center on Budget and Policy Priorities relates, the wealthiest 1 percent of all Americans, roughly 2.5 million people, receive "nearly as much income after taxes as the bottom 40 percent, about 100 million people. While wealthy households are taking a larger share of the national income, the tax burden has been shifted down the income pyramid." A social theory of a reconstructed, multicultural democracy must advance the reorganization and ownership of capital resources, advance the expansion of production in minority areas, and provide guarantees for social welfare such as a single-payer, national health care system.

The factor of race, by itself, does not and cannot explain the massive transformation of the structure of capitalism in its postindustrial phase and the destructive redefinition of work itself as we enter the twenty-first century. Increasingly in Western Europe and America, the new division of haves versus have-nots is characterized by a new segmentation of the labor force. The division is between those workers who have maintained basic economic security and benefits—such as full health insurance, term life insurance, pensions, educational stipends or subsidies for the employee's children, paid vacations, and so forth—versus those marginal workers who are unemployed, who are part-time employees, or who labor but have few if any benefits. Since 1982, temporary employment, or part-time hirings without benefits, has increased 250 percent across the United States while all employment has grown by less than 20 percent. Today, the largest private employer in the United States is Manpower, the world's largest temporary employment agency, with 560,000 workers. I predict that by the year 2000, half of all American workers will be classified as part-time employees, or as they are termed within IBM, "peripherals." The reason for this massive restructuring of labor relations is capital's search for surplus value or profits. I estimate that the total 1993 U.S. payroll costs of $2.6 billion will be reduced $800 million by using part-time laborers and employees. Increasingly, disproportionately high percentages of Latino and African American workers will be trapped within this second-tiered labor market. Black, Latino, Asian American, and low-income white workers all share a stake in fighting for a new social contract relating to work and social benefits: The right to a good job should be as guaranteed as the human right to vote; the right of free quality health care should be as secure as the freedom of speech. The radical changes within the domestic economy require that black leadership reach out to other oppressed sectors of the society, creating a common program for economic and social justice. Vulgar Afrocentrism looks inward; the new black liberation of the twenty-first century must look outward, embracing those people of color and oppressed people of divergent ethnic backgrounds who share our democratic vision.

Our ability to transcend racial chauvinism and interethnic hatred and the old definitions of "race," to recognize the class commonalties and joint social justice interests of

all groups in the restructuring of this nation's economy and social order, will be the key in the construction of a nonracist democracy, transcending ancient walls of white violence, corporate power, and class privilege. By dismantling the narrow politics of racial identity and selective self-interest, by going beyond black and white, we may construct new values, new institutions, and new visions of an America beyond traditional racial categories and racial oppression.

61. Rethinking Alliances

Agency, Responsibility, and Interracial Justice

ERIC K. YAMAMOTO

Recent writing on coalition building tends to be ahistorical, focusing primarily on a search for common ground—the necessity and difficulty of locating common political-economic interests between Korean Americans and African Americans, for example. Or it focuses on culture and fostering understanding of differing group cultural behaviors or on social structure and exploring how dominant institutions construct racial conflict. These focuses yield important insights. They, however, also constrain the field of inquiry; they tend to obscure a foundational component of groups living peaceably and working politically together.

That foundational component is interracial justice. Interracial justice, as I conceive it, reflects a commitment to antisubordination *among* nonwhite racial groups. It entails a hard acknowledgment of how racial groups have harmed and continue to harm one another, along with affirmative efforts to redress these harms that have continuing effects. Interracial justice includes two related dimensions. One is conceptual, requiring a recognition of situated racial group power and, consequently, constrained yet meaningful group agency in addition to corresponding group responsibility. The second dimension is practical. It entails messy, shifting, continual, and often localized processes of interracial healing.

Asian Americans and Native Hawaiians: Apology and Redress

In summer 1993 Asian American groups called for an Asian American apology to Native Hawaiians and for multimillion-dollar reparations. Those Asian American groups represented churches within the Hawai'i Conference of the United Church of Christ. Their call for redress, offered as a resolution at the Hawai'i Conference's 171st Aha Pae'aina (annual meeting), complemented another pending resolution of apology on behalf of the entire multiracial conference for the participation of white missionary predecessors in the 1893 overthrow of the Hawaiian monarchy. In their resolution, the Asian American groups recalled Asian disapproval of the dethroning of Queen Liliuokalani in 1893 by

A version of this chapter previously appeared as Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility, and Interracial Justice*, 3 Asian Pac. Am. L.J. 33 (1995). Originally published in the *Asian Pacific American Law Journal*.

white business and religious leaders supported by U.S. officials and an American warship. They also acknowledged "a certain bond" between Hawaiians and Asians during the first half of this century as social-economic-political outsiders in white oligarchically controlled Hawaii. They also addressed one hundred years of often oppressive group interactions—confessing that "we as Asians have benefitted socially and economically by the illegal overthrow" of the sovereign Hawaiian government and that "[m]any Asian Americans have benefitted while disregarding the destruction of Native Hawaiian culture and the struggles of Na Kanaka Maoli [native Hawaiian people]."[1]

The Asian American groups then addressed current relationships arising out of those historical interactions—"a particular dynamic . . . between Native Hawaiians and Asian Americans, rooted in mutual misunderstanding and mistrust," resulting in the "use of stereotypes and caricatures to demean and dehumanize" and giving rise to the persistence of "racist attitudes and actions." Finally, while acknowledging ambiguity as to "motives, results, characterizations, and causes of the events [surrounding the overthrow]," the Asian American groups focused on "the anguish of our Native Hawaiian sisters and brothers" within and beyond the conference and sought to begin a "process of repentance, redress, and reconciliation," offering "our support to their struggle for justice."[2]

From one vantage point, by proposing an apology and reparations, those Asian American groups were seeking to live out religious beliefs about peace and justice. From another, they were seeking to alter Asian American relationships with Hawaii's indigenous people by addressing racial status and position and "how structures and strategies of domination created under colonialism are transferred and redeployed by the formerly colonized."[3] From both perspectives, the Asian American groups were employing theology and law to rearticulate racial identities relationally and thereby build bridges between groups. They were endeavoring to address perceived injustice, historical and contemporary, arising out of relations between two racial groups as a foundation for contributing to social structural change in Hawaii. In effect, they were attempting to give new meaning to the legally constructed, internally dissonant racial category of Asian Pacific American.

Anonymous hate phone calls and heated debate in several other largely Asian American churches preceded formal presentation of the finished resolution to all 120 churches at the conference's Aha Pae'aina. The resolution's attempt to cast reconciliation in terms of relations between Asian Americans and Native Hawaiians met immediate challenge. Ministers and congregations contested any unified meaning of Asian American. One congregation, comprising primarily fourth- and fifth-generation Chinese Americans, was outraged by the resolution, finding it both demeaning of Hawaii's Chinese Americans and lacking in moral ("I didn't do anything wrong") and legal ("what right do they have") justification. The largely Korean American churches tended to express indifference, hinting that any responsibility for complicity in the white-controlled oppression of Native Hawaiians in the first half of the century lay with Japanese and Chinese Americans. The Samoan American churches stood silent, leaving unexpressed feelings of present-day discrimination against Samoans by others, including some Native Hawaiians. Clergy of the self-identified Hawaiian churches in the conference and congregation members, most of whom were some combination of Hawaiian, Asian, and white ancestry, expressed wide-ranging views about the significance of, and indeed need for,

an apology and redress from the conference generally and Asian American churches specifically. Others observed that mixed ancestry blurred the lines between Hawaiians entitled and not entitled to benefit from reparations.

The passionate testimony of an eighty-year-old Chinese American minister, formerly of a Hawaiian church on Oahu, illustrated the complexity of the intergroup issues raised by the apology-redress resolution. Reverend Richard Wong, in a letter presented at the Aha Pae'aina, opposed the resolution in part because the term "Asian American" in the resolution encompassed Chinese Americans who he felt were not legally or morally culpable.

> As an Asian/Chinese, we Chinese look back at our [relations] with Native Hawaiians. We feel that we have not exploited nor dehumanized them. But in fact, we have accepted them enough to marry them. Today, the so-called "Hawaiian names"—Apaka, Ahuna, Achiro, and so on—are unions of Chinese in Hawaii. . . . Please do not clump Chinese with other Asian-Americans who may have taken advantage of these Oahuans [Hawaiians on Oahu]. Secondly, if the Asian-Americans fear they have deeply denied Native Hawaiians, they should offer their own apology [and reparations].[4]

By identifying himself as "Asian/Chinese" and by objecting to the "clumping" of "Chinese with other Asian-Americans," Reverend Wong's testimony raised the issue of pan-racialization: Is Asian American (even leaving out Pacific Islanders for the moment) a homogenous racial category? If not, is it nevertheless a meaningful category? In what situations? These questions about Asian American as a racial category give rise to questions about the category's shifting borders: Under what circumstances do individuals faced with justice issues shift between pan-racial and ethnic identities? How do differences concerning history, culture, economics, gender, class, mixed ancestry, immigration status, and locale contribute to malleable victim and perpetrator racial identities? How do unstable racial identities detract from or provide opportunities for deeper understandings of interracial harms and group responsibility for healing?

Reverend Wong's testimony also raised the related identity issue of intraracial group distancing. His testimony referred to "Asian/Chinese" as "we" and "Asian-Americans" as "they" ("the Asian-Americans . . . they should offer their own apology"). By excluding we/Chinese from the broader category of they/Asian Americans he appeared to concede forms of Asian American complicity in the oppression of Native Hawaiians while simultaneously distancing Chinese Americans from an identity as an oppressor. Sometimes intraracial group distancing flows from a desire to enlarge subgroup benefits; sometimes, to avoid subgroup blame. Intragroup distancing in the context of group acknowledgment of partial legal or moral responsibility for oppression of others reveals the illusive internal boundaries of Asian American identity. Most important, Reverend Wong's testimony inverted the notion of Asian American foreignness. Asian American foreignness often is contemplated in two related ways. At the level of global identity, the Oriental as objectified Other encompasses Asians in America. Edward Said's notion of Orientalism explains the construction of alternatively exoticized or demonized west Asian Orientals as the oppositional predicate for the construction of subjectified, valorized white Occidentals.[5] Stretching to include east Asia, all Asians are Orientals and the foreign Other for mainstream America.

At the level of national identity, mainstream America tends to focus on Asian ancestry and morphology, lumping Japanese nationals, for example, with Americans of Japanese ancestry. Whether considering economic competition or redress for the World War II internment, a shockingly large segment of white American society fails to distinguish between Japanese nationals and Japanese Americans. The same is true for other Asian American subgroups. No such lack of discernment occurs for Irish nationals and Americans of Irish ancestry. The lumping of Asian Americans with Asian nationals folds Asian Americans into foreign nationals, making them non-American and therefore easier targets during economic or political hard times for other Americans' enmity and violence.

Common to constructions of Asian American foreignness and to an extent their critiques is an often unstated referent. Asian Americanness is determined by the norms or perceptions of white mainstream America or Asian American resistance to those norms or perceptions. Reverend Wong's testimony and the Asian American apology-redress resolution are illuminating, I suggest, because they moved these constructions and critiques to a different setting and inverted them. Speaking as an "Asian/Chinese" about the "denial of Native Hawaiians," Reverend Wong's statement subtly yet significantly moved Asian American foreignness beyond Anglo-American perceptions of Asian Americans.

In addition, the positional shift expands an emerging African American–Asian American–Latino framework for groups of color. It constructs Asian Americanness in part from the perspective of indigenous peoples, America's first people, who remain outsiders in America. From this outsider perspective, Asian Americans are sometimes viewed as late-coming settlers who have "made it," as foreign insiders—foreignness inverted.

Third-generation Japanese Americans in Hawaii self-identified as local rather than Japanese American. They did so partially as a response to many indigenous Hawaiians' negative perceptions of Japanese, especially Japanese national businesses and second-generation Japanese Americans. These perceptions were of Japanese and haoles (whites) from the continental United States exercising inordinate control over the Hawaii economy, state bureaucracy, and private lands, much to the detriment of Hawaiian culture and the *aina*, or native land. These "foreigners" were perceived as having wrested insider control. Identifying with local situated young Japanese Americans alongside increasingly activist Native Hawaiians in terms of culture and community preservation and in terms of resistance to these perceived outsiders in control of the islands. Local identity thus reflected culture (appreciating the amalgam of cultures) and social structure (collective opposition to foreign control over development of the islands).

Indeed, in the mid-1970s some Asian Americans and Native Hawaiians worked in coalition under the banner of Palaka Power, or localism, to advance local interests through law. They were instrumental in the enactment of several state statutes designed to lessen in-migration and outsider economic influence and in the restructuring of the state constitution to recognize Native Hawaiian rights. A recent study reveals that many Hawaii Asian Americans continue to self-identify with their own subgroup (for example, Chinese American) and with local rather than Asian American. While subgroup or ethnic identity maintains ancestral-cultural attachments, local identity links Asian Americans with Native Hawaiians and other groups. It does so by creating a collective culture and an oppositional Hawaii-based identity rooted in resistance to increasing external socioeconomic control.

Despite the continuing appeal of an encompassing local identity for some Asian Americans and the success of past coalitional efforts, many Native Hawaiians now question if not reject collective identification symbolized by local. They criticize the way local identity erases significant differences in history and current needs among racial groups and, more important, trivializes Native Hawaiians' unique cultural and legal claims to land and self-governance as indigenous peoples. They assert that in crucial social and legal respects Native Hawaiians are different from Japanese, Chinese, Korean Americans, and more recent immigrant groups. These Native Hawaiian criticisms of an essentialized local identity emphasize time (distinct histories), place (varying attachments to land), culture (disparate practices and values), and power (control of business, land, and government). They implicitly reposition Asian Americans as foreign insiders. In doing so, they underscore the instability of a narrowly circumscribed Asian American identity. They also illustrate the decentering of whiteness. Whiteness, although of continuing significance, cannot be seen as the singular referent for determining racial identities or defining racial justice.

Healing and Interracial Justice

As mentioned earlier, interracial justice presupposes a recognition of situated group power and therefore constrained yet meaningful group agency and corresponding responsibility in the construction of racial identities and interracial conflicts. It also entails messy, shifting, continual, and often localized processes of interracial healing. Both, I have argued, are predicates to racial groups living together peaceably and working together politically. Myriad questions concerning efficacy and authority surround notions of healing among racial groups: Is healing linked to individual psyches or to the public rearticulation of group images? Which forms of healing repair surface wounds while leaving oppressive social structures unaddressed? Who within a group, or within a subgroup of a group, decides which healing steps are appropriate and sufficient, and what are the risks of leadership cooptation? I endeavor here only to suggest that interracial healing approaches must be multidisciplinary and guided by antisubordination principles.

Law does not directly address healing. The actual healing of injured bodies, minds, and spirits and the repairing of broken group relationships generally lie beyond the law's reach. Law instead addresses healing indirectly through the multifaceted idea of justice. Some conceive of legal justice in a manner that ignores healing completely. For them, legal justice simply means dispute resolution or the disposition of claims according to substantive norms through fair process. This version of legal justice tends to turn a blind eye to the social and psychological impacts of dispute resolution outcomes and procedures on the participants and their communities.

Why examine Asian Americans and Native Hawaiians? I have not, as have others, described Hawaii as a race relations model. I do nevertheless find the dynamics of Asian American and Native Hawaiian relations in Hawaii to be particularly relevant to more generalized inquiry about interracial justice. Despite many important differences, the Hawaii of today and several parts of the United States of the near future bear a critical resemblance in terms of racial demographics. Asians and Asian Americans (including many recent immigrants from Southeast Asia) comprise a politically and economically

significant portion of Hawaii's population. They are of diverse cultures and disparate socioeconomic classes and have multiple identities. Documented and undocumented workers from Mexico are among the state's fastest-growing immigrant labor groups. Hawaii's indigenous peoples are asserting historically rooted claims to land and self-governance and are rapidly becoming players in the state economy. African Americans, although small in numbers, continue to suffer overt and structural discrimination. Whites are the largest single group. Measured against all nonwhite groups however, they are a numerical minority and no longer dominate elective political offices. They do continue to exert dominant control over private business and media. The Hawaii economy has transformed from an agriculture-military economy to one that is service-oriented with many lower-end jobs filled by recent immigrants. Group stereotyping addresses not only racial characteristics but also social structural power. For example, an anti–Asian American backlash has developed from a mythology of Asian American, particularly Japanese American, economic and political dominance. While Japanese Americans are highly visible in elective offices and are overrepresented in public sector employment, "contrary to popular misconception," they "do not have the highest occupational status . . . [and are] especially absent in terms of corporate power."[6]

Predictions about California demographics for 2020 bear important similarities and differences to Hawaii's current demographics, as do anticipated demographic changes throughout the country. One common dimension of changing demographics across America is the salience of relations *among* racial groups generally and issues of interracial conflict and healing particularly—issues of interracial justice.

For the Asian American churches, reconciliation among the many racially diverse churches of the Hawai'i Conference through an apology to and redress for Native Hawaiians emerged as a localized issue of interracial justice. Racial misunderstanding and sometimes antipathy among member churches needed to be acknowledged. Only when present pain rooted in past harms was addressed and, to the extent appropriate, redressed could there be justice. And only when there was justice could there be reconciliation and a foundation for genuine hope and cooperation. As discussed, the Asian American churches' proposed resolution of apology to Native Hawaiians and accompanying redress initially generated heated debate within and beyond those churches. That debate, often challenging the racial categories and racial politics of the resolution itself, ranged from strong endorsement to ringing denouncement. The process was messy and conflictual. The participants at the United Church of Christ Hawai'i Conference's annual meeting discussed earnestly but could not agree on what happened historically, who was involved, who was culpable, or what redress if any was appropriate.

The Asian American churches' resolution was heard along with a broader resolution calling for an apology and redress from the multiracial Hawai'i Conference itself. While observing the extended discussions, I sensed that nothing productive would result. When it appeared that the conference polity could reach no consensus on appropriate action, Reverend Kekapa Lee, a Native Hawaiian–Chinese American pastor of a small church on Maui, stood and said, "I would like to ask all those willing Hawaiians to please stand." A dozen or so of the four hundred people in the room stood. Lee continued:

> Those of us who are standing are Hawaiian people—people who lived in this archipelago called Hawai'i for generations. . . . Some of us are hurt deeply by what

> took place 100 years ago. Some of us have not a consensus on the role of the [church in the overthrow of the Hawaiian nation]. That is not the point. [T]he call for apology . . . [is intended] to sever this *pilikia* [troubled feeling] that we might move on. We want to put this behind and we call upon all of you who are not Hawaiian to *kokua* [cooperate]—even though some of us Hawaiians are not totally worth this.[7]

> Another thirty Hawaiians rose, slowly. Lee spoke again.

> And I have a very heavy, heavy, heavy heart because I don't understand why an apology is such a big thing. . . . Some of us are hurting and in pain because of this, and we're asking your support and *kokua* . . . because there are many things that face our church and our community as Hawaiians and we want to move on but feel that this apology is so important.[8]

While Reverend Lee continued, many more Hawaiians rose. At first sixty, then eighty, finally perhaps one hundred; almost all the Hawaiians in the polity, including those who earlier spoke against the resolution, stood. The emotion was palpable. It was only at that moment, I believe, following days of fractious discussion, that most of the non-Hawaiians there (including many white and Asian Americans) grasped the depth of the continuing pain experienced by Hawaiians within their own conference. It was only then that they appeared to begin to understand how their refusal to acknowledge that present pain and its myriad historical sources erected huge barriers between groups within the conference, barriers to addressing collectively the "many things that face our church and our community." It was then that many of the earlier disagreements emerged in a new light. The members of the conference polity then by consensus adopted an amended version of the broader resolution directing the conference to apologize to Native Hawaiians for the conference predecessor's participation in the overthrow of the Hawaiian nation and to begin a discussion about reparations.

A difficult year-long self-study followed among church members and leaders within the Hawai'i Conference. Disagreements continued about the extent of historical complicity of the conference's predecessor in the overthrow of the Hawaiian nation and about the appropriateness of reparations. In 1994 self-study culminated in a solemn apology service and ceremony and with a commitment by the conference to continue discussions about land reparations. Those discussions are ongoing. In 1995, the national corporate board of the United Church of Christ, in furtherance of its own apology and that of the Hawai'i Conference, despite tight financial times, offered Native Hawaiians $1.25 million in the form of an educational trust as partial reparations.

Has some degree, or form, of interracial justice occurred? And if so, has it contributed to racial groups' better living together peaceably and working together politically? There are, of course, no clear answers, just more questions. What are the likely effects of the apology, the partial reparations, the conference resolution, the Asian American resolution, and the tumultuous processes surrounding them? What, if anything, will have changed in terms of individual feelings, group relations, and church structure? In the larger community and throughout the state, how will images or representations of interracial relations have changed, if at all? Is what appears to be interracial healing

meaningful for Native Hawaiians, and if so, will it be lasting? How will participation in the apology-reparation process have changed the Asian Americans involved and Asian Americans generally? These questions of interracial justice merge into what may be a task of paramount importance for communities of color in the twenty-first century: rethinking alliances.

NOTES

1. Motion 5 of the 171st Annual Meeting of the Hawai'i Conference of the United Church of Christ: "A Vision of a New Day: Promoting Solidarity and Reconciliation Through an Act of Apology by the 171st Aha Pae'aina, Directing a Public Apology to Be Made on Its Behalf, and Directing Redress by the Hawai'i Conference of the United Church of Christ," in Ho'o Lokahi, 171st Aha Pae'aina, June 15–19, 1993, Hawai'i Conference, United Church of Christ, at 82.

2. *Id*. at 81–82.

3. Jeff Chang, Lessons of Tolerance: Rethinking Race Relations, Ethnicity, and the Local Through Affirmative Action in Hawai'i 1 (1994).

4. Dean Fujii (reading letter of Reverend Richard Wong), Transcript of Proceedings, Aha Pae'aina, June 19, 1993, Hawai'i Conference, United Church of Christ, at 5.

5. Edward Said, Orientalism 4–15, 201–11 (1978).

6. Jonathan Y. Okamura, *Why There Are No Asian Americans in Hawaii: The Continuing Significance of Local Identity*, 35 Soc. Process in Haw. 172 (1994).

7. Reverend Kekapa Lee, *supra* note 1, at 11.

8. *Id*.

From the Editors

Issues and Comments

Why do many people find conflict within racial minorities so surprising? If whites can't get along with other racial groups, why should anyone expect minorities to get along smoothly with each other? Aren't different minorities as culturally and historically different from each other as they are from whites?

How can we all get along? Is it possible? Manning Marable thinks it is but that it will require more effort than most people think.

Do you agree that race relations are often seen as a black-white issue? If so, can other races be heard only by destroying this binary form of thinking? What are the drawbacks for Asians of being labeled the model minority? See Part X for more readings on this subject.

Do you agree with Angela Harris's conjecture that black Americans play a pivotal role in defining race in the United States? Is such an argument a case of selfish nationalism, another way to move up by stepping on other groups, or the simple, plain truth? Jorge Klor de Alva believes that black (or any other form of) exceptionalism is a matter of perspective and that for many Latinos, African Americans are merely a type of Anglo. Do you agree? Are some Mexican Americans prejudiced against blacks because Mexico's history and culture incorporate an antiblack bias, as Tanya Hernández suggests?

Suppose a person of color, say, a Latino, discriminates against someone of a different color, say, a black, in connection with a job, university slot, or other valuable benefit. Should the same laws that were designed to deal with white-on-black (or white-on-brown) discrimination cover the situation in which one minority discriminates against another?

Must racism always exist? Is everyone racist, including minorities?

Is friction between minority groups promoted by elite whites to weaken the civil rights coalition and deflect attention from those who really benefit from racial oppression—corporations, employers, large churches, growers, and union busters? Two of the authors in this part (Marable and Eric Yamamoto) appear to believe so. Do you?

SUGGESTED READINGS

Blacks, Latinos and Asians in America: Status and Prospects for Politics and Activism (James Jennings ed., 1997).

Delgado, Richard, *Linking Arms: Recent Books on Interracial Coalition as an Avenue of Social Reform*, 88 Cornell L. Rev. 855 (2003).

Du Bois, Paul Martin, & Jonathan J. Hutson, Bridging the Racial Divide: A Report on Interracial Dialogue in America (1997).

Hing, Bill Ong, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 Cal. L. Rev. 863 (1993).

Krieger, Linda Hamilton, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 Cal. L. Rev. 1251 (1998).

Lawrence, Charles R., III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 Stan. L. Rev. 819 (1995).

Matsuda, Mari J., *Beside My Sister, Facing the Enemy: Legal Theory out of Coalition*, 43 Stan. L. Rev. 1183 (1991).

McClain, Paula D., & Joseph Stewart Jr., "Can We All Get Along?" Racial and Ethnic Minorities in American Politics (1995).

Miles, Jack, *Black vs. Brown: African Americans and Latinos*, Atlantic Monthly, Oct. 1992, at 41.

Multi-America: Essays on Cultural Wars and Cultural Peace (Ishmael Reed ed., 1997).

Piatt, Bill, Black and Brown in America: The Case for Cooperation (1997).

Race and Ethnic Conflict: Contending Views on Prejudice, Discrimination, and Ethnoviolence (Fred L. Pincus & Howard Ehrlich eds., 1994).

Race and Politics: New Challenges and Responses for Black Activism (James Jennings ed., 1997).

Robinson, Reginald L., *"The Other Against Itself:" Deconstructing the Violent Discourse Between Korean and African Americans*, 67 S. Cal. L. Rev. 15 (1993).

Trask, Haunani-Kay, *Coalition-Building Between Natives and Non-Natives*, 43 Stan. L. Rev. 1197 (1991).

Vaca, Nicolas C., The Presumed Alliance: The Unspoken Conflict Between Latinos and Blacks and What It Means for America (2004).

Yamamoto, Eric K., *Race Apologies*, 1 J. Gender Race & Just. 47 (1997).

Yamamoto, Eric K., Rethinking Alliances: Agency, Responsibility, and Interracial Justice (1998).

PART XIII

LEGAL INSTITUTIONS, CRITICAL PEDAGOGY, AND MINORITIES IN THE LAW

IN ADDITION TO tackling such substantive issues as hate speech, the intersection of race and sex, and American Indian law reform, critical race theory writers have taken a lively interest in the politics and fairness of the institutions where they work—law schools, law firms, and the bar. Part XIII begins with Derrick Bell's sly, probing "Chronicle of the DeVine Gift," in which he examines head-on the tired excuse that white-dominated institutions cannot hire minority lawyers and professors because the pool is so small. His parable explores what would happen if a law school found itself deluged with spectacularly credentialed blacks willing to teach there. Next, Richard Delgado examines the early domination of civil rights writing and discourse by influential whites.

This part continues with Mari Matsuda's reflections on how excellence, in academic life or anywhere else, takes many forms, not all of them easily captured in a two-hour paper-and-pencil test. Angela Onwuachi-Willig, like Bell, analyzes what happens when universities or other employers encounter applicants of color with superstar credentials and scramble for ways to justify rejecting them.

Each of these chapters emphasizes themes that the reader will already find familiar from earlier sections of this book: the qualification hurdle and how it can look from different perspectives, the marginalization of outsider ideas and the energetic insistence of outsider writers that they be heard, the legitimacy (indeed, necessity) of grounding theories and strategies in the personal, the ubiquity of the white perspective in legal case law, the way empathy often fails but nevertheless is urgently needed, and the necessity of establishing genuine diversity if society is to grow and prosper.

62. The Civil Rights Chronicles

The Chronicle of the DeVine Gift

DERRICK A. BELL, JR.

It was a major law school, one of the best [my friend Geneva Crenshaw began], but I do not remember how I came to teach there rather than at Howard, my alma mater. My offer, the first ever made to a black, was the culmination of years of agitation by students and a few faculty members. It was the spring of my second year. I liked teaching and writing, but I was exhausted and considered resigning, although more out of frustration than fatigue.

I had become the personal counselor and confidante of virtually all the black students and a goodly number of the whites. The black students needed someone with whom to share their many problems, and white students, finding a faculty member willing to take time with them, were not reluctant to help keep my appointment book full. I liked the students, but it was hard to give them as much time as they needed. I also had to prepare for classes—where I was expected to give an award-winning performance each day—and serve on every committee at the law school on which minority representation was desired. In addition, every emergency concerning a racial issue was deemed my problem. I admit that I wanted to be involved in these problems, but they all required time and energy. Only another black law teacher would fully understand what I had to do to make time for research and writing.

So when someone knocked on my door late one afternoon as I was frantically trying to finish writing final exam questions, I was tempted to tell the caller to go away. But I didn't. And at first I was sorry. The tall, distinguished man who introduced himself as DeVine Taylor was neither a student nor one of the black students' parents, who often dropped by when they were in town just to meet their child's only black teacher.

Mr. Taylor, unlike many parents and students, came quickly to the point. He apologized for not making an appointment but explained that his visit concerned a matter requiring confidentiality. He showed me a card and other papers identifying him as the president of the DeVine Hair Products Company, a familiar name in many black homes and one of the country's most successful black businesses. I recognized Mr. Taylor's face and told him that I knew of his business, even if I did not use his products.

A version of this chapter previously appeared as Derrick A. Bell, Jr., *The Civil Rights Chronicles*, 99 Harv. L. Rev. 4 (1985). Originally published in the *Harvard Law Review*.

"You may also know," Mr. Taylor said, "that my company and I have not been much involved in this integration business. It seems to me that civil rights organizations are ready to throw out the good aspects of segregation along with the bad. I think we need to wake up to the built-in limits of the equal opportunity that liberals are always preaching. Much of it may be a trick that will cost us what we have built up over the years without giving us anything better to take its place. Personally, I am afraid they will integrate me into bankruptcy. Even now, white companies are undercutting me in every imaginable way.

"But," he interrupted himself with a deep sigh, "that is not why I am here. You have heard of foundations that reward recipients based on their performance rather than on their proposals. Well, for some time my company has been searching for blacks who are truly committed to helping other blacks move up. We have located and helped several of these individuals over the years by providing them with what we call the DeVine Gift. We know of your work and believe that you deserve to be included in that group. We want to help you help other blacks, and we can spend a large amount of money in that effort. For tax and other business reasons, we cannot provide our help in cash. And we do not wish anyone to know that we are providing the help."

It was clear that he was serious, and I tried to respond appropriately. "Well, Mr. Taylor, I appreciate the compliment, but it is not clear how a black hair products company can be of assistance to a law teacher. Unless"—the idea came to me suddenly—"unless you can help me locate more blacks and other minorities with the qualifications needed to become a faculty member at this school."

Mr. Taylor did not look surprised. "I was a token black in a large business before I left in frustration to start my own company. I think I understand your problem exactly, and with our nationwide network of sales staff, I think we can help."

When I was hired, the faculty promised that although I was their first black teacher, I would not be their last. This was not to be a token hire, they assured me, but the first step toward achieving a fully integrated faculty. But subsequent applicants, including a few with better academic credentials than my own, were all found wanting in one or another respect. My frustration regarding this matter, no less than my fatigue, was what had brought me to the point of resignation before Mr. Taylor's visit.

With the behind-the-scenes help from the DeVine Gift, the law school hired its second black teacher during the summer, a young man with good credentials and some teaching experience at another law school. He was able to fill holes in the curriculum caused by two unexpected faculty resignations. The following year, we "discovered," again with the assistance of Mr. Taylor's network, three more minority teachers—a Hispanic man, an Asian woman, and another black woman. In addition, one of our black graduates, a law review editor, was promised a position when he completed his judicial clerkship.

We now had six minority faculty members, far more than any other major white law school. I was ecstatic, a sentiment that I soon learned was not shared by many of my white colleagues. I am usually more sensitive about such things, but I so enjoyed the presence of the other minority faculty members, who eased the burdens on my time and gave me a sense of belonging to a critical mass, that I failed to realize the growing unrest among some white faculty members.

Had we stopped at six, perhaps nothing would have been said. But the following year, Mr. Taylor's company, with growing expertise, recruited an exceptionally able black lawyer. His academic credentials were impeccable. The top student at our competitor school,

he had been a law review editor and had written a superb student note. After clerking for a federal court of appeals judge and a U.S. Supreme Court justice, he had joined a major New York City law firm and was in line for early election to partnership. I am not sure how they did it, but the DeVine people discovered that he had an unrealized desire to teach, and an application followed. He would be our seventh minority faculty member and, based on his record, the best of all of us.

When the dean came to see me, he talked rather aimlessly for some time before he reached the problem troubling him and, I later gathered, much of the faculty. The problem was that our faculty would soon be 25 percent minority. "You know, Geneva, we promised you we would become an integrated faculty, and we have kept that promise—admittedly with a lot of help from you. But I don't think we can hire anyone else for a while. I thought we might share the wealth a bit by recommending your candidate to some of our sister schools whose minority hiring records are far less impressive than our own."

"Dean," I said as calmly and, I fear, as coldly as I could, "I am not interested in recruiting black teachers for other law schools. Each of the people we have hired is good, as you have boasted many times. And I can assure you that the seventh candidate will be better than anyone now on the faculty without regard to race."

"I admit that, Geneva, but let's be realistic. This is one of the oldest and finest law schools in the country. It simply would not be the same school with a predominantly minority faculty. I thought you would understand."

"I'm no mathematician," I said, "but 25 percent is far from a majority. Still, it is more racial integration than you want, even though none of the minorities, excluding perhaps me, has needed any affirmative action help to qualify for the job. I also understand, even if tardily, that you folks never expected that I would find more than a few minorities who could meet your academic qualifications; you never expected that you would have to reveal what has always been your chief qualification—a white face, preferably from an upper-class background."

To his credit, the dean remained fairly calm throughout my tirade. "I have heard you argue that black law schools like Howard should retain mainly black faculties and student bodies, even if they have to turn away whites with better qualifications to do so. We have a similar situation; we want to retain our image as a white school just as you want Howard to retain its image as a black school."

"That is a specious argument, Dean, and you know it. Black schools have a special responsibility to aid the victims of this country's long-standing and continuing racism. Schools like this one should be grateful for the chance to change their all-white image. And if you are not grateful, I am certain the courts will give you ample reason to reconsider when this latest candidate sues you to be instated in the job he has earned and is entitled to receive."

The Dean was not surprised by my rather unprofessional threat to sue. "I have discussed this at length with some faculty members, and we realize that you may wish to test this matter in the courts. We think, however, that there are favorable precedents on the issues that such a suit will raise. I do not want to be unkind. We do appreciate your recruitment efforts, Geneva, but a law school of our caliber and tradition simply cannot look like a professional basketball team."

He left my office after that parting shot, and I remember that my first reaction was rage. Then, as I slowly realized the full significance of all that had happened since I received

the DeVine Gift, the tears came and kept coming. I cried and cried at the futility of it all. Through those tears, over the next few days, I completed grading my final exams. Then I announced my resignation and the reasons for it.

When I told the seventh candidate that the school would not offer him a position and why, he was strangely silent, only thanking me for my support. About a week later, I received a letter from him—mailed not from his law firm but, according to the postmark, from a small, all-black town in Oklahoma.

Dear Professor Crenshaw:

Until now, when black people employed race to explain failure, I, like the black neoconservative scholars, wondered how they might have fared had they made less noise and done more work. Embracing self-confidence and eschewing self-pity seemed the right formula for success. One had to show more heart and shed fewer tears. Commitment to personal resources rather than reliance on public charity, it seemed to me, is the American way to reach goals—for blacks as well as for whites. Racial bias is not, I thought, a barrier but a stimulant toward showing them what we can do in the workplace as well as on the ball field, in the classroom as well as on the dance floor.

Now no rationale will save what was my philosophy for achievement, my justification for work. My profession, the law, is not a bulwark against this destruction. It is instead a stage prop illuminated with colored lights to mask the ongoing drama of human desolation we all suffer, regardless of skills and work and personal creed.

You had suggested I challenge my rejection in the courts, but even if I won the case and in that way gained the position to which my abilities entitled me, I would not want to join a group whose oft-stated moral commitment to the meritocracy has been revealed as no more than a hypocritical conceit, a means of elevating those like themselves to an elite whose qualifications for their superior positions can never be tested because those qualifications do not exist.

Your law school faculty may not realize that the cost of rejecting me is exposing themselves. They are, as Professor Roberto Unger has said in another context, like a "priesthood that had lost their faith and kept their jobs."[1]

But if I condemn hypocrisy in the law school, I must not condone it in myself. What the law school did when its status as a mainly white institution was threatened is precisely what even elite colleges faced with a growing number of *highly qualified Asian students are doing: changing the definition of merit. My law firm and virtually every major institution in this country would do the same thing in a similar crisis of identity. I have thus concluded that I can no longer play a role in the tragic farce in which the talents and worth of a few of us who happen to get there first is dangled like bait before the masses, who are led to believe that what can never be is a real possibility. When next you hear from me, it will be in a new role as avenger rather than apologist. This system must be forced to recognize what it is doing to you and me and to itself. By the time you read this, it will be too late for you to reason with me. I am on my way.*

Yours,
The Seventh Candidate

This decision, while a shock, hardly prepared me for the disturbing letter that arrived a few days later from DeVine Taylor, who evidently had read of my well-publicized resignation.

Dear Geneva,

Before you received the DeVine Gift, your very presence at the law school posed a major barrier to your efforts to hire additional minority faculty. Having appointed you, the school relaxed. Its duty was done. Its liberal image was assured. When you suggested the names of other minorities with skills and backgrounds like your own, your success was ignored and those you named were rejected for lack of qualifications. When the DeVine Gift forced your school to reveal the hidden but no less substantive basis for dragging their feet after you were hired, the truth became clear.

As a token minority law teacher, Geneva, you provided an alien institution with a facade of respectability of far more value to them than any aid you gave to either minority students or the cause of black people. You explained your resignation as a protest. But you should realize that removing yourself from that prestigious place was a necessary penance for the inadvertent harm you have done to the race you are sincerely committed to save.

I am happy to see that the DeVine Gift has served its intended purpose. I wish you success in your future work.

DeVine Taylor

"A devastating note," I murmured. Geneva had seemed to relive rather than simply retell her Chronicle. She was so agitated by the time she finished that she seemed to forget I was there and began to pace the room. She said something about the foolishness of accepting a teaching position at a school where she would be so vulnerable. For my part, I was more worried about the current state of Geneva's health than about her Chronicle. I tried to reassure her.

"I think that most minorities feel exposed and vulnerable at predominantly white law schools. And I know that most black teachers run into faculty resistance when they seek to recruit a second nonwhite faculty member. Of course, these teachers continue to confront the qualifications hurdle; they never reach the problem you faced. Our question, however, is whether the Supreme Court would view the law school's rejection of a seventh eminently qualified minority candidate as impermissible racial discrimination. At first glance," I said, "the dean's confidence in favorable precedents was not justified. Although the courts have withdrawn from their initial expansive reading of Title VII, even a conservative Court might find for your seventh minority candidate, given his superior credentials."

"Remember," Geneva cautioned, "the law school will first claim that its preference for white applicants is based on their superior qualifications. I gather the cases indicate that the employer's subjective evaluation can play a major role in decisions involving highly qualified candidates who seek professional level positions."

"That is true," I conceded. "Generally, courts have shown an unwillingness to interfere with upper-level hiring decisions in the elite professions, including university

teaching. Under current law, if there are few objective hiring criteria and legitimate subjective considerations, plaintiffs will only rarely obtain a searching judicial inquiry into their allegation of discrimination in hiring."

"In other words," Geneva summarized, "this would not be an easy case even if the plaintiff were the first rather than the seventh candidate."

"I think that is right, Geneva," I replied. "Many of the decisions that the Court let stand went against plaintiffs alleging discriminatory practices, although some held in their favor."

"Do you think, then," Geneva asked, "that our seventh candidate has no chance?"

"No," I answered. "The Court might surprise us if the record shows that the plaintiff's qualifications are clearly superior to those of other candidates. It would be a very compelling situation, one not likely to occur again soon, and the Supreme Court just might use this case to reach a contradiction-closing decision."

Geneva was getting anxious. "So are you now ready to predict what the Supreme Court would do in this case?"

Like most law teachers, I am ready to predict judicial outcomes even before being asked, but recalling what Geneva believed was at stake, I thought it wise to review the situation more closely. "Weighing all the factors," I finally said, "the dean's belief that his law school will prevail in court may be justified after all."

"I agree," Geneva said. "And we have not yet considered the possibility that even if the Court found that our candidate had the best paper credentials, the law school might have an alternative defense."

"That is true," I said. "The law school might argue that even if its rejection of the seventh candidate was based on race, the decision was justified. The school will aver that its reputation and financial well-being are based on its status as a majority institution. The maintenance of a predominantly white faculty, the school will say, is essential to the preservation of an appropriate image, recruitment of faculty and students, and enlistment of alumni contributions. With heartfelt expressions of regret that the world is not a better place, the law school will urge the Court to find that neither Title VII nor the Constitution prohibits it from discriminating against minority candidates when the percentage of minorities on the faculty exceeds the percentage of minorities within the population. At the least, the school will contend that no such prohibition should apply while most of the country's law schools continue to maintain nearly all-white faculties."

"And how do you think the Court would respond to such an argument?" Geneva asked.

"Well," I answered, "given the quality of the minority faculty, courts might discount the law school's fears that it would lose status and support if one-fourth of its teaching staff were nonwhite."

Geneva did not look convinced. "I don't know," she said. "I think a part of the dean's concern was that if I could find seven outstanding minority candidates, then I could find more—so many more that the school would eventually face the possibility of having a 50 percent minority faculty. And the courts would be concerned about the precedent set here. What, they might think, if other schools later developed similar surfeits of superqualified minority job applicants?"

"Well," I responded, "the courts have hardly been overwhelmed with cases demanding that upper-level employers have a 25 to 50 percent minority work force, particularly

in the college and university teaching areas. But perhaps you are right. A Supreme Court case involving skilled construction workers suggests that an employer may introduce evidence of its hiring of blacks in the past to show that an otherwise unexplained action was not racially motivated.[2] Perhaps, then, an employer who has hired many blacks in the past may at some point decide to cease considering them. Even if the Court did not explicitly recognize this argument, it might take the law school's situation into account. In fact, the Court might draw an analogy to housing cases in which courts have recognized that whites usually prefer to live in predominantly white housing developments."

"I am unfamiliar with those cases," Geneva said. "Have courts approved ceilings on the number of minorities who may live in a residential area?"

"Indeed they have," I replied. "Acting on the request of housing managers trying to maintain integrated developments, courts have tailored tenant racial balance to levels consistent with the refusal of whites to live in predominantly black residential districts. The Second Circuit, for example, allowed the New York City Housing Authority to limit the number of apartments it made available to minority persons whenever 'such action is essential to promote a racially balanced community and to avoid concentrated racial pockets that will result in a segregated community.'[3] The court feared that, unless it allowed the housing authority to impose limits on minority occupancy, a number of housing developments would reach the tipping point—the point at which the percentage of minorities living in an area becomes sufficiently large that virtually all white residents move out and other whites refuse to take their places.[4]

"The analogy is not perfect," I concluded, "but the tipping point phenomenon in housing plans may differ little from the faculty's reaction to your seventh candidate. Both reflect a desire by whites to dominate their residential and nonresidential environments. If this is true, the arguments used to support benign racial quotas in housing may also be used to support the law school's employment decision."

Geneva disagreed. "I do not view the law school's refusal to hire the seventh candidate as in any way benign. The school's decision was unlike the adoption of a housing quota intended to establish or protect a stable, integrated community before most private discrimination in the housing area was barred by law. The law school did not respond to a tipping point resulting from the individual decisions of numerous parties whom the authorities cannot control. The law school instead imposed a stopping point for hiring blacks and other minorities, regardless of their qualifications. School officials, whose actions are covered by Title VII, arbitrarily determined a cut-off point."

"Don't get trapped in semantics," I warned Geneva. "A housing quota that is benign seems quite invidious to the blacks who are excluded by its operation. They are no less victims of housing bias than are those excluded from neighborhoods by restrictive covenants. Yet at least in some courts, those excluded by benign quotas have no remedy. In our case, the law school could argue that the seventh candidate should likewise have no remedy: He has made—albeit involuntarily—a sacrifice for the long-run integration goals that so many find persuasive in the housing sphere."

"In other words," Geneva said, "if and when the number of blacks qualified for upper-level jobs exceeds the token representation envisioned by most affirmative action programs, opposition of the character exhibited by my law school could provide the impetus for a judicial ruling that employers have done their fair share of minority hiring. This rule, while imposing limits on constitutionally required racial fairness for the black

elite, would devastate civil rights enforcement for all minorities. In effect, the Court would formalize and legitimize the subordinate status that is already a de facto reality."

"Indeed," I said, "affirmative action remedies have flourished because they offer more benefit to the institutions that adopt them than they do to the minorities whom they are nominally intended to serve. Initially, at least in higher education, affirmative action policies represented the response of school officials to the considerable pressures placed on them to hire minority faculty members and enroll minority students. Rather than overhaul admissions criteria that provided easy access to offspring of the upper class and presented difficult barriers to all other applicants, officials chose to 'lower' admissions standards for minority candidates. This act of self-interested beneficence had unfortunate results. Affirmative action now 'connotes the undertaking of remedial activity beyond what normally would be required. It sounds in *noblesse oblige,* not legal duty, and suggests the giving of charity rather than the granting of relief.' At the same time, the affirmative action overlay on the overall admissions standards admits only a trickle of minorities. These measures are, at best, 'a modest mechanism for increasing the number of minority professionals, adopted as much to further the self-interest of the white majority as to aid the designated beneficiaries.'"[5]

"There is one last point," I told Geneva. "Some courts have been reluctant to review academic appointments, because 'to infer discrimination from a comparison among candidates is to risk a serious infringement of first amendment values.'"[6]

"In other words," Geneva said, "the selection of faculty members ascends to the level of a First Amendment right of academic freedom."

"I am afraid so," I nodded, "and the law schools' lawyers will certainly not ignore Justice Powell's perhaps unintended support for this position given in his *Bakke* opinion, in which he discussed admissions standards in the context of a university's constitutional right of academic freedom. He acknowledged that ethnic diversity was 'only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.'[7] Given the importance of faculty selection in maintaining similar aspects of this form of academic freedom, it would seem only a short step to a policy of judicial deference to a school's determination that a successful minority recruiting effort was threatening to unbalance the ethnic diversity of its faculty."

"You say all this to make what point?" Geneva asked.

"Just this. Your school's affirmative action program had not contemplated the DeVine Gift. Because the gift enabled you to recruit outstanding minority candidates for every faculty vacancy, the gift thus rendered possible what was not supposed to happen. The faculty's opposition to your seventh candidate was based on an unconscious feeling that it had been double-crossed. Had the seventh candidate been the first, the faculty would have gladly accepted him. It might even have hired him if you had recognized its fear of becoming a predominantly minority faculty and agreed to limit your recruitment drive. But with no end in sight to the flow of qualified minority applicants, the faculty determined to call a halt."

"You assume," Geneva said, "that any faculty would react as mine did to an apparently endless flow of outstanding minority faculty prospects. But I would wager that if the Chronicle of the DeVine Gift were presented to white law teachers in the form of a hypothetical, most would insist that their faculties would snap up the seventh candidate in an instant."

"What you are seeking," I said, "is some proof that a faculty *would* respond as yours did, and then some explanation as to *why*. The record of minority recruitment is so poor as to constitute a prima facie case that most faculties *would* reject the seventh candidate. And most black law teachers would support this view. Their universal complaint is that after predominantly white faculties have hired one or two minority teachers, the faculties lose interest in recruiting minorities and indicate that they are waiting for a minority candidate with truly outstanding credentials. Indeed, as long as a faculty has one minority person, the pressure is off, and the recruitment priority simply disappears."

"No one, of course, can prove *whether* a given faculty would react as mine did," Geneva said, "but for our purposes, the more interesting question is why a faculty would if it did. You would think that whites would be secure in their status-laden positions as tenured members of a prestigious law school faculty. Why, then, would they insist on a predominantly white living and working environment? Why would they reject the seventh candidate?"

"Initially," I replied, "it is important to acknowledge that white law teachers are not bigots in the redneck, sheet-wearing sense. Certainly, no law teacher I know consciously shares Ben Franklin's dream of an ideal white society or accepts the slave owner's propaganda that blacks are an inferior species who, to use Chief Justice Taney's characterization, 'might justly and lawfully be reduced to slavery for his benefit.'[8] Neither perception flourishes today, but the long history of belief in both undergirds a cultural sense of what Professor Manning Marable identifies as the 'ideological hegemony' of white racism. Marable asserts that all of our institutions of education and information—political and civic, religious and creative—either knowingly or unknowingly 'provide the public rationale to justify, explain, legitimize or tolerate racism.' Professor Marable does not charge that ideological hegemony is the result of a conspiracy, plotted and executed with diabolical cunning.[9] Rather, it is sustained by a culturally ingrained response by whites to any situation in which whites are not in a clearly dominant role. It explains, for example, the first-black phenomenon in which each new position or role gained by a black for the first time creates concern and controversy as to whether they are ready for this position or whether whites are ready to accept a black in this position."

"Putting it that way," Geneva responded, "helps me understand why the school's rejection of my seventh candidate hurt me without really surprising me. I had already experienced a similar rejection on a personal level. When I arrived, the white faculty members were friendly and supportive. They smiled at me a lot and offered help and advice. When they saw how much time I spent helping minority students and how I struggled with my first writing, they seemed pleased. It was patronizing, but the general opinion seemed to be that they had done well to hire me. They felt good about having lifted up one of the downtrodden. And they congratulated themselves for their affirmative action policies. But were these policies to continue for three generations, who knew what might happen?

"Then, after I became acclimated to academic life, I began receiving invitations to publish in the top law reviews, serve on important commissions, and lecture at other schools. At that point, I noticed that some of my once-smiling colleagues now greeted me with frowns. For them, nothing I did was right: My articles were flashy but not deep, rhetorical rather than scholarly. Even when I published an article in a major review, my colleagues gave me little credit; after all, students had selected the piece, and what did

they know anyway? My popularity with students was attributed to the likelihood that I was an easy grader. The more successful I appeared, the harsher became the collective judgment of my former friends."

"I think many minority teachers have undergone similar experiences," I consoled Geneva. "Professor Richard Delgado thinks that something like 'cognitive dissonance' may explain the shift:

> At first, the white professor feels good about hiring the minority. It shows how liberal the white is, and the minority is assumed to want nothing more than to scrape by in the rarefied world they both inhabit. But the minority does not just scrape by, is not eternally grateful, and indeed starts to surpass the white professor. This is disturbing; things weren't meant to go that way. The strain between former belief and current reality is reduced by reinterpreting the current reality. The minority has a fatal flaw. Pass it on.[10]

The value of your Chronicle, Geneva, is that it enables us to gauge the real intent and nature of affirmative action plans. Here, the stated basis for the plan's adoption—'to provide a more representative faculty and student body'—was pushed to a level its authors never expected it to reach. The influx of qualified minority candidates threatened, at some deep level, the white faculty members' sense of ideological hegemony and caused them to reject the seventh candidate. Even the first black or the second or the third no doubt threatens the white faculty to some extent. But it is only when we reach the seventh, or the tenth, that we are truly able to see the fear for what it is. Get my point?"

NOTES

1. Roberto Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 563, 675 (1983).

2. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579–80 (1978).

3. Otero v. New York City Hous. Auth., 484 F.2d 1122, 1140 (2d Cir. 1973).

4. For explanations and examinations of the tipping point phenomenon, see Anthony Downs, Opening Up the Suburbs 68–73 (1973); Bruce Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 Stan. L. Rev. 245, 251–66 (1974); and Note, *Tipping the Scales of Justice: A Race-Conscious Remedy for Neighborhood Transition*, 90 Yale L.J. 377, 379–82 (1980).

5. Derrick Bell, *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 Calif. L. Rev. 3, 8 (1979).

6. Lieberman v. Gant, 630 F.2d 60, 67 (2d Cir. 1980).

7. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–12 (1978).

8. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857).

9. Manning Marable, *Beyond the Race-Class Dilemma*, The Nation, Apr. 11, 1981, at 428.

10. Letter from Richard Delgado to Linda Greene (Apr. 24, 1985) (copy on file at Harvard Law School Library).

63. The Imperial Scholar

Reflections on a Review of Civil Rights Literature

RICHARD DELGADO

When I began teaching law, I learned from a number of well-meaning senior colleagues to play things straight in my scholarship—to establish a reputation as a scholar in some mainstream legal area and not get too caught up in civil rights or other ethnic subjects. Being young, impressionable, and anxious to succeed, I took their advice to heart and, for the first six years of my career, produced a steady stream of articles, book reviews, and the like, most of them impeccably traditional in substance and form. The dangers my friends warned me about were averted; the benefits accrued. Tenure securely in hand, I turned my attention to civil rights law and scholarship.

Realizing I had much catching up to do, I asked my research assistant to compile a list of the twenty or so leading law review articles on civil rights, giving him the criteria you would expect: frequent citation by courts and commentators, publication in a major law review, theoretical rather than practical focus, and so on. When he submitted the list, I noticed that each of the authors was white and male. I checked his work myself, with the same result. Further, a review of the footnotes of these articles disclosed a second remarkable coincidence—the works cited were also written by authors who were themselves white and male. I was puzzled. I knew that many black, Latino, and Native American law professors were then teaching at American law schools, many of them writing in areas about which they cared deeply: antidiscrimination law, the equality principle, and affirmative action. Much of that scholarship, however, seems to have been consigned to oblivion. Courts rarely cited it, and the legal scholars whose work really counts almost never did. The important work was published in eight or ten law reviews and written by a small group of professors who teach in the major law schools.

Most of this work, to be sure, seemed strongly supportive of minority rights. All the more curious that these authors, the giants in the field, only infrequently cited a minority scholar. My assistant and I prepared an informal sociogram, a pictorial representation of who cites whom in the civil rights literature. It is fascinating. Paul Brest cited Laurence Tribe. Laurence Tribe cited Paul Brest and Owen Fiss. Owen Fiss cited Bruce

A version of this chapter previously appeared as Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. Pa. L. Rev. 561 (1984). Originally published in the *University of Pennsylvania Law Review*.

Ackerman, who cited Paul Brest and Frank Michelman, who cited Owen Fiss and Laurence Tribe and Kenneth Karst.

It does not matter where one enters this universe; one comes to the same result: an inner circle of about a dozen white, male writers who comment on, take polite issue with, extol, criticize, and expand on each other's ideas. It is something like an elaborate minuet.

The failure to acknowledge minority scholarship extended even to nonlegal propositions and assertions of fact. W.E.B. Du Bois, deceased black historian, received an occasional citation. Aside from him, little else rated a mention. Leon Higginbotham's monumental *In the Matter of Color* might as well not exist. The same was true of the work of Kenneth Clark, black psychologist and past president of the American Psychological Association, and Alvin Poussaint, Harvard Medical School professor and authority on the psychological impact of race. One could search in vain for references to the powerful book by physicians William Grier and Price Cobbs *Black Rage*, or to Frantz Fanon's *The Wretched of the Earth*, or even to writings of or about Martin Luther King, Jr., César Chávez, and Malcolm X. When the inner-circle writers needed authority for a factual or social scientific proposition about race they generally would cite reports of the U.S. Commission on Civil Rights or else each other.

A single anecdote may help illustrate what I mean. A law professor who writes about civil rights showed me, for my edification, a draft of an article of his. It is, on the whole, an excellent article. It extols the value of a principle I will call "equal personhood." Equal personhood is the notion, implicit in several constitutional provisions and much case law, that each human being, regardless of race, creed, or color, is entitled to be treated with equal respect. To treat someone as an outsider, a nonmember of human society, violates this principle and devalues the self-worth of the person so excluded.

I have no quarrel with this premise, but, on reading the one-hundred-plus footnotes of the article, I noticed that its author failed to cite black or minority scholars, an exclusion from the community of kindred souls as glaring as any condemned in the paper. I pointed this out to the author, citing as illustration a passage in which he asserted that unequal treatment can cause a person to suffer a withered self-concept. Having just written an article on a related subject, I was more or less steeped in withered self-concepts. I knew who the major authorities were in that area.

The professor's authority for the proposition about withered self-concepts was Frank Michelman, writing in the *Harvard Law Review*. I pointed out that although Frank Michelman may be a superb scholar and teacher, he probably has relatively little first-hand knowledge about withered self-concepts. I suggested that the professor add references to such works as Kenneth Clark's *Dark Ghetto* and Grier and Cobbs's *Black Rage*, and he agreed to do so. To justify his selection of Frank Michelman for the proposition about withered self-concept, the author explained that Michelman's statement was "so elegant."

Could inelegance of expression explain the absence of minority scholarship from the text and footnotes of leading law review articles about civil rights? Elegance is, without question, a virtue in writing, in conversation, or in anything else in life. If minority scholars write inelegantly and Frank Michelman writes elegantly, then it would not be surprising if the latter were read and cited more frequently, and the former less so. But minority legal scholars seem to have less trouble being recognized and taken seriously in areas of scholarship other than civil rights theory. If elegance is a problem for minority

scholars, it seems mainly to be so in the core areas of civil rights: affirmative action, the equality principle, and the theoretical foundations of race relations law.

In 1971, Judge Skelly Wright wrote the article "Professor Bickel, the Scholarly Tradition, and the Supreme Court." In it, Judge Wright took a group of scholars to task for their bloodless carping at the Warren Court's decisions in the areas of racial justice and human rights. He accused the group of missing the central point in these decisions—their moral clarity and passion for justice—and labeled the group's excessive preoccupation with procedure and institutional role and its insistence that the Court justify every element of a decision under general principles of universal application, a "scholarly tradition."

I think I have discovered a second scholarly tradition. It consists of white scholars' systematic occupation of, and exclusion of minority scholars from, the central areas of civil rights scholarship. The mainstream writers tend to acknowledge only each other's work. It is even possible that, consciously or not, they resist entry by minority scholars into the field, perhaps counseling them, as I was, to establish their reputations in other areas of law. I believe that this scholarly tradition exists mainly in civil rights; nonwhite scholars in other fields of law seem to confront no such tradition.

Defects in Imperial Scholarship

To this point, I have been making an empirical claim. A person who disagreed with my thesis could attempt to show that some white inner-circle authors do cite nonwhite scholars appropriately, perhaps by introducing a sociogram of his or her own. My examination of the literature in the field, while admittedly not a scientific study, leads me to believe this is a vain task. A second response would assert that the exclusion of minority viewpoints from white scholarship about civil rights is, as they say, harmless error; it doesn't matter who advocates freedom and equality, as long as someone does so.

What difference does it make if the scholarship about the rights of group A is written by members of group B? Although Derrick Bell raised this question in a footnote, no one seems to have addressed it directly. Legal doctrines and case law may, however, suggest answers by way of analogy. Relevant doctrines include standing, real party in interest, and *jus tertii*, doctrines that in general insist that B does not belong in court if he or she is attempting, without good reason, to assert the rights of, or redress the injuries to A. We also have rules pertaining to joinder of parties, intervention, and representation in class suits, all assuring that the appropriate parties are before the court. On a more general level, our political and legal values contain an antipaternalistic principle that forbids B from asserting A's interest if A is a competent human being of adult years, capable of independently deciding on and asserting that interest.

Abstracting from these principles, it is possible to compile an a priori list of reasons why we might look with concern on a situation in which the scholarship about group A is written by members of group B. First, members of group B may be ineffective advocates of the rights and interests of persons in group A. They may lack information; more important, perhaps, they may lack passion, or that passion may be misdirected. B's scholarship may tend to be sentimental, diffusing passion in useless directions, or wasting time on unproductive breast-beating. Second, while the Bs might advocate effectively, they might advocate the wrong things. Their agenda may differ from that of the

As; they may pull their punches with respect to remedies, especially where remedying A's situation entails uncomfortable consequences for B. Despite the best of intentions, Bs may have stereotypes embedded deep in their psyches that distort their thinking, causing them to balance interests in ways inimical to As. Finally, domination by members of group B may paralyze members of group A, causing the As to forget how to flex their legal muscles for themselves.

A careful reading of the inner-circle articles suggests that many of the above-mentioned problems and pitfalls are not simply hypothetical but do in fact occur. Some of the authors were unaware of basic facts about the situation in which minority persons live or how they see the world. From the viewpoint of a minority member, the assertions and arguments made by nonminority authors were sometimes so naive as to seem incomprehensible and hardly merit serious consideration. For example, some writers took seriously the reductio ad absurdum argument about an infinitude of minorities (if blacks and Hispanics, why not Belgians, Swedes, and Italians; what about an individual who is half black or three-quarters Hispanic?) or worried about whether a white citizen forced to associate with blacks has his or her freedom of association violated as much as a black compelled to attend segregated schools. One author reasoned that the *Carolene Products* "footnote four" analysis is no longer fully applicable to American blacks, because they have ceased to be an insular minority in need of heightened judicial protection. Another placed the burden on proponents of preferential admissions to show that no nonracial alternative exists, because today's minority may become tomorrow's majority and vice versa.

In addition to factual ignorance or naivete, some of the writing suffered from a failure of empathy, an inability to share the values, desires, and perspectives of the population whose rights are under consideration. In his article "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation," Derrick Bell pointed out that litigators in school desegregation cases have often seemed unaware of what their clients really wanted or have pursued one remedy (e.g., integration) out of ideological commitment, even though the client wanted something different (e.g., better schools). A similar distancing of the scholar from the community he writes about was visible in the civil rights commentaries. The authors in the core group tended to be very concerned about *procedure*. Many of the articles were devoted, in various measures, to scholarly discussions of the standard of judicial review that courts should apply in different types of civil rights suit. Others were concerned with the relationship between federal and state authority in antidiscrimination law or with the respective competence of a particular decision maker to recognize and redress racial discrimination. One could easily conclude that the question of who goes to court, what court they go to, and with what standard of review are the burning issues of American race-relations law. Perhaps the emphasis on procedure and judicial role is harmless, just a peculiar kink lawyers get in law school, but I doubt it.

Other peculiarities of perspective surfaced in connection with choosing a principle on which to base (or oppose) affirmative action. Measures to increase minority representation in education and the work force have been justified in three broad ways: reparations (or retribution), social utility, or distributive justice. The reparations argument emphasizes that white society has mistreated blacks, Native Americans, and Hispanics and now must make amends for that mistreatment. Utility-based arguments justify

affirmative action on the ground that increased representation of minorities will be useful to society. The distributive justice rationale observes that a certain amount of wealth is available and argues that everyone is entitled to a minimum share of it. Many of the minority scholars emphasize the reparations argument and stress the inherent cost to whites; the authors of the inner-circle articles generally make the case on the grounds of utility or distributive justice.

Emphasizing utility or distributive justice as the justification for affirmative action introduces a number of significant consequences. It enables the writer to concentrate on the present and the future and overlook the past. One need not dwell on unpleasant matters like lynch mobs, segregated bathrooms, Bracero programs, migrant farm-labor camps, race-based immigration laws, or professional schools that, until recently, were lily white. The past becomes irrelevant; one just asks where things are now and where we ought to go from here, a straightforward social-engineering inquiry of the sort that law professors are familiar with and good at. But just as the adoption of either of the two present-oriented perspectives renders the investigation comfortably safe, it robs affirmative action programs of their moral force in favor of a sterile theory of fairness or utility. No doubt great social utility attaches to affirmative action, but to base it solely on that ground ignores the right of minority communities to be made whole and the obligation of the majority to render them so. Moreover, what if the utility calculus changes in the future, so that the programs no longer appear "useful" to the majority? Can society then ignore those who still suffer the effects of past discrimination?

Distributive justice is a somewhat less objectionable ground for justifying affirmative action, but it too ignores history and makes for a rather weak, pallid case. It also invites the neutral-principles response: If the idea is to start playing fair now, how can we achieve fairness by discriminating against whites? Moreover, the remedies espoused under both the social utility and distributive justice rationales are often justified because they have been voluntarily created by legislatures, employers, or schools. A we-they analysis, espoused by several of the commentators, justifies a disadvantage that we (the majority) want to impose on ourselves to favor them (the minority). This type of thinking, however, leaves the choice of remedy and the time frame for it in the hands of the majority; it converts affirmative action into a benefit, not a right. It neglects the possibility that a disadvantaged minority may have a moral claim to a particular remedy.

The inner-circle commentators rarely deal with issues of guilt and reparation. When they do, it is often to attach responsibility to a scapegoat, someone of another time or place, and almost certainly of another social class than that of the writer. These writers tend to focus on intentional and determinable acts of discrimination inflicted on the victim by some perpetrator and ignore the more pervasive and invidious forms of discriminatory conditions inherent in our society. This perpetrator perspective deflects attention from the victim class, the blacks, Native Americans, Chicanos, and Puerto Ricans who lead blighted lives for reasons directly traceable to social and institutional injustice.

A corollary of this perspective is that racism need not be remedied by means that encroach too much on middle- or upper-class prerogatives. If racial inequality is mainly the fault of the isolated redneck, outmoded ritual violence, or even long abrogated governmental actions, then remedies that would encroach on simple conditions of life—middle-class housing patterns, for example, or the autonomy of local school boards—are unnecessary. Many persons of minority race see racism as including institutional

components that extend far beyond lynch mobs, segregated schools, or epithets like "nigger" or "spick." Self-interest, mixed with inexperience, may make it difficult for the privileged white male writer to adopt this perspective or face up to its implications.

The uniformity of life experience of the inner-circle of writers may color not only the way they conceptualize and frame problems of race but also the solutions or remedies they devise. Remedies pursued at "all deliberate speed" or couched in terms of vague targets and goals entered the law when the legal system turned in earnest to problems of race. Their appearance is probably related to a utility-based perspective that ignores past injustices and simply seeks to engineer a solution with the most utility to society as a whole and the minimal amount of disruption. If the issue is not one of simple injustice requiring immediate correction, but merely an unfortunate and abstractly created problem requiring remedy, that leisurely treatment is not surprising.

Moreover, regardless of the scope and time frame of racial remedies, their costs are generally imposed disproportionately on minorities and lower-class whites. Most university affirmative action programs, for example, pit minorities against each other and against low-income whites. The programs generate hostility among these groups, while exempting from such unpleasantness the high-achieving white product of a private prep school and Ivy League college, who can remain aloof from these battles. As an alternative, one might consider an overhaul of the admissions process and a rethinking of the criteria that make a person a deserving law student and future lawyer. Admission standards prepared with this revision might result in a proportionate number of minorities, whites, and women gaining admission. Minority commentators have suggested such an approach, but the idea has not gained traction.

Imperial Scholarship—Explaining the Tradition

Studied indifference to minority writing on issues of race would be justified if the writing were second rate, inelegant, unscholarly, or unimaginative. But as was mentioned earlier, minority writers have had little trouble gaining recognition outside the core areas of civil rights. Poor quality of writing therefore seems an unlikely explanation. Minority authors who write about racial issues might fail, as well, to be objective; passion and anger might render them unfit to reason rigorously or express themselves clearly, while white authors are above self-interest and thus capable of thinking and writing objectively. But this too seems implausible, because it presupposes that white writers have no vested interest in the status quo. Moreover, common experience suggests that most persons, including minorities, perform better, not worse, at tasks they care deeply about.

In explaining the absence of minority scholarship from the text and footnotes of the central arenas of legal scholarship dealing with civil rights, I reject conscious malevolence or crass indifference. I think the explanation lies at the level of unconscious action and choice. Perhaps the explanation lies in a need to remain in control, to make sure that legal change occurs, but not too fast. The desire to shape events is a powerful human motive and could easily account for much exclusionary scholarship. The moment one makes such a statement, however, one is reminded that it is these same liberal authors who often have been the strongest supporters of affirmative action in their own university communities and who have often been prepared to take chances (as they see it) to advance the goal of an integrated society. Perhaps the two behaviors can be reconciled

by observing that the liberal professor may be pleased to have minority students and colleagues serve as figureheads, ambassadors of good will, and future community leaders but not necessarily happy with the thought of a minority colleague who might go galloping off in a new direction.

Whatever the explanation of the phenomenon, it has not gone unnoticed. Derrick Bell once observed that the exclusion of minority participants from litigation and scholarship about black issues reminds him of traditional families of former years in which parents would tell their children, "Keep quiet. We are talking about you, not to you."

What should be done? As a beginning, minority students and teachers should raise insistently and often the unsatisfactory quality of the scholarship being produced by the inner circle—its biases, omissions, and errors. Its presuppositions and worldviews should be made explicit and challenged. That feedback will increase the likelihood that when a well-wishing white scholar writes about minority problems, he or she will give minority viewpoints and literature the full consideration due. That consideration may help the author avoid the types of substantive error catalogued earlier.

But while no one could object if sensitive white scholars contribute occasional articles and useful proposals (after all, there are many more of them), must these scholars make a career of it? The time has come for white liberal authors who write in the field of civil rights to redirect their efforts and to encourage their colleagues to do so as well. Many other important subjects could, and should, engage their formidable talents. As these scholars stand aside, nature will take its course; the gap will quickly be filled by talented and innovative minority writers and commentators. The dominant scholars should affirmatively encourage their minority colleagues to move in this direction, as well as simply make the change possible.

Only such a transformation will end the incongruity of one group's maintenance of a failed ideology for another, an irony that Judge Charles Wyzanski saw as clearly as anyone:

> To leave non-whites at the mercy of whites in the presentation of non-white claims which are admittedly adverse to the whites would be a mockery of democracy. Suppression, intentional or otherwise, of the presentation of non-white claims cannot be tolerated in our society. . . . In presenting non-white issues non-whites cannot, against their will, be relegated to white spokesmen, mimicking black men. The day of the minstrel show is over.[1]

The day of the minstrel show is, indeed, over.

NOTE

1. Western Addition Community Org. v. NLRB, 485 F.2d 917, 940 (D.C. Cir. 1973) (Wyzanski, J., dissenting), *rev'd*, 420 U.S. 50 (1975).

64. Who Is Excellent?

MARI J. MATSUDA

"Look for the absences." That was a subversive piece of academic advice women passed on to one another twenty years ago when I started teaching. Who's not in the canon? What aren't we writing about? What questions aren't we asking?

So what have you heard about AIDS lately? Do you know that the HIV infection rate of young black gay men is 30 percent, in contrast to 12 percent in the gay population generally? Who will save the life of that silent teenager in baggy jeans who dares not tell anyone that the path of his desire is not straight?

Look for the absences. Listen to the silences. Turn the world upside down by standing in solidarity with the bottom.

Who will save the life of that silent teenager? In my city, at a gay Black Pride event, the brothers from Us Helping Us steer those young men toward the condom table. Placing a strong black hand on the shoulder of a man-child in baggy jeans, they fight an epidemic with the only tools they have: a leaflet, a condom, a face, and an attitude that just might, this time, break through.

Every day we open our newspapers and if we have a soul left, we find something to weep over. A child abandoned, a school's scandalous failure, a war raging, a torture revealed, a rape relegated to a tiny paragraph in the third section. School children write earnest essays about homelessness, the rainforest, peace in the Holy Land, but they are told by adults around them that the solutions to the problems they see are complicated and evasive.

A debate swirls around affirmative action in college admissions. A judge here says it is constitutionally permissible, another that it is not. I wrote that affirmative action is consistent with meritocracy;[1] critics respond that it is a racial spoils system.[2]

In college admissions we ask, "Who is excellent?" No college looks for average. We want the best and define ourselves by the quality of our students. I support affirmative action because it is about getting the best student body we can get. In this postmodern world, however, concepts like "the best" are contested.

A version of this chapter previously appeared as Mari J. Matsuda, *Who Is Excellent?*, 1 Seattle J. Soc. Just. 29 (2002). Originally published in the *Seattle Journal for Social Justice*.

I once spoke in support of affirmative action at the University of Colorado. During the question and answer period, a young white man stood up and said, "I'm an engineering major, and I am entitled to the best teacher, not someone the university was forced to hire because of affirmative action." I once spoke at Stanford in support of affirmative action, and during the question and answer period, a young Latina stood up and said, "The dean of the law school says he supports diversity in faculty hiring, but he will not compromise academic standards."

These students are taught that there are two boxes. One is labeled excellent, the best, academic standards. The other is labeled black, brown, woman, affirmative action, compromise. That engineering major in Colorado has somehow learned that a black woman could not possibly be the best person to teach him what he needs to know. He is going to leave the university with that assumption, and someday, when he is in a position to hire new engineers for a Fortune 500 company, the human resources director will ask him why he hasn't interviewed any women or people of color. He will answer, "I don't look for color or gender. I just want good engineers, and I can't help it if they are all white men." He will respond with hurt and anger when someone suggests his assumptions are racist and sexist.

It's too late to have this conversation for the first time when you are out in the workforce holding a position of power. Ask executives at Texaco, where they paid $176 million to settle a class action suit brought by a black woman. Ask executives at Coca-Cola, which just handed over $113 million in a similar class action suit. Ask them whether they would rather their managers had learned the lessons of intercultural competence before they came to work and before worker discontent erupted into front-page litigation. They will tell you that prior learning is preferable to learning it on the job, at company expense, and under court order.

Throughout my teaching life I have tried to teach these things. It is not easy, because in American universities, if you are teaching about subordination, you inevitably teach students who are underprepared.

I have had the privilege of working with Texaco as part of a task force on equality and fairness that was forced on the company by court order. Engineers abound in the oil industry. They like numbers. They have learned, however, that working with people takes more than numbers. Because their profits depend on it, these engineers have learned a little bit about intercultural competence. They tell me, for example, that they can't make money if everyone in the room thinks the same way. A story they use to illustrate this point is that of the modern C-store. This is the convenience store now located at every major intersection, attached to the filling station. What you may not have realized is that they are making more money selling soda, cigarettes, and bread than gas. The profit margin on gas is not great. Do you know the markup on soda?

The modern C-store came about when someone asked, "Why don't women shop at our C-stores?" They decided to ask women, who said, "They are dirty, cramped, hidden from view, and magnets for crime." So they designed the modern C-store: all glass front, facing the street and floodlit, with wide aisles and a huge daily business in bread and milk. They now have a new customer base of working women and men who return regularly. It turns out that men like clean bathrooms, too. What the oil company executives gained from this experience is a basic lesson: listen to women; they may see things we do not see. Some prescient executives are even saying, "Some of them should be us. We need women on the executive floor if we are really going to grab that market share."

These pragmatic businessmen grasp new marketing ideas quickly and are open to the idea that equality might be good for business. It has an almost macho quality to it. "Lesser men might be afraid of equality, but not me. Let them all in. I'll still come out on top."

In business, as in sports, a finish line, called earnings, measures everyone against the competition. In the academy, it's more complicated, and that may be the source of the resistance we encounter. Is the finish line the *U.S. News and World Report* ranking, under which the test scores of your students and your school's estimation in the eyes of the mostly white men who form the opinion cadre of academic excellence fix your school's position in the hierarchy? Or is it some other internal measure, contested as fiercely as all forms of it in the cauldron of the postmodern university?

I serve on an admissions committee, and I believe in searching widely for excellence: the student who was the only white kid in his class at a black, urban high school; the immigrant who watched her parent work three jobs; the Mormon missionary from a small town who is the first in his family to apply to the Ivy Leagues; the gay teen who risked taking a date to the senior prom; the black journalism major who refuses to cover sports; the one who started an advocacy group—you name the cause, I'm looking for the ones who have enough spark to care about something. Of course, I regularly vote to admit the best of the lot from our standard story: "Mom's a lawyer, and Dad's a banker; I grew up in the suburbs playing competitive tennis, and you will see from my essay that I craft a fine sentence with an appropriate sense of irony and self-deprecation; my numbers are off the charts; you will like me." They all have something to learn from one another, and many have something to teach their teachers.

I am particularly interested in the boundary crossers, the translators, those with a self-consciousness about their positioned perspective. Dr. Du Bois, the most brilliant social theorist of recent years, described the dual vision that comes from the black experience and built his life's work on that duality. Paradoxically, his outsider's vision resulted in work that explains the mainstream American experience with great depth and power. You simply cannot understand American history without understanding it along the color line that Dr. Du Bois described. Nothing makes sense, from our Constitution to the recent presidential election, if it is not examined through the lens the color line provides.

It is one thing to have an experience but quite another to examine it, describe it, and convey it. We occasionally see students who have worked at this, who speak more than one language, and who regularly grab planets out of their orbits, forcing unknown to encounter unknown. Like the bright-faced neighbor child who will come up and ring the bell to see what's cooking—ignoring that adults arrange play dates on calendars—we are blessed by grown ones who simply won't stay behind their fences, who somehow lack the gene that tells them they aren't welcome at the black table or the Jewish table or the jock table and who will roam and graze and jostle with them all.

Something, somewhere, gives a few that ability. Sometimes it is an extraordinarily confident and outgoing personality. More frequently, it is learned behavior. Some Americans, in this increasingly segregated country, still grow up in settings where, by design or by accident, they encounter difference and learn to approach it unafraid. Still others are immersed in the ways of a separate world, even as they are learning to navigate the dominant one. The child who grew up translating school forms for immigrant parents, the child who watched a single mom struggling to get by on minimum wage—they

know a world made invisible by the dominant one. They see the spaces of mutuality, the failures of connection, the unavoidable conflict, and the places of exploitation. They turn what they see over in their heads and ask if there is another way. We need these types in the mix at our universities, both as teachers and as learners.

Many admissions officers will tell you they are looking for that, although if they are honest, they tell you the numbers come first.

I put little stock in the numbers and applaud the growing movement in the academy to abandon the time-pressured multiple-choice test as the determining criterion for admission. If you are looking for a doctor, a plumber, a lawyer, a contractor, or a teacher for your child, you don't ask about their test scores. You ask about what they have done. If in every aspect of our real lives we use functional measures of excellence, why not in college admissions? This will entail learning how to measure the whole student, to define the desired range of attributes in our student mix, and to assess ability with a variety of tools. This will result not only in more diversity but also in more fairness to all, including large numbers of middle-class white students of great talent, creativity, and intellect who are routinely weeded out by our overreliance on high-stakes tests. Indeed, all those parents complaining that their child's spot was taken by one admitted under affirmative action should ponder: If their child was robbed of a place at the table, perhaps it was because her talents were overlooked in a system that measures excellence according to absurdly narrow criteria.

What I offer is a restatement of the mission of the university that not only validates affirmative action but requires it. We understand, now, that human knowledge is so vast that the goal of cabining it into a list that students can memorize is absurd. We have said for a while that what we are teaching is critical thinking. How do we form questions, posit answers, test propositions, create and dismantle categories, research, read, analyze, and search electronic databases with a stance that not only welcomes ideas but tests and challenges them as well? How do we do this in a human community, maintaining both enough criticism to sharpen our thinking and enough respect to keep the conversation going? One by one the disciplines have faced challenges from the perspective of race, gender, class, sexuality, and a range of social positions other than the dominant. This is part of the critical thinking we are teaching. The empirical evidence supports what is intuitively true. Students who learn in a setting of interaction with difference, that is, in integrated as opposed to segregated environments, develop stronger skills of cognition and reasoning. Why wouldn't they? How can you learn in a room in which everyone thinks exactly as you do? Where is the challenge in that world of monocultural assumptions and uncontroverted explanatory rules? You don't get many Einsteins in that world or Du Boises.

If we want to feed the architects of the next paradigm, the doctors for the next plague, the makers of the lasting peace, we have to take them to the place of unheard ideas. We can't predict where that place will be, but I guarantee you that it is not a monocultural university.

Resistance is the standard response to each effort, in each discipline, to interject positioned perspective into the established order. That is, to say, "As an Asian American woman, I interpret immigration law in this way," invites attack from the moment of utterance.

The critics charge that identity politics is a wrongheaded effort. It stunts human experience by reducing people to categories, it encourages division, it is intellectually

limiting, and—the criticism I find most challenging—it constitutes reactionary politics, because an individual's quest for social status is necessarily at odds with a universal quest for social justice. In other words, "I'm black and I'm proud" will not take you all the way down the road marked "freedom and justice for all." I have tried to take the critique of identity politics seriously. I was the first Asian American woman law professor in the United States. I walked into a category of one, and I know what it feels like to stand outside a university door with your heart pounding, take a deep breath, and tell yourself, "You are your mother's daughter; you have a right to be here; go on in and stand up at the podium where you belong," when all of nature, it seems, wants you outside that door.

When I, the first like me, was barely through that door, people started acting as though I was everywhere and had been saying the same thing over and over again for years. They were so weary of it—as if all of Asian American history, all of women's history and women of color feminism was old news to them. "Cant" was a word I heard frequently in my early days of teaching, as in "the tired cant of race, sex, and class." People who had never read Du Bois or who could not even guess when the Chinese first arrived in the United States or the Japanese or Koreans, were convinced that they had heard it all before or that it was not worth hearing. The idea that the Asian American experience is relevant to understanding the American ideology of race and equality was dismissed by people who never bothered to examine the evidence. When this kind of dismissal surfaced in hiring and tenure decisions, it became clear that the end game was exclusion. "Nothing new or exciting in this race work" became code for "Your kind need not apply."

Many of the critics of multiculturalism, of affirmative action, and of identity politics are true reactionaries. They think inequality is both inevitable and good. They valorize a narrow version of elite white male culture as the American Culture and lament the opening of the university doors to barbarians like me.

But another group of critics do not think of themselves as reactionary. They are self-described as liberal or left. When they say identity is divisive, I ask whether identity groupings—from Asian American studies to Act Up—necessarily preclude other groupings. You can't have a movement for social change without having a movement for social change. Some sense of a group of kindred spirits engaged in collective action is a precondition of progressive politics. If it is not groupness that is the problem, why is grouping along the lines of race always a problem? It is only so if the group is hard-edged, static, exclusionary, and hell-bent on reconfiguring hierarchy. My own experience in ethnic studies is that positioned perspective is in fact a launching pad for intercultural explorations, for inviting intersectional analysis and cross-critique. Once you accept race as a useful category of analysis, it is more difficult to reject gender or sexuality as a useful category.

The left critique of identity politics asks whether it is a good deal to trade cultural nationalism for control of the means of production. Are blacks better off, they ask rhetorically, now that they can purchase kente cloth housewares while imprisonment rates of young black men are approaching genocide? I find this kind of question sad. What black person could possibly think this was a good deal? My black friends are sadder about it than anyone in the theory world can imagine. Cultural nationalism commodified is what you have left when you kill off and COINTELPRO any black leader who links black pride with condemnation of wealth inequality, when you eviscerate the labor movement

through the same technique, and when you succeed in the massive and quite miraculous propaganda task—funded at levels the left could never come close to—of convincing an entire generation of Americans that wealth inequality is inevitable, good, and at the same time nonexistent.[3]

Am I a cultural nationalist? I love my identities, which include feminist, critical race theorist, Okinawan, Sansei, Asian American, Third World, mother, leftist, and intellectual worker. From each of these places I stand on the shoulder of ancestors who were reaching for a better world for themselves and those who follow. I don't see that claiming one identity diminishes another, and from digging deep into each I think I am better able to understand the human condition. Each has a political meaning for me—it means fighting for something, sometimes something quite specific, such as the demilitarization of Okinawa Island, and sometimes something quite universal, such as a welcoming world for all children.

I find that much of my political knowledge about how to move the world comes from these identities: from the work I did from these positions, from the historical struggles others have waged from these positions, and most significantly from the intersections. What does getting military bases out of Okinawa have to do with the quest for decent public schools in my community? Quite a bit, it turns out, as Congress enacts tax cuts that will force us to choose between funding the military and funding education. When I stand outside the White House gates demanding that they put schools first, I will stand in all my identities. That is only a contradiction in the world of either-or, the world that my sisters and brothers around the world are exploding through their coalitions.

I don't mean to suggest that identity critics have nothing useful to say. They are obviously right to the extent that they criticize any form of identity politics that presumes identity grouping as an end in itself or that promotes ignorance over critical thought.

Meanwhile, back on the ground, quiet debates go on within identity communities, where progressives understand that nationalism has its limits. They empathize with the young people, told all their lives that they are worthless, who come alive when someone tells them to grab on to what others hate and claim it with pride. Sometimes that stance can pull you out of a dying place and into a living one, a place from which you can join the fragile and beleaguered worldwide movement for peace and equality for all human beings. And sometimes it's just more separatist claptrap, or hours and hours put into ethnic dance practice or Brazilian martial arts or some revival of something that will give your life meaning but won't get you to read Frantz Fanon.

It's not either-or, which is the first lesson I learned in Antisubordination 101. If those young brown-skinned children are putting all their energy into picking ferns for the *hula halau*, at least they aren't at the back of the school parking lot sniffing glue, which is what some young Native Hawaiians I went to school with did with their pain before cultural nationalism hit the islands. Hula is not the revolution, but it might save someone's life.

Who is excellent? Who will save this child? The brothers in Us Helping Us are the identity critic's nightmare, a splinter off a splinter: gay black men in southeast Washington, D.C. Who else will go up to that teenager, understanding that behind his refusal to smile and his practiced posture of indifference lies a human soul, scared, longing for love, filled with passions for sex and more than sex. Who will break through? We joke about it in my neighborhood, about the sweet, huggable boys who hit puberty and

suddenly have to pretend they never smile, never talk, never strike any pose other than cool. If they show weakness, in black urban neighborhoods, they are targets. If they show toughness, they are targets, too. We joke about it—"I saw him waiting for the bus, and I said, "Helloooo.' I said, 'C'mon, can't you just say hello? You know me!'" We laugh, but we also know it's a deadly serious negotiation these young men must maneuver.

Who will go up to that boy and convince him to use a condom? Maybe someone who once held that pose, who has a feel for how much persistence to use, when to back off, how to leave the door open, who knows how it feels to be scared and fearless at the same time: I'm gonna live forever. What if nobody loves me? I'm not afraid; there's a cure for AIDS. What if he thinks I'm stupid? Someone has to save this child and every other one out there at risk of harm. Who will do it? Who is excellent? Who will come to our universities? What will we teach them?

NOTES

1. Charles R. Lawrence III & Mari J. Matsuda, We Won't Go Back: Making the Case for Affirmative Action (1997).

2. See, e.g., Ward Connerly, Creating Equal: My Fight Against Race Preferences 3 (2000).

3. See Jean Stefancic & Richard Delgado, No Mercy: How Conservative Think Tanks and Foundations Changed America's Social Agenda (1996).

65. Complimentary Discrimination and Complementary Discrimination in Faculty Hiring

ANGELA ONWUACHI-WILLIG

This chapter focuses on one form of discrimination in faculty hiring: discrimination against the "overqualified" minority faculty candidate—one who is presumed to have too many opportunities and thus gets excluded from faculty interview lists and consideration. It lays out a hypothetical superstar, bidding-war minority faculty candidate in English and explicates how the exclusion of this candidate, although accompanied by high praise and not racial animus, may constitute actionable discrimination. In so doing, it examines how federal courts have analyzed the concept of overqualification when employers have articulated it as the reason for not hiring a job applicant. It then explains why the myth of the overqualified minority faculty candidate as a highly sought-after commodity can render that candidate's exclusion from interviews, and thus hiring, a unique and specific form of racial discrimination. Paradoxically, this form of complimentary discrimination works to create the complementary discrimination of keeping other, less qualified, but certainly qualified, minorities locked out of the academic market or out of particular schools. Faculties' dreams of one day recruiting the superstar minority candidate—generally the only type whom they truly find acceptable—can function as an excuse for not settling for racial minority candidates who are well qualified but not as highly credentialed as the superstars, which, in turn, continues the cycle of low representation of minorities on college and university faculties.

When faculties fail to give an offer to a minority candidate at the end of the hiring process, they frequently offer one of two excuses.

1. There were no, or hardly any, applications from qualified minority candidates to consider.
2. There was no point in even trying to interview the few qualified minority candidates on the market because they would never accept an offer from the department. These candidates are in such high demand that top schools will engage in bidding wars over them.

A version of this chapter previously appeared as Angela Onwuachi-Willig, *Complimentary Discrimination and Complementary Discrimination in Faculty Hiring*, 87 Wash. U. L. Rev. 763 (2010). Originally published in the *Washington University Law Review*.

According to this usual round of excuses, minority faculty candidates fall into two basic types: (1) those who are unqualified for the department, and (2) those who are overqualified for the department. Most academic articles address the disadvantages of the minority applicant in the first category—the minority candidate who is deemed unqualified or unworthy for hire, in many cases because of conscious or unconscious biases. This chapter, however, concentrates on the concept of the overqualified minority candidate, the one who is presumed to have too many opportunities and suffers exclusion on that ground. Can this form of complimentary exclusion—exclusion from interviewing pools based on the notion that one is just too good to recruit to a particular department—be a form of actionable discrimination?

A Long Way to Go

Although faculties on university and college campuses are increasingly becoming more diverse, they still have a long way to go. Between 1993 and 2003, the percentage of underrepresented minority faculty at four-year institutions grew only 2 percentage points nationally, from about 6 percent to 8 percent. In some fields, such as law, the proportion of minorities who are being hired into faculty positions is actually decreasing. For example, in 2005 the Association of American Law Schools (AALS) reported that "minority candidates for faculty positions bore a disproportionate share of the decrease in hiring slots," noting that "both the absolute number as well as the proportion of minority law professors hired decreased in 1996–97 from 1990–91."[1]

As one goes up the professorial ranks on campuses, the proportion of faculty of color declines at each level. As of 2007 statistics from the Department of Education showed that African Americans constituted 6.3 percent of assistant professors, 5.5 percent of associate professors, and 3.4 percent of professors; Latinos constituted 3.8 percent of assistant professors, 3.3 percent of associate professors, and 2.4 percent of professors; Asian Pacific Americans constituted 10.3 percent of assistant professors, 7.7 percent of associate professors, and 7.1 percent of professors; and American Indians constituted 0.4 percent of assistant professors, 0.4 percent of associate professors, and 0.3 percent of professors.

Additionally, while faculty positions suffer a pipeline problem because of the low percentages of racial minorities with a Ph.D. or with other academic credentials, the lack of diversity among college and university faculties is not a result of this shortage. For example, in a study of nearly three hundred recipients of all races who had been awarded fellowships from three prestigious programs run by the Ford, Spencer, and Mellon Foundations, a team of scholars found that even elite minority candidates experience difficulty finding academic jobs. Specifically, the researchers found that even though the minority Ph.D.s in their study were among the most elite of the new scholars on the market, few of them (only 11 percent) were highly sought after, meaning that they had "received personal solicitations from institutions and multiple job offers." Even for them, being highly sought after meant only "being called by no more than two institutions—often not ones that were the candidates' top choices." By contrast, the researchers reported that 75 percent of the white male Ph.D.s in their study "had found faculty appointments with which they were quite satisfied" and that "[i]n most cases where such candidates had had difficulty finding a regular faculty job, the fields in which they specialized had virtually no openings."[2]

In fact, studies show that minority faculty members are usually not hired during standard faculty hiring searches. Because of biases that make it difficult for majority faculty members to view minority candidates as juniors who can carry on department traditions or as the most qualified applicants, underrepresented minorities are rarely hired absent a focus on diversity or other types of interventions. In a study of nearly seven hundred faculty searches at three large elite public research universities, researchers discovered that minority faculty members were most likely to be hired under one of the following three designated conditions:

> (1) The job description used to recruit faculty members explicitly includes diversity; (2) An institutional "special hire" strategy, such as a waiver of a search, target of opportunity hire, or spousal hire is used; and (3) The search is conducted by an ethnically or racially diverse search committee.[3]

In essence, it is generally only when institutions focus on diversifying their ranks that racial minorities, especially underrepresented racial minorities, received offers to join faculties. Absent a special effort on diversity, either through the search or on the hiring committee, racial and ethnic diversity receives little attention in the hiring process. Even then, colleges and universities perform poorly in diversifying their faculties racially and ethnically.

Furthermore, even though the number of minority hires among faculties has increased, this increase is largely just compensating for the minority faculty who leave their institutions each year. For instance, in the field of law, a wide gap has opened between the tenure rates of minority and majority faculty, and that gap is growing over time. As the AALS explained in one of its studies concerning minority faculty recruitment and retention in 2004:

> Comparing minority and non-minority tenure-track professors, we see two alarming trends—a wide racial tenure gap in each cohort and longitudinally, an increasing racial gap over time. Among those law professors hired in 1991, 74% of white law professors were awarded tenure by year seven, as compared to 60% of people of color. The racial gap is more striking for the 1996–1997 cohort, where 73% of white law professors but only 47% of minority law professors were awarded tenure by year eight.[4]

The most startling statistic from this AALS report was its revelation that, out of the eleven Latinas/os who became law professors in 1996–1997, none of them had received tenure by year seven.

Can a Compliment Be Discriminatory? (What Bidding Wars?)

In today's academic job market, it is difficult for those with doctorates and other advanced degrees to obtain tenure-track appointments. All job applicants, including the most highly qualified candidates, may experience road bumps during job searches. No person is guaranteed a faculty appointment. Still, myths and legends attach themselves to groups of potential job applicants, such as minority candidates with the purported

right pedigree, right awards and prizes, right teaching evaluations, and right publications. One such myth is that these candidates are so heavily sought after that they are fighting off offers, drowning in phone calls, and deciding between the bidding offers from numerous institutions. As data from several studies have revealed, however, this myth is not rooted in reality. To the contrary, highly qualified minority applicants often struggle to find academic jobs. In fact, many of them experience a specific and unique form of exclusion on the market based on the compliment of being unattainable because of the combination of their race and exceptional credentials.

Consider, for example, the hypothetical job search of Derrick Kennedy, an African American male from Omaha, Nebraska. Kennedy received his B.A. in English, summa cum laude, from Amherst College and graduated from Harvard University with a Ph.D. in English. As a graduate student, Kennedy won the highest school prize in his graduate division for his dissertation. He also had stellar teaching evaluations from his days as a teaching assistant and instructor. After graduate school, he completed a postdoctoral fellowship at Yale University with the number-one scholar in his field, British literature, and now has a list of publications that is the envy of his peers and that should easily land him a job at a prestigious doctorate-granting institution.

As a graduate of Amherst, however, Kennedy is committed to education at liberal arts colleges and wants to become a professor at a top liberal arts institution. All of Kennedy's peers tell him, "You're a shoo-in for a job at a liberal arts college. An English department at a liberal arts college will jump at the chance to hire you."

However, none of the English departments at the seven liberal arts colleges with openings in British literature offered Kennedy an interview. They simply could not believe that Kennedy would actually come to a liberal arts college over a major doctorate-granting institution, despite his express commitment to small colleges in his application cover letter and that of his advisor. These departments concluded that Kennedy must be using them as a backup.

These seven English departments, even the ones at highly ranked institutions, were worried about sticking their necks out to go after a candidate like Kennedy. They had been burned before not by minority candidates but by majority candidates who had similar credentials and went to other institutions. For example, one department ended up with a failed search after giving an offer to a superstar white male candidate who held on to the offer for weeks until he got one from his top choice, causing the department to lose its second and third choices to other schools. Another department lost a new faculty position, which it had fought hard for years to obtain, after its own failed search. Additionally, although each of the English departments had had luck with recruiting majority candidates with Kennedy's credentials in the past, they all truly believed that they had no chance of recruiting an applicant like Kennedy, because they expected that Kennedy, unlike the less-sought-after superstar majority candidates (who, in their view, are hurt by supposedly aggressive affirmative action hiring practices), would have more offers than he could handle.

As these departments saw it, they had no shot at recruiting Kennedy, precisely because he is a highly qualified minority. They determined that doctorate-granting institutions would engage in a bidding war over him that they would surely lose because of fewer resources and lack of comparable research support. Furthermore, they thought, even if they could convince Kennedy to consider a liberal arts institution, they would

not be able to persuade him to come to their particular schools. Each of the targeted liberal arts colleges is located in a small town, and each worried that its location would be an obstacle for recruitment because of the small number of African Americans who live there.

Unfortunately for Kennedy, he believed his peers and subscribed to the myth of himself as a bidding-war candidate. He applied only to liberal arts colleges, not to major research institutions. At the end of his search, Kennedy, despite his stellar credentials, had no job offer or prospects.

Each one of the seven institutions to which Kennedy applied hired less qualified candidates—at least on the basis of traditional paper credentials. All but one of the final hires were white, including a few who lacked a doctorate in hand. Four of the final hires were the second choices of the departments, with those departments initially granting offers to white candidates with credentials very similar to Kennedy's. The sole minority hire at these schools was Asian Pacific American, but he was already working at the liberal arts institution as a predoctoral fellow when its English department extended him an offer.

After his failed search, Kennedy was disappointed and angry. He did not understand why he received no job offers, much less interviews, at the schools to which he had applied. After learning about the credentials of a few final hires, Kennedy called his advisor to see if he could offer insight into why he received no interviews. Through a referral from a friend, Kennedy's advisor called the chair of the search committee at Kennedy's top-choice school. The chair told the advisor, "Are you kidding me? We would have loved to have interviewed him—heck hired him—if we knew that he was really interested! But, to be honest, we took one look at his CV and determined that he was out of our league. You know how all those top-tier schools clamor for stellar minority candidates. We figured that he would have his pick of the litter. An African American male like that!" Kennedy began to wonder, "Do I have actionable claims for race discrimination?"

Too Good for Discrimination?

The answer to Kennedy's question is not so easy to determine. No relevant Title VII race discrimination cases address overqualification in the job market. Furthermore, although courts have held that the employer rationale of overqualification may be a pretext for discrimination in age discrimination cases brought under the Age Discrimination in Employment Act, it is not so clear that they would extend that holding to academic race discrimination cases. Title VII makes it illegal for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to . . . privileges of employment, because of such individual's race, color, religion, sex, or national origin." Plaintiffs can prove discrimination through either direct or circumstantial evidence. "Direct evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." Because employers rarely provide plaintiffs with smoking-gun evidence of discriminatory intent, plaintiffs usually work to prove their discrimination claims through circumstantial evidence. For example, in the hypothetical above, although one could argue that the search committee chair's comments about Kennedy directly implicate race, a fact finder would have to draw several inferences on the way to that

conclusion. Thus, even for Kennedy, who can point to comments by one decision maker that directly address race, the likely method for proving discrimination is through circumstantial evidence.

In 1973, the Supreme Court established a burden-shifting framework in *McDonnell Douglas Corp. v. Green*[5] to evaluate racial discrimination claims through the use of circumstantial evidence. Under this framework, a plaintiff can prove discrimination in hiring through three different steps. In the first step, the plaintiff must establish a prima facie case of discrimination by proving that (1) he or she belongs to a minority group, (2) he or she applied for and was qualified for the position at issue, (3) he or she was rejected for the job despite his or her qualifications, and (4) the position remained open after his or her rejection, and the employer continued to seek or review applications from persons of similar qualifications. Once the plaintiff proves each of these, the court then draws an inference of discrimination and moves to the second step, where the employer must merely articulate a legitimate explanation for rejecting the plaintiff's application. If the employer satisfies this burden, the court then moves to the third step, where the plaintiff has to prove that the employer's stated reason was a pretext for discrimination to win the case. The plaintiff may prove pretext by demonstrating "that the proffered reason (1) had no basis in fact, (2) did not actually motivate the [employer's] challenged conduct, or (3) was insufficient to warrant the challenged conduct." Even then, a jury may still rule in favor of the defendant if it believes that a nondiscriminatory factor was at play.

For discrimination cases turning on overqualification, courts generally focus on the third step in the *McDonnell Douglas* framework: proving pretext. While an employer's unwillingness to consider and hire an overqualified applicant may appear illogical at first glance, it certainly is not irrational and thus cannot in itself serve as determinative proof of pretext. Employers have to consider workplace morale, work satisfaction among employees, and the retention of employees. Specifically, employers may want to avoid hiring an overqualified job applicant for fear that the employee would leave for a more desirable job shortly thereafter or to avoid expending resources to investigate and recruit someone who will not accept.

These same considerations (and others) come into play during faculty searches at colleges and universities. For example, departments may not want to offer a position to an overqualified candidate if they fear that he or she will simply hold on to the offer until a better one comes along, leaving them with no available backups and a failed search. Likewise, departments may worry about a candidate who is seeking an offer from them for the sole purpose of negotiating better packages with the candidate's first-choice institution. Additionally, few departments want to invest the time and resources in training and mentoring a young faculty member, only to have him or her leave a year or two later for greener pastures.

While conceding that employers have a variety of considerations in running a business or organization, courts have nevertheless acknowledged that, for some, the rationale of overqualification may simply be a subterfuge for discriminatory motives. For his race discrimination claim, however, Kennedy cannot rely on the reasoning used in age discrimination cases to debunk the overqualification rationale during the proof-of-pretext stage of his case. Unlike with age, one cannot assume that reference to a candidate as overqualified is a code word for the purposeful exclusion of racial minorities. As the Fifth Circuit reasoned in one race discrimination lawsuit that turned on the defense of

overqualification, there is "no reason to believe that a person's race would make him any more or less likely to seek other opportunities more equivalent to his prior positions."[6] Overqualified white candidates can and do suffer from the same type of exclusion on the job market. Furthermore, the type of exclusion that candidates such as Kennedy experience in the academic job market is not the type that Congress envisioned when it enacted Title VII. At that time, legislators envisioned exclusion based on the dislike of racial minorities or negative stereotypes and myths about racial minorities. Kennedy's exclusion, on the other hand, is based, in part, on high praise of his credentials.

However, Kennedy's exclusion from interviewing pools should not preclude an understanding of his experiences as a unique form of discrimination. Although rooted in a positive evaluation of Kennedy as a faculty candidate, the various departments' decisions to exclude him from the pool of interviewees were due to his racial background. Specifically, the decisions were grounded in a racial myth—the myth of the highly qualified minority candidate who is engaged in bidding wars. But for his race, Kennedy might have been offered an interview and job in some of these departments, much like a few of his white superstar counterparts were.

Furthermore, in determining whether Kennedy's claim is actionable, it should not matter that the myth carried with it a positive racial stereotype. The consequence for Kennedy, regardless of whether the stereotype was positive or negative, was the same: no interviews and thus no job offers or prospects. All that should matter is that the decision makers deliberately excluded him based on a racial stereotype.

In Kennedy's case, the departments' reason for rejecting him for an interview was not neutral or unrelated to race. In fact, the decision not to interview him was based on a belief of his unattainability as a faculty member precisely because of his minority status, coupled with his exceptional credentials. Indeed, a number of the schools considered and interviewed white candidates with credentials comparable to Kennedy's and even extended offers to them—likely because of the belief that they, though highly sought after as well, would not be as highly sought after as Kennedy because they are white and do not benefit from affirmative action. In this sense, Kennedy's discrimination claim stems, ironically, from efforts to remedy past discrimination or, more pointedly, from the proven misperception that minority faculty candidates are receiving numerous quality offers, or even offers at all, because of these efforts.

The relevant question in cases such as Kennedy's is not whether the employer's speculations and, thus, decisions are rooted in any real experience but rather whether those decisions are motivated by racial stereotype. Are the faculties' decisions grounded in the stereotype of the minority bidding-war candidate? Are the faculties treating superstar minority candidates differently by not interviewing them but interviewing majority candidates with similar credentials? Faculties do have a right to make predictions on attainability based on their past experiences, but such predictions cannot be influenced by racial considerations.

Moreover, acknowledgment of the viability of overqualified race discrimination claims does not mean that such plaintiffs will automatically win their lawsuits. Circumstantial discrimination cases are difficult to prove in general, and faculty-hiring-discrimination cases are even harder to prove given the many subjective factors that go into interviewing and hiring determinations. As many courts have noted, an employer has wide discretion in deciding whom it will hire provided that its decisions are not based on impermissible

considerations. Although courts' suspicions may tend to go up when defendants offer excessively subjective reasons for challenged actions, the reality is that faculty search committees reject numerous qualified and overqualified applicants for a broad range of reasons, including highly subjective and speculative ones. Thus, in most cases, the court's or jury's ultimate determination on discrimination will depend on a long list of questions and not just ones about whether the candidate was perceived as unattainable. Courts and juries will also have to examine whether the perception of the candidate's unattainability was rooted in the myth of the minority bidding-war candidate, whether the employer interviewed superstar majority candidates but failed to interview minority superstars, whether the employer tried to mask discriminatory intent by interviewing only minority candidates who it knew (through references) would not join its faculty, and so on.

Finally, recognizing Kennedy's claim as actionable will scarcely open up the floodgates of litigation by faculty applicants, including white applicants. As noted above, institutions may legitimately exclude candidates on the basis of their perceived overqualification. Thus, white applicants who are not included in finalist pools because they are perceived as being impossible to recruit (without regard to their race) would not have viable race-discrimination claims under Title VII, which precludes only those actions rooted in or occurring because of race. When white candidates are excluded because of perceived overqualification, that perception derives from their credentials alone or on other non-race-related factors, such as the institution's location. On the other hand, because the view of Kennedy as a candidate who will have too many offers is rooted in a specific racial myth—that of the highly qualified, bidding-war minority candidate—the decision to not pursue him is premised on race and thus actionable under Title VII.

Complementing Discrimination

Complimentary discrimination against overqualified candidates such as Kennedy causes more than just injury to those candidates alone. While many faculties may view the superstar minority candidate as difficult to recruit and thus not worth the time and effort of being included in their hiring processes, they also tend to view such minority candidates as the only ones worthy of hire. As a result, it can be difficult for minorities who do not have traditional credentials, or even those with just less than stellar but still strong traditional credentials, to place very well in the job market or even enter academia. In sum, not only can the superstar minority candidate find himself or herself excluded from faculty hiring pools because he or she is perceived as being unattainable; faculties' dreams of one day recruiting such a candidate can serve as an excuse for not settling for minority candidates who are less qualified (at least on paper) but clearly well qualified for employment. Moreover, resistance to these lesser but well-qualified minority candidates occurs even when majority members of the faculty have equal or lesser qualifications to those candidates or when the faculty has decided to give an offer to a majority candidate with similar qualifications.

Risky Business?

Faculties' reasons for not hiring those minority candidates who are not superstars but nonetheless objectively qualified vary. For some faculties, while they generally do not

want any of their junior faculty to fail in achieving tenure, they especially do not want to risk having a minority faculty member fail in that respect. As a consequence, they err on the side of caution by reserving their pursuit and hiring of minority candidates to bidding-war superstars. They fear that a minority faculty member's tenure failure could result in their earning a reputation as an unfriendly or hostile department for racial minorities. As a result, they end up requiring that racial minorities satisfy a higher qualification threshold relative to white candidates. Other faculties worry about potential lawsuits brought by minority candidates if they fail to achieve tenure or promotion, even though majority members are equally as capable of filing such suits, particularly in this age of rising reverse-discrimination suits. Faculties, because of their own unconscious biases, simply may not conceive of a minority candidate as the strongest one for a job.

While paths to academia are also very difficult for majority members, the opportunities for white candidates to obtain jobs with less traditional credentials or even through less traditional methods, such as through referrals, are greater than those for minority candidates. According to Richard Delgado, minority candidates rarely join faculties in the informal way that a number of white candidates do. As he put it, "The net result [of biases against racial minorities] is that white people have two chances of getting hired . . . by being superstars and satisfying the ostensible, on-the-books hiring criteria institutions start out with . . . or by means of the informal route the school resorts to . . . when the season is almost over, and the harvest is not yet in."[7] Furthermore, when minority candidates are selected for faculty positions, such hires are often attributed to diversity goals rather than merit, even when the minority candidate looks exactly like competing white candidates on paper and performs just as well or better during the interview.

Holding Out for the Dream

Consider, for example, the hypothetical case of Peggie Lee, an Asian Pacific American female from Detroit, Michigan. Lee graduated from the University of Michigan, magna cum laude, with a B.A. in philosophy. Thereafter, she attended Columbia Law School, where she served as an essays editor on the *Columbia Law Review* and was president of the Asian Pacific American Law Students Association. After law school, she clerked on the Second Circuit Court of Appeals and then practiced law at the Department of Justice, Civil Rights Division.

The fall before Lee planned to become a law professor, she applied for teaching positions through the faculty-appointments register at the AALS website. Although Lee was engaged in an extremely busy practice at the Department of Justice, she was able to write a couple of articles during her spare time. Thus, by the time that she went on the market, Lee had one published student note, one published law review article, and another forthcoming. Her published law review article had placed in a top-fifty general interest law review, and her forthcoming piece was set for publication in a top-ten specialty law journal.

Lee had a number of interviews at the AALS job market conference and received a fair number of callbacks from those interviews, one at a law school ranked in the top fifty. When Lee went for her callback at that law school, she enjoyed herself, and the faculty liked her. Her job talk, in which she presented a paper, was good, though not groundbreaking, but Lee showed great skill in answering questions after her talk.

In addition to Lee, the law school was considering several other candidates, three of them white men of varying credentials and another a Latino with credentials similar to Lee's, Robert Sanchez. One of the white male candidates, John Shine, was a superstar candidate. He had held a prestigious circuit court clerkship with a Supreme Court feeder judge and then a clerkship on the Supreme Court, had been editor in chief of his law school's general interest journal, and had two publications, both very well placed, with another forthcoming. The second white male candidate, Bob Smith, and Robert Sanchez, the Latino candidate, each had a circuit court clerkship, editorial positions on the general interest law journal of their law schools, and at least one publication. The remaining white male candidate, Tom Jones, had a circuit court clerkship and had been the managing editor of a secondary journal at his school; he had one publication, a student note, and a work in progress. Finally, the law school had previously scheduled a callback with a superstar African American male candidate, Jim Vernon, who withdrew before he had a chance to come to campus.

When Shine came to the law school for his interview, he blew the faculty away with his job talk. Ultimately, though, Shine withdrew from consideration when he received an offer from a higher-ranked law school. Tom Jones did not excel as much as Shine did during his visit. Very nervous, he gave a poor job talk, and several faculty members gained the impression that he would not be a good teacher. Robert Sanchez gave a good but not great job talk and failed to really excite the faculty about his research. Finally, Bob Smith came in and gave a less-than-mediocre job talk but responded relatively well to questions. Several faculty members noted that, although they were disappointed by Smith's performance, he came highly recommended by one of the leading scholars in his field.

When the faculty met to decide which candidate to extend an offer to, they quickly decided to exclude Tom Jones from consideration. After some discussion, the faculty also decided to exclude Sanchez. The hiring decision thus came down to Lee and the second white male candidate, Bob Smith. In discussing the two candidates, majority faculty members repeatedly commented how Lee just did not come across as a good fit for the law school. Others commented that Lee was not quite Wanda Jones, a former faculty member of color who had become a superstar and later moved to a top-ten law school (but who, ironically enough, had barely squeaked by during the law school's hiring process). "Peggie just does not have the same promise as Wanda," they said. These same faculty members supported giving an offer to Smith, even though he underperformed during his job talk, because they thought that he had "so much potential." When certain faculty members pointed out that Lee had very similar credentials to Smith and had actually outperformed Smith during her job talk and question period, the supporters of Smith downplayed the difference in their performances and highlighted Smith's references, which were stronger than Lee's (without any recognition of how advantage, privilege, access, and race can influence such references). In fact, after a supporter of Lee tried to make his case for her, one faculty member even commented, "It's too bad Vernon didn't come in for an interview. He would have been a good hire for us." In the end, Smith ended up with the job offer and accepted. Lee ended up at a third-tier law school.

Did the faculty make the wrong decision? Faculty hiring decisions are very difficult, and Smith is, after all, highly qualified and has tremendous promise as a scholar and teacher. But the real question is whether the faculty discriminated against Lee (or for

that matter, Robert Sanchez) in its evaluation of the candidates. Arguably, the faculty did. As some of the faculty members' comments suggest, many of them never saw Lee as anything more than a diversity hire, comparing her with a past faculty member of color who had left and with a superstar minority candidate who did not even arrive for an interview. As a consequence, these faculty members ended up holding Lee to a higher standard than Smith, discounting her good performances and not cutting her slack for any perceived weaknesses while bending over backward to explain Smith's performance. Indeed, they seemed to be holding out for the dream minority candidate and judging Lee more harshly because she did not satisfy that dream, while never holding Smith up to that standard. More importantly, they allowed their dream of recovering "a new Wanda Jones" as a faculty member and getting a future Vernon on their faculty to serve as an excuse for not giving a job offer to Lee. In sum, discrimination by the faculty rested not so much in its final decision about whom to extend the offer to as it did in the different treatment and evaluation process for minority candidates who complemented, so to speak, that final decision and thus completed the circle of exclusion.

Avoiding Bad Compliments

Faculties must begin to understand the complicated and subtle forms of differential treatment that occur through complimentary and complementary discrimination because their actions only reinforce dangerous (though at times positive) racial stereotypes and injure the job prospects of good minority faculty candidates. They need to understand these forms of discrimination so that they can increase the diversity on their faculties and prepare their graduates for a diverse society. Schools will not be able to accomplish this goal unless their faculty members engage in serious self-reflection and analysis about their hiring behavior. As mentioned, minority representation among tenured and tenure-track faculty at colleges and universities remains quite low at many campuses, even ones with significant minority public and student populations. If institutions want their students to think critically and broadly, they must expose them to people with backgrounds different from their own and to a wide range of viewpoints, which may vary on the basis of racial experience.

For example, in law, scholars such as Professors Derrick Bell, Kimberlé Crenshaw, Richard Delgado, Regina Austin, Neil Gotanda, Cheryl Harris, Charles Lawrence, Mari Matsuda, and Patricia Williams wrote foundational pieces in critical race theory that challenged both the substance and style of conventional legal scholarship. Their work, in turn, forever changed all areas of scholarship, both legal and nonlegal, and gave birth to other progressive, antisubordination movements such as Latina/o critical theory and critical white studies.

The task of countering complimentary and complementary discrimination in faculty hiring is not an easy one. To reach the goal of increased racial diversity among faculties, search committee members must consist of people from diverse backgrounds with different perspectives on how to judge applicants. Diverse committees are more likely to create diverse finalist pools, which in turn can increase the likelihood of hiring a person of color. Creating a diverse hiring committee, however, can be difficult if faculty members have simply hired reflections of themselves for years and years and only a few minority faculty members are on hand to take on this time-consuming task.

Additionally, undoing discrimination by compliment will require faculty members to engage in the hard task of critical self-reflection as a means of examining to what extent they assist in perpetuating myths that eventually result in racial biases in the faculty hiring process. For example, faculties could reflect on whether they have hired racial and ethnic minorities outside the three designated conditions described earlier. If not, they could explore how such practices, which have resulted in a two-track system in which minorities are hired only when diversity is a focus, reinforce the complimentary-complementary dichotomy. In so doing, they can force themselves to analyze and answer why superstar minority candidates receive short shrift during the regular process and why other qualified minorities are simply not viewed as good enough unless the process is irregular, meaning focused on diversity.

A friend who teaches at a small liberal arts college told the following story about a search including a superstar racial minority candidate whom she initially opposed for hire in her department:

> During a search a couple years ago, I became fixated on the belief that a certain candidate (call him candidate X) was not interested in working for our institution. My impressions of him during a preliminary interview had convinced me that he was just "playing the game" and had not convinced me of any serious interest in our institution. As a result, I felt strongly that inviting him to campus would be a waste of one of our "slots" for on campus interviews. I repeated this impression several times during our deliberations. My senior colleague corrected me by saying that my "sense" of what this candidate really wanted was not the point and was not one of our criteria for selection. He was entirely correct, and I relented, despite my strongly felt "gut" sense. As it turns out, I had reversed two candidates in my own memory, so that my impression, in addition to not being the point of our selection process, had also been misplaced and misdirected. If my colleagues had listened to me, I would have prevented the candidate we ended up hiring in the search from coming to campus based on a hunch that was misdirected.

As my friend's story reveals, critical reflection of one's internalization of racial myths and stereotypes, including positive ones about a candidate's range of choices, can result in numerous positive endings. In my friend's case, self-evaluation not only opened her up (and ultimately her department) to considering a candidate whom she had previously viewed as racially unattainable because of the candidate's record and her institution's location in a nondiverse community (though she had actually misidentified the candidate) but also provided the candidate with an opportunity to physically interview in the department and at least express his serious interest in the institution. Most of all, it prevented the department from giving the candidate the "compliment" of excluding him from consideration for the open position. Instead, it enabled the department to give him the best compliment possible, a job offer, which, when accepted, ended up benefiting the institution as a whole by providing it with a new, young faculty star and a person of color in its community.

NOTES

1. AALS Committee on Recruitment and Retention of Minority Law Teachers, The Racial Gap in the Promotion to Tenure of Law Professors: Report of the Committee on the Recruitment and Retention of Minority Law Teachers Committee Commentary 3 (2005), http://www.aals.org/documents/racialgap.pdf.

2. Daryl G. Smith, *Faculty Diversity When Jobs Are Scarce: Debunking the Myths*, Chron. Higher Educ. Sept. 6, 1996, at B3.

3. Daryl G. Smith et al., *Interrupting the Usual: Successful Strategies for Hiring Diverse Faculty*, 75 J. Higher Educ. 133 (2004), at 134.

4. AALS Committee on Recruitment and Retention of Minority Law Teachers, *supra* note 1, at 3; see also Richard White, AALS Report, The Promotion, Retention, and Tenuring of Law School Faculty: Comparing Faculty Hired in 1990 and 1991 to Faculty Hired in 1996 and 1997 12–15 (2004).

5. 411 U.S. 792 (1973).

6. Barnes v. Ergon Refining, Inc., No. 93-7375, 1994 WL 574190, at *4 n.11 (5th Cir. Oct. 4, 1994).

7. Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 Geo. L.J. 1711, 1728 (1995).

From the Editors

Issues and Comments

Why does the professor in Derrick Bell's article think that Geneva's colleagues resisted hiring the seventh candidate of color even though he was as well, if not better, credentialed than the first six to be hired? And does the Chronicle reveal the hollowness of the merit argument—questioning as it does that blacks would be hired even if they had an extraordinary amount of merit?

Has critical civil rights scholarship been accepted over the past decade? If it has, is this a refutation of Bell's and Richard Delgado's arguments? What are the advantages of the autobiographical approach to writing and teaching? Does it have any dangers and risks? To what extent is ethnicity—or blackness—a matter of personal choice, a decision to be, or not to be, black? What costs and benefits accrue to one who decides to be black?

For additional discussions of the role of persons of color in academia or the legal profession, see the chapters by Devon Carbado and Mitu Gulati (Part IV), Kevin Brown and Jeannine Bell (Part XI), Margaret Montoya (Part XIV), and Randall Kennedy (Part XV). Important articles by Kimberlé Crenshaw, Deborah Jones Merritt, and Deirdre Bowen, among others, are listed in the Suggested Readings, immediately following.

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PART XIV

CRITICAL RACE FEMINISM

ONE OF THE most exciting areas of critical race writing is critical race feminism. In addition to writings about intersectionality (Part VII) and antiessentialism (Part VIII)—two areas of obvious concern to women of color—crits have been addressing such subjects as the woman as outlaw, the social construction of women of color, and women's reproductive rights.

Part XIV begins with Monica Evans, who, in a brilliant flip, shows how black women have managed to capitalize on their invisibility, marginalization, and "outlaw" status to provide safe places for black insurrection to take hold. Margaret Montoya's "*Máscaras, Trenzas, y Greñas*: (Un)Masking the Self While (Un)Braiding Latina Stories and Legal Discourse" weaves the multiple strands of her outsider identity into a jurisprudential and personal framework that can offer feminists of color a means to survive in an alien world.

Sumi Cho addresses particular challenges faced by women of color in the labor market and workplace, particularly if they are young, Asian, single, and attractive. Elvia Rosales Arriola interviews dozens of workers and organizers in large multinational or U.S.-owned sweatshop-type assembly plants (maquiladoras) located just across the U.S. border in Mexico.

66. Stealing Away

Black Women, Outlaw Culture, and the Rhetoric of Rights

MONICA J. EVANS

Steal away, steal away, steal away to Jesus;
Steal away, steal away home,
I ain't got long to stay here.
My Lord calls me; He calls me by the thunder,
The trumpet sounds within-a my soul,
I ain't got long to stay here.

The African American spiritual "Steal Away" is located within the tradition of escape songs, a series of codes embedded in music and sung by slaves to alert each other to the time for escape from bondage to freedom. Slaves sang these songs under the very noses of their captors, who were unable to hear in the music any force that might subvert their own authority.

Escape songs present a dialectic of power, deceit, and identity. By appearing to live out the identity of beasts of burden, loyal and unintelligent, lowing to each other in soothing, unpolitical tones, slaves were able to carve out time and space for resistance and could formulate their escape plans in the very presence of their captors. The marginality of slaves made it possible for them to effect their escape from a destructive culture and to construct their own identities.[1]

"Steal Away" is especially powerful in its use of theft imagery as a means of redemption. The song calls on slaves to "steal"—that is, to break the law in order to reclaim themselves. By stealing away, slaves took it upon themselves to subvert, by means of deceit, theft, and disruption, the oppressive institutions of the prevailing social order. Theft, disorder, and deceit, images we are trained to accept as incompatible with the law, nevertheless provided slaves and their descendants with a positive alternative to oppression. One hundred thirty years after emancipation, "stealing away" continues to describe African American culture and, by extension, all communities of color that construct cultural identities as outlaws in a radical and positive alternative to oppression and exclusion.

Consider, for a moment, black women as shapers and transmitters of a positive, outlaw culture, through which black women develop and formalize strategies for coping with the terrifying exclusion of blacks from the protection of mainstream law. Consider

A version of this chapter previously appeared as Monica J. Evans, *Stealing Away: Black Women, Outlaw Culture, and the Rhetoric of Rights*, 28 Harv. C.R.-C.L. L. Rev. 263 (1993). Originally published in the *Harvard Civil Rights–Civil Liberties Law Review.*

outlaw culture as a historical and continuing response of African American communities to the dominant culture, with specific emphasis on the role of African American women in shaping that response. Outlaw culture forms a basis for African American women to present themselves to a dominant legal and social culture that currently represents African American women, if at all, in overwhelmingly negative terms. Might we not reconceptualize outlaw culture in positive terms and offer that concept as an alternative to the prevailing representation of black women in law, society, and popular culture?

My use of outlaw culture as a constructively subversive norm is quite different from the concept of outlaw culture usually (and stereotypically)[2] represented in popular media, traditional legal systems, and even race discourse.[3] "Outlaw" means outside the purview of mainstream law, that is, outside the law's regard and protection. This state of being on the outside is both a matter of fact—imposed by dominant legal discourse that silences, marginalizes, and constructs black life as dangerous and deviant—and a matter of choice, in the sense that black communities often place themselves in deliberate opposition to mainstream cultural and legal norms when those norms ill serve such communities. "Outlaw culture" refers to a network of shared institutions, values, and practices through which subordinated groups "elaborate an autonomous, oppositional consciousness."[4]

Outlaw culture is in constant motion, taking on different nuances in different contexts. Like the African American community as a whole, outlaw culture is always in the process of making and remaking itself. Outlaw culture refers to the process by which African Americans shift within and away from identities in response to mainstream legal systems and dominant culture. It describes a conscious and subconscious series of cultural practices constituting life at the margins. Marginality is thus a strategy for carving out spaces in which to maneuver and resist.

Outlaw culture is born of, but is not limited by, exclusion from mainstream norms and protections. It derives its power from deception; it embodies practices and codes that have significance in African American communities at odds with the appearance of these practices and codes in mainstream society. The deception has multiple locations across a broad spectrum. In some instances, deception takes the form of aggression or even defiance. In other instances, deception locates itself in apparent nonaggression and in compliance with the law. The aggressive aspect of a young urban black man often masks a sense of vulnerability to physical abuse by police or the knowledge that neither the police nor the legal system will provide aid when he is in need and will in many instances deploy violence against him.[5] On the other end of the spectrum, the extreme respectability of church ladies and clubwomen often provides protective coloring to mask a subversive political agenda. Critical race scholarship has been instrumental in revealing that law may act as an instrument of subordination as well as one of empowerment. In the sense of empowerment, outlaw culture involves defining and redefining one's relationship to law, acting insubordinate when necessary, and manifesting scrupulous adherence to law and order when useful.

Outlaw culture is not limited to young urban black males or relentlessly proper black church- and clubwomen. Rather, it cuts across temporal, political, and class lines, providing a means for African American communities to become themselves by constantly positioning themselves as Other and by subverting prevailing norms that are destructive

to African American communities. Outlaw culture is the means by which we engage in critique. Outlaw culture, rather than obstructing black empowerment, both interrogates mainstream culture and affirms African American culture.

African American Women and Outlaw Culture

The history of black stability and empowerment is inextricably linked with subversion, and black women have been an important source of subversive outlaw activity. The term "contraband" provides a striking example. In mainstream discourse that word refers to illegal drugs and often is associated with black urban culture. But "contrabands" have an antecedent reference to slaves who took it upon themselves—often with the aid of that most prominent of outlaw women, Harriet Tubman—to disrupt existing legal norms of property and explode the boundaries of a destructive culture.

The Montgomery bus boycott derived its impetus from Rosa Parks's subversion of a legally sanctioned apartheid system. And Carol Moseley Braun became the first African American woman elected to the U.S. Senate in part because of her persistent critique of the Senate Judiciary Committee's outrageous mistreatment of Professor Anita Hill. Moseley Braun's very presence in the Senate was a disruption of implicit traditions embedded in the definition of a senator.

Harriet Tubman engaged in stealing away to freedom and self-definition. Such an assertion seems odd because it concedes, albeit in a very limited way, that what is being stolen is the self. Does this suggest that Harriet Tubman was in fact chattel—since chattel, and not fully realized selves, are the proper objects of theft? Clearly not. Rather, she used the concept of stealing away as a means of reclaiming herself, her family, and the Underground Railroad passengers in her care. By stealing away, she denied the very commodification of her self that the institution of slavery sought to impose and that the term "stealing" implies. In converting the notion of stealing for her own benefit, Harriet Tubman subverted the legal structure that demanded adherence from her. She was an outlaw in the truest sense.

The idea of Harriet Tubman as an outlaw, one standing outside law as an act of resistance and self-definition, raises complex issues concerning the definitions of criminality and femininity by which black women are bound and that black women internalize. The concept of an outlaw woman is itself contradictory. In traditional notions of outlawry, an outlaw is a masculine metaphor. The qualities associated with outlaws—defiance, independence, and rebelliousness—are closely associated with masculine concepts, invoking images of Jesse James, Butch Cassidy, Robin Hood, and Rambo.

Sandra Rosado is another woman of color standing in opposition to law as a means of definition and redemption. Ms. Rosado's story is an intersectional examination of race, womanhood, and lawbreaking. She stands outside the boundaries of law while calling into question the legitimacy of mainstream legal discourses in which the core experiences and aspirations of women of color are unable to find expression.

Sandra Rosado is a twenty-year-old Afro-Latina woman who lives with her brother Angel and her mother, Cecilia Mercado, in New Haven, Connecticut. Mrs. Mercado receives payments under the Aid to Families with Dependent Children (AFDC) program, more commonly referred to as welfare. Ms. Rosado worked part-time in a community

center, and before government sanctions, she set aside her wages in a savings account earmarked for college. Unfortunately, Ms. Rosado's accumulation of approximately $4,900 for college exceeded the asset limits imposed by state welfare eligibility rules. As a result, state officials required Ms. Rosado to spend down her savings account balance to preserve her mother's eligibility for future welfare payments. Instead of spending the money on college tuition, Rosado was forced[6] to spend the money on clothes and perfume. Additionally, federal officials demanded that Mrs. Mercado return the approximately $9,300 she received in welfare payments while Ms. Rosado's money was in the bank. In May 1992, the Connecticut Supreme Court ruled against Mrs. Mercado's appeal of the repayment order.[7] Officials close to the case indicated that a waiver of the repayment order was unlikely.

Sandra Rosado's story is one example of what Patricia Hill Collins calls a "controlling image."[8] In shifting the national conversation away from the underlying skewed priorities that legitimize unfair power arrangements and perpetuate the underclass, welfare cheat rhetoric avoids examining the possibility that social ills implicate a flaw in the predatory individualism of the capitalist marketplace. In welfare queen rhetoric, it is lower-class, loose, dark women who bring low the American dream. Feminist and race-critical scholarship posits law as a series of stories particularly reflecting the experiences of the narrator and selectively taking from history and culture to shape the narrative. The process of legal narrative is an epistemological enterprise of transforming local narrative into universal, neutral fact. The power of legal narrative to disregard or render insignificant the stories of those traditionally outside the law has been well, although far from exhaustively, explored.

In one sense, the decision at state and federal levels to pursue the Rosado matter as a case of welfare cheating was animated by an official incapacity to move beyond the perspective of controlling imagery. Sandra Rosado, coming within the purview and regard of law only to be condemned as a flouter of law, is clearly not within the category of persons whose stories reflect reality or fact. She is within a category of persons—women, people of color, young people—who are outsiders and whose stories lack the power to create fact. It is not what Sandra Rosado has done but what she is that makes her an outlaw.

In a larger sense, Sandra Rosado's story raises questions of representation and agency. What it means to be a young, unmarried, and unpropertied woman of color is in great measure a function of the prevailing imagery and representations of young, working-class black women. This prevailing imagery tells us that Sandra Rosado *must* be a cheat. It also tells us that she is not an agent; she is not in the category of persons that the prevailing imagery recognizes as having access to capital or knowledge or having the power of self-governance that derives from both of these resources. The dominant imagery of self-empowered capital acquirers has nothing to do with Sandra Rosado. The image of the man who bucks the odds and pulls himself up by his bootstraps is just that—(1) an image (2) of a man.[9]

Sandra Rosado explodes the categories assigned to her by the master narrative. She is a young woman who "stole away" from state-created dependency and from legal rules that could only hurt her. Saving money for college in violation of welfare rules and in violation of the rules preventing access to knowledge is the insubordination of an outlaw, kicking against the legal system that perpetuates her subordination.

Clubwomen as Outlaws

Unlike Harriet Tubman and Sandra Rosado, who quite literally broke the law, the clubwomen's outlawry stands in stark contrast to their very law-abiding natures. They would, presumably, wince at the idea of being outlaws. The clubwomen were part of the national black women's activist movement of the late nineteenth and early twentieth centuries.[10] The black women's clubs initially organized around issues of abolition, then around postslavery relief programs providing basic food, clothing, and shelter for emancipated and escaped slaves. The clubwomen later focused on education and social welfare programs.[11] Meetings were given to fund-raising, political writing,[12] and discussion. State and regional clubs were united at the national level under the banner of the National Association of Colored Women. The clubs shared strategies for black women's suffrage, racial parity, and promulgation of moral and religious values. They united under the motto "Lifting as We Climb," which stood for clubwomen's focus on collective action and responsibility.[13] It was not enough for clubwomen individually to succeed; clubwomen shared a sense that they were representatives of their race and their gender so that their goals were unfulfilled if any member of their community was left behind.

In addition to political associations, African American women formed literary clubs, sewing circles, colored YMCAs, and altar guilds. While there were some distinctions among the associations in terms of focus, they shared a common focus of "benevolent societies" in being organized around principles of social and religious uplift. The clubwomen were deeply religious and very proper. My mother (who was a child at the time) remembers that when the Twilight Social and Civic Improvement Club of West Baden, Indiana, met at Little Mother's house, the women always prefaced meetings with a prayer from St. Paul's epistle to the Philippians. Clubwomen "worked diligently throughout the years to battle racism, poverty and discrimination. The clubs provided a protective environment which encouraged the black women . . . to meet and seek solutions to the social problems of the black community."[14]

Clubwomen founded schools, orphanages, old-age homes, and other social institutions for black children and for the aged in an era in which public commitment and funding for black institutions were virtually nonexistent. They carved out cultural institutions outside the purview of mainstream law, thereby providing an educational and social welfare structure where the law refused to do so and establishing an infrastructure that furthered the goals of race and gender equality.

While Harriet Tubman and Sandra Rosado disregarded certain laws that objectified and controlled them, clubwomen believed in adherence to the law and social order. Nonetheless, in several important aspects they were not bound by the dichotomies that governed mainstream social order. For instance, the division between public and private spheres did not hold meaning for clubwomen in certain contexts.[15] A clubwoman could not bring about public civic improvement if she was lacking in private morality or if her home did not reflect the values she sought to bring to public spaces. For clubwomen, good mothering, education, religious devotion, and family life all constituted political activity.

Educated Class

An outlaw culture desperately needs an educated class of people for its survival. First, knowledge of the dominant law is important for strategy: One must know when to

adhere to law and when to resist or oppose it. Having a body of educated participants provides the basic unit of citizenship in the larger culture. In the decades following *Brown v. Board of Education*, it has become apparent that the relationship between education and upward mobility for African Americans remains contested. However, it is indisputable that without access to mainstream education African Americans are unable even to maintain the status quo. Education gives outlaw culture the language with which to speak to and translate for the larger culture. The educated class acquires knowledge of the law through its liaisons to the larger culture and transmits this knowledge through a network of schools, churches, and clubs that form the infrastructure of the African American community.

Finally, it is not coincidence that clubwomen provided an educational structure and a knowledge of the law. Historically, black men have not been trusted by mainstream culture to be educated because education is a means of empowerment. Accordingly, empowered black males, already perceived as a physically and sexually aggressive force, pose an unacceptable threat to dominant norms of racial purity and intellectual superiority. Black women must fill the void, therefore, by absorbing and passing on vital information about mainstream law in an era in which looking at a white woman the wrong way or failing to observe de jure and de facto segregation laws could cost a black man his life or subject a black woman to rape and degradation.

Underground Railroad

Outlawry also demands an ongoing underground railroad. An outlaw is someone who the law declares may be trespassed against at will. Therefore, an outlaw needs a network of people who will provide help and harbor to the most vulnerable members of the culture.

Life without help or harbor for the outlaw may be inevitable in the dominant culture. However, such a condition is unlikely to flourish within the "safe spaces" in the African American community where outlaws are invisible to the dominant gaze. Patricia Hill Collins identifies several locations of "relatively safe discourse"[16] where blacks speak freely "to articulate a self-defined standpoint."[17] She names black women's relationships with one another, both in informal friendships and in black women's organizations, as one such focal point for the nurturing of black women's consciousness.

Other focal points of African American consciousness are located within the infrastructure that clubwomen provided. Churches, schools, orphanages, social outings, and club meetings all provided what Professor Collins calls safe spaces. I think of them as akin to safe houses on the underground railroad, places of harbor for fugitives from the dominant culture or lines behind which contrabands seek and find safety. In transforming the concept of the political, clubwomen converted their schools and homeplaces into spheres in which they could resist hegemonic representations of black women. In this sense the homeplace formed a situs of radical political activity.

Patricia Hill Collins's and bell hooks's references to "safe spaces" and "homeplaces" as sites wherein to resist cultural hegemony raise the issue of particular members of the culture who are vulnerable to dominant oppression. When I think of cultural hegemony and imperialism, I think of home and school—the places children inhabit—as the most important sites of resistance. The most pernicious act of imperialism does not consist of the occupation of territory or the exploitation of resources. Rather, it is the co-opting

of the representation of the indigenous self. This co-opting is most effectively done by engaging children as accomplices. I think of the Hitler Youth, whose loyalty and trust were co-opted and converted from their parents and family to the Nazi Party. I think of the constant attacks on bilingual education and the message transmitted to children whose native language and culture are devalued and suppressed. I think of the generations of black children calling their smart classmates Oreos—children who learn early that white defines smartness—and who, through the pervasive negative imagery of black life, continue to scrub their skin raw in the hope that the blackness will wash off. I think of all the children of color who are subtly and not-so-subtly encouraged to repudiate the cultural legacies of their mothers and fathers.

Home and school were two sites of intense club activity. Providing places to revel in their culture, resist negative representations of their culture, and support each other in locating and defining the self within their culture was a transformative political act of the clubwomen. Thus, the clubwomen provided help, harbor, and access to knowledge of the law. In so doing, they developed deliberate strategies for coping with their outsider status, transforming banditry into a culture of positive response to exclusion.

The elitism and class distinctions that informed much of the clubwomen's values have been widely criticized for replicating the very systems of oppression against which the clubwomen fought. What has been largely obscured is the extent to which the clubwomen's Victorian aspirations also contained a subversive political dimension—what Professor Higginbotham refers to as a "politics of respectability." The clubwomen's respectability was conservative, yet it expressed an outlaw sensibility at several levels.

The radical nature of the clubwomen's respectability must be viewed in light of the historical context of the clubs. Unlike those of their white counterparts, black women's clubs were formed with an emphasis on challenging representations of African Americans as uneducated and morally unworthy of full participation as citizens in American society.

A response to societal views of black women as loose, immoral, and sexually available provided much of the impetus behind clubwomen's respectability, which in turn led them to embrace a Victorian sexuality. This aggressive respectability of clubwomen was part of a method to define black women in opposition to negative representations of black female sexuality. Clubwomen, especially those of the middle class, challenged the prevailing stereotype by presenting themselves as largely desexualized, well-educated, and hyper-respectable Victorian ladies.

Furthermore, respectability necessitated the political act of reclaiming the integrity of black men as well as black women. Typical excuses for the assertion that blacks were not entitled to full participation in American life were their illiteracy, lack of education, and incapacity for moral behavior. Clubwomen exposed the racism behind such supposedly race-neutral objections by focusing their efforts on eradicating illiteracy and by taking on a system of moral values. Both efforts would create a critical mass of educated and hypermoral blacks. If whites still rejected blacks' participation in society, it would have to be for some reason other than the supposedly race-neutral excuses offered. Clubwomen's respectability was thus a strategy for exposing the duplicity of a racist society by forcing white racism into the open. It provided a moral imperative that was the impetus and justification for further civil rights work. "Never give them a reason" is a maxim that resounded in my own upbringing and that underlay much of the clubwomen's politics of respectability.

Respectability and aspiration to Victorian values also provided a means of denying white patriarchy its presumptive access to black women's bodies. Little Mother told her great-grandson that one impetus for the establishment of the clubs was "to teach young Negro women that they do not have to submit to white men's advances . . . and to guide young Negro women into fruitful adulthood by establishing a value system which recognizes and protects their integrity."[18] The respectability and Victorian value system were components of a strategy for coping with exclusion from agency regarding one's body.

Even today, in stark contrast to the popular understanding of African American cultures, a deep Victorian and conservative streak runs through many black communities.[19] My own upbringing—in terms of compulsory church attendance, parental discipline, and teachings on sexuality—was far more strict than that of most of my white friends and colleagues. There are no conservatives like black conservatives.[20]

A sense of beating them at their own game informed much of the respectability of the clubwomen and embodied a subversive element. Going farther than the white oppressors—acting more ladylike, using crisper speech, and disapproving of low-class behavior more than their white counterparts—was a means of appropriating and subverting the practices employed by white women. It was also a way of saying, "We are better at following your rules than you are." A principal area in which clubwomen were committed to beating white women at their own game was the appropriation of values of true womanhood and motherhood in opposition to conventional wisdom that black women were suitable for neither.

The clubwomen's respectability thus reveals itself as subversive in its deployment of Victorian sensibilities as an aspect of the politics of self-identity. The clubwomen's privileging of respectable behavior and middle-class mores provided a locus in which to contest the negative imagery of black women and reform for themselves, for the dominant society, and for their race the institutions of womanhood, motherhood, and sexuality as they are practiced by black women.

Implications for the Larger Culture: Outlaw Culture and the Rhetoric of Rights

Looking to black women and outlaw culture would prove useful as a means of informing our understanding of rights and relationships. Rather than adopting an ethic of care and relationships to replace rights as an organizing principle of jurisprudence, I propose that scholars turn to those women and communities of women who embody an outlaw culture as a source of guidance for constructing lives at the margins of rights.

Outlaw culture involves the practice of shifting in and out of identities. Outlaw culture is an extraordinarily complex but-and intersection of life outside the purview of law that still holds law to its promises. As Martin Luther King, Jr., pointed out, a promise broken is still a promise.[21] Like Dr. King, outlaw culture does not abandon the concept of rights: Outlaws still have a claim on the legal system to the extent that the system is centered on the discourse of rights. Women in outlaw culture have also built a rich life in the absence of rights. Therefore, outlaws are an appropriate and particularly helpful model of how to simultaneously hold on to rights and hold the nation to its promise of rights while using other, nonrights epistemologies for self-definition.

Clubwomen did not reject the notion of rights. As influential members of their communities asserting leadership positions in churches and schools, clubwomen fiercely asserted their right to control the educational and charitable services that they organized and oversaw. Black women were involved in the struggle for civil rights qua rights at every level. They thus can teach us alternative ways to think about rights. Stepping out of binary thinking can free us to imagine paradigms other than the rights-autonomy paradigm or the ethics of care–relationships paradigm. While clubwomen engaged in a struggle for rights, their concept of the self and the rights to which the self is entitled were not conflated with the idea of atomistic individualism. They did not define their mission in terms of a self-interested utility maximization as an autonomy-based rights discourse might. Rather, as their motto indicates, they lived out the relationship between rights and responsibilities by lifting as they climbed. For clubwomen, the struggle for rights was incoherent unless it simultaneously nurtured communal relationships that were predicated on a responsibility for uplifting the race. Engagement with rights, as part of the process of self-definition, was contextualized within home, family, and community life. A truly defined self (and a truly cultured person) was one who had the ability to see his or her continuity with the larger community of family, church, school, and race.

Clubwomen simultaneously occupied spheres of rights and relationships. This multidimensional existence—the "constant shifting of consciousness"—is described by critical scholars as multiple consciousness or, sometimes, intersectionality. This dualistic existence, far from being an incoherent contradiction, was a source of life and protective cover for the clubwomen as outlaws. Clubwomen who were outlaws, both as a normative matter and as a description of reality, were not either-or people. Their outlook is helpful in advancing a jurisprudence that moves beyond the polarities of rights versus relationships.

The ultimate irony of looking to outlaw culture is the paradox of looking to extralegal communities as a source of jurisprudence. Outlaw communities show us how a rights discourse could function without consigning us to disconnected, atomistic autonomous spheres. They also teach us that constructing communities and rules on an ethic of care and interconnectedness need not entail a wholesale abandonment of rights.

There are at least two formidable (albeit self-engendered and therefore not insurmountable) obstacles to a jurisprudence informed by black women's outlaw culture. The first lies in the difficulty of moving out of the box, out of binary thinking. For a culture reared on the tenet "You can't have it both ways" (I have always wondered why not), this is a daunting hurdle. The second is that the white male legal establishment must be able to put its sense of cultural and gender superiority aside and do what white males find very difficult: learn how to learn from the (outlaw) cultural practices of African American women.

Mainstream society is not accustomed to looking to the cultural practices of African American women for any positive models. However, in a society where autonomous individualism and traditional rights discourse have not produced the goods promised, mainstream culture would do well to turn to the values that animate other communities. Perhaps the wily, audacious descendants of black clubwomen have something besides an outstretched palm to offer mainstream America.[22] Perhaps we can wonder, as

does poet and critic Maya Angelou, "[W]hat if all the vitality and insouciance and love of life of black America were openly included in the national psyche?"[23]

The clubwomen, Harriet Tubman, Rosa Parks, Little Mother, Sandra Rosado, and all the African American women who in their own way resist the forces that would define, limit, and misrepresent them are wily, audacious outlaws. With their constancy, African American women have constructed a culture of opposition and a carefully honed wit to win.[24] We can teach you much.

NOTES

1. For a discussion of the relationship between power and identity, see generally Martha Minow, *Identities*, 3 Yale J.L. & Human. 97 (1991); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 Buff. L. Rev. 1, 45 (1990).

2. The stereotypical representation of black urban culture as an outlaw culture renders invisible the contributions of African American women in shaping a cohesive society and in transmitting values of stability and empowerment within African American communities. Representations of crack-ridden neighborhoods and welfare queens obscure the role of outlaw culture as an instrument of communal empowerment.

Outlaw culture has been and remains a tool for what bell hooks calls "decolonization" of black women's minds. See bell hooks, Yearning: Race, Gender, and Cultural Politics 41–49 (1991).

3. *Reconstruction*, a journal of opinion and commentary on African American culture, published an article by Professor Mark Naison in which he notes the emergence of an "outlaw culture" among low-income black urban youth, a group that has "rejected African-American communal norms in favor of the predatory individualism of the capitalist marketplace." Mark Naison, *Outlaw Culture and Black Neighborhoods*, 1 Reconstruction, no. 4, 1992, at 128. But see Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. Cal. L. Rev. 1769 (1992) (discussing, inter alia, the development of black women's gangs and the identity politics associated with urban outlaw communities). Even here, however, the discussion must avoid using men's gangs as the referent by which to evaluate the phenomenon of women's gangs. Conflating women's gangs with men's gangs obscures the differing functions served by women's lawbreaking activities.

4. White, *supra* note 1, at 48.

5. This sense of vulnerability has a firm foundation in American history. In 1987 the Supreme Court put us on notice that black life may be trespassed against with lesser penalties than those imposed for trespass against white life. The Supreme Court has stated that murderers of whites being 4.3 times more likely to receive the death penalty than murderers of blacks is not sufficient to demonstrate that a death penalty sentence constituted arbitrary state action in violation of the Fourteenth Amendment or was cruel and unusual punishment contrary to the Eighth Amendment. McCleskey v. Kemp, 481 U.S. 279 (1987).

6. AFDC restrictions on accumulation of assets also place limitations on the type of items on which Ms. Rosado's account could be spent down, militating against the acquisition of investment-type assets and in favor of nondurable, nonappreciating goods. Thus, Ms. Rosado's expenditures on clothes and perfume were not only reasonable within AFDC restrictions but were for all practical purposes dictated by those restrictions.

7. See Mercado v. Commissioner of Income Maintenance, 607 A.2d 1142, 1146 (Conn. 1992).

8. See Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment 67–90 (1991).

9. My first conscious realization of the power of cultural myths to drive my own imagination came as I was reading a United Negro College Fund advertisement in the New York City subway in the mid-1970s. The ad pictured a black woman wearing a white lab coat, peering into a microscope. The caption read, "Why do you assume that the scientist who finds a cure for cancer will be a man? Or white?" Even though I was already in high school, that was the first time it had occurred to me that someone other than a white man could be the one to find a cure for cancer. Prevailing representations

of society's scientists, doctors, and whiz kids were at that time, and continue to be, almost universally white and male. Even those of us who are neither get seduced by the imagery.

10. See, e.g., Cynthia Neverdon-Morton, Afro-American Women of the South and the Advancement of the Race, 1885–1925 (1989); Anne Firor Scott, Natural Allies: Women's Associations in American History (1991); Evelyn Brooks Higginbotham, *African-American Women's History and the Metalanguage of Race*, 17 Signs 251 (1992); Evelyn Brooks Higginbotham, *In Politics to Stay: Black Women Leaders and Party Politics in the 1920s*, reprinted in Women, Politics, and Change 199 (Louise A. Tilly & Patricia Gurin eds., 1990); Anne Firor Scott, *Most Invisible of All: Black Women's Voluntary Associations*, 56 J. S. Hist. 3 (1990).

11. See Scott, Natural Allies, *supra* note 10, at 45–57.

12. My great-grandmother ghostwrote speeches for Herbert Hoover in his presidential candidacy. This was not an unusual function of black clubwomen. While the black vote, especially in the wake of women's suffrage, was an important one for Republican candidates, then as now candidates for national office were reluctant to be seen as overly friendly to black interests. The use of black ghostwriters for political speeches was an important campaign strategy and provided avenues for overtly political activity for clubwomen who wrote on race and women's issues. For a discussion of black women's organizations in Republican Party politics, see Higginbotham, *In Politics to Stay*, *supra* note 10, at 199–248.

13. See, e.g., *id*. at 205.

14. A Brief History of the Indiana State Federation of Colored Women's Clubs, Inc. 2 (1987).

15. For a discussion of black women's clubs and their repudiation of the public-private dichotomy, see generally Eileen Boris, *The Power of Motherhood: Black and White Activist Women Redefine the "Political,"* 2 Yale J.L. & Feminism 25 (1989).

16. Collins, *supra* note 8, at 95 (1991).

17. *Id*. at 96.

18. Conversation between Maxwell Sparks and Bessie Carter Jones, retold to me in New York (Feb. 5, 1991). Maxwell Sparks is my cousin and a great-grandson of Bessie Carter Jones.

19. This conservatism has both personal (for example, church and family values) and political elements (with respect to alliance with particular political parties). But feminism's admonition that "the personal is political" operates here as well and cautions that it is not a simple (or perhaps wise) matter of distinguishing between social (that is, personal) versus political conservatism in black communities. The 1992 presidential campaign debate over family values involved textured and interlocking systems of political as well as private conservatism. These interlocking systems act on black communities and produce a black conservatism that is very difficult to categorize as either personal or political.

20. This appears to be a fairly well-kept secret: The true conservatives are often located in black communities. The emergence of black neoconservatives such as Clarence Thomas and Shelby Steele has caused consternation and confusion among the traditional left. The confusion derives in part from long-standing assumptions that blacks who engaged in and benefited from the civil rights struggle would hold political views similar to white liberals. The confusion also derives from the cynical thoroughness with which the political right has linked liberal programs and the Democratic Party with special favors for blacks.

Mari Matsuda asserts, "When you are on trial for conspiracy to overthrow the government for teaching the deconstruction of law, your lawyer will want black people on your jury [on the theory that black jurors are more likely to understand that people in power sometimes abuse law for their own ends]." Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323, 323 (1987). I am not sure I would agree. It depends on the black juror. Not all black jurors recognize the hegemonic and subordinative dimensions of law; others, having internalized racist imagery, may be more willing than whites to render an adverse judgment in the scenario Professor Matsuda posits. Some black people I would just as soon strike (from the jury, that is). If as critical scholars assert, race is a coalition constantly in the process of being made and remade, then Professor Matsuda's statement must be qualified in light of the different meanings that may attach to the term "black juror" at different times and in different circumstances.

21. Dr. Martin Luther King, Jr., *I Have a Dream, Keynote Address of the March on Washington, D.C., for Civil Rights (August 28, 1963)*, in A Testament of Hope: The Essential Writings of Martin Luther King, Jr., 217 (James M. Washington ed., 1986).

22. Regina Austin, *Sapphire Bound!*, 1989 Wis. L. Rev. 539, 555.

23. Irvin Molotsky, *Poet of the South for the Inauguration*, N.Y. Times, Dec. 5, 1992, at A8.

24. As constructors of creative responses to exclusion, outlaws embody the character in a poem by Edwin Markham that my mother often recited:

> *He drew a circle that shut me out—*
> *Heretic, rebel, a thing to flout.*
> *But Love and I had the wit to win:*
> *We drew a circle that took him in!*

Edwin Markham, *Outwitted*, in Poems of Edwin Markham 18 (Charles L. Wallis ed., Harper & Bros., 1950) (1913).

67. *Máscaras, Trenzas, y Greñas*

(Un)Masking the Self While (Un)Braiding Latina Stories and Legal Discourse

MARGARET E. MONTOYA

One of the earliest memories from my school years is of my mother braiding my hair, making my *trenzas.* In 1955, I was seven years old. I was in second grade at the Immaculate Conception School in Las Vegas, New Mexico. Our family home with its outdoor toilet was on an unpaved street, one house from the railroad tracks. I remember falling asleep to the earthshaking rumble of the trains.

My sister and I dressed in front of the space heater in the bedroom we shared with my older brother. Catholic school girls wore uniforms. We wore blue jumpers and white blouses. I remember my mother braiding my hair and my sister's. I can still feel the part she would draw with the point of the comb. She would begin at the top of my head, pressing as she drew the comb down to the nape of my neck. "Don't move," she'd say as she held the two hanks of hair, checking to make sure that the part was straight. Only then would she begin, braiding as tightly as our squirming would allow, so the braids could withstand our running, jumping, and hanging from the monkey bars at recess. "I don't want you to look *greñudas* [uncombed]," my mother would say.

My mother's use of both English and Spanish gave emphasis to what she was saying. She used Spanish to talk about what was really important: her feelings, her doubts, her worries.[1] She also talked to us in Spanish about gringos, Mexicanos, and the relations between them. Her stories were sometimes about being treated outrageously by gringos, her anger controlled and her bitterness implicit. She also told stories about Anglos she admired—those who were egalitarian, smart, well spoken, and well mannered.

Sometimes Spanish was spoken so as not to be understood by Them. Usually, though, Spanish and English were woven together. *Greñuda* was one of many words encoded with familial and cultural meaning. My mother used the word to admonish us, but she wasn't warning us about name-calling: *Greñuda* was not an epithet that our schoolmates were likely to use. Instead, I heard my mother saying something that went beyond well-groomed hair and being judged by our appearance—she could offer strategies for passing *that* scrutiny. She used the Spanish word partly because there is no precise English equivalent but also because she was interpreting the world for us.

A version of this chapter previously appeared as Margaret E. Montoya, Máscaras, Trenzas, y Greñas: *Un/masking the Self While Un/braiding Latina Stories and Legal Discourse*, 15 Chicano-Latino L. Rev. 1 (1994). Originally published in the *Chicano-Latino Law Review*. The title translates to "Masks, braids, and uncombed, messy hair."

The real message of *greñudas* was conveyed through the use of the Spanish word—it was unspoken and subtextual. She was teaching us that our world was divided, that They-Who-Don't-Speak-Spanish would see us as different, would judge us, would find us lacking. Her lessons about combing, washing, and doing homework frequently relayed a deeper message: Be prepared, because you will be judged by your skin color, your name, your accent. They will see you as ugly, lazy, dumb, and dirty.

As I put on my uniform and as my mother braided my hair, I changed; I became my public self. My *trenzas* announced that I was clean and well cared for at home. My *trenzas* and school uniform blurred the differences between my family's economic and cultural circumstances and those of the more economically comfortable Anglo students. I welcomed the braids and uniform as a disguise that concealed my minimal wardrobe and the relative poverty in which my family lived.

As we walked to school, away from home, away from the unpaved streets, away from the Spanish and toward the Anglo part of town, I felt both drawn to and repelled by my strange surroundings. I wondered what Anglos were like in their big houses. What did they eat? How did they furnish their homes? How did they pass the time? Did my English sound like theirs? Surely their closets were filled with dresses, sweaters and shoes, *apenas estrenados* (hardly worn).

I remember being called on one afternoon in second grade to describe what we had eaten for lunch. Rather than admit to eating *caldito* (soup) *y tortillas*,[2] partly because I had no English words for those foods, I regaled the class with a story about what I assumed an American family would eat at lunch: pork chops, mashed potatoes, green salad, sliced bread, and apple pie. The nun reported to my mother that I had lied. Afraid of being mocked, I had unsuccessfully masked the truth and consequently revealed more about myself than I concealed.

Our school was well integrated because it was located in a part of town with a predominantly Latino population. The culture of the school, however, was overwhelmingly Anglo and middle class. The use of Spanish was frowned on and occasionally punished. Any trace of an accent when speaking English would be pointed out and sarcastically mocked. This mocking persisted even though, and maybe because, some of the nuns were also "Spanish."[3]

By age seven I was keenly aware that I lived in a society that had little room for those who were poor, brown, or female. I was all three. I moved between dualized worlds: private-public, Catholic-secular, poverty-privilege, Latina-Anglo. My *trenzas* and school uniform were a cultural disguise. They were also a precursor for the more elaborate mask I would later develop.

Presenting an acceptable face, speaking without a Spanish accent, hiding what we really felt—masking our inner selves—were defenses against racism passed on to us by our parents to help us get along in school and in society. We learned that it was safer to be inscrutable. We absorbed the necessity of constructing and maintaining a disguise for use in public. We struggled to be seen as Mexican but also wanted acceptance as Americans at a time when the mental image conjured up by that word included only Anglos.

Mine is the first generation of Latinas to be represented in colleges and universities in anything approaching significant numbers. We are now represented in virtually every college and university. But for the most part, we find ourselves isolated. Rarely has

another Latina gone before us. Rarely is there another Latina whom we can watch to try and figure out all the little questions about subtextual meaning, about how dress or speech or makeup is interpreted in this particular environment.

My participation in the Chicano student movement in college fundamentally changed me. My adoption of the ethnic label as a primary identifier gave me an ideological mask that serves to this day. This transformation of my public persona was psychically liberating. This nascent liberation was, however, reactive and inchoate. Even as I struggled to redefine myself, I was locked in a reluctant embrace with those whose definitions of me I was trying to shrug off.

When I arrived as a student at Harvard Law School, I dressed so as to proclaim my politics. During my first day of orientation, I wore a Mexican peasant blouse and cutoff jeans on which I had embroidered the Chicano symbol of the *aguila* (a stylized eagle) on one seat pocket and the woman symbol on the other. The *aguila* reminded me of the red and black flags of the United Farm Worker rallies; it reminded me that I had links to a particular community. I was never to finish the fill-in stitches in the woman symbol. My symbols, like my struggles, were ambiguous. The separation of the two symbols reminds me today that my participation in the Chicano movement had been limited by my gender, while in the women's movement it had been limited by my ethnicity. I drew power from both movements—I identified with both—but I knew that I was at the margin of each. As time went on, my clothes lost their political distinctiveness. My clothes signified my ambivalence: Perhaps if I dressed like a lawyer, eventually I would acquire more conventional ideas and ideals and fit in with my peers. Or perhaps if I dressed like a lawyer, I could harbor for some future use the disruptive and, at times, unwelcome thoughts that entered my head. My clothing would become protective coloration. Chameleon-like, I would dress to fade into the ideological, political, and cultural background rather than proclaim my differences.

Máscaras and Latina Assimilation

For stigmatized groups, such as persons of color, the poor, women, gays, and lesbians, assuming a mask is comparable to being onstage. A feeling of being onstage is frequently experienced as being acutely aware of one's words, affect, tone of voice, movements, and gestures because they seem out of sync with what one is feeling and thinking. At unexpected moments, we fear that we will be discovered to be someone or something other than who or what we pretend to be. Lurking just behind our carefully constructed disguises and lodged within us is the child whom no one would have mistaken for anything other than what she was. Her masking was yet imperfect, still in rehearsal, and at times unnecessary.

For Outsiders, being masked in the legal profession has psychological as well as ideological consequences. We have not only the perception of being onstage but also, possibly, schizoid feelings, induced by the experience of class jumping—being born poor but later living on the privileged side of the economic divide as an adult. As first-year law students don their three-piece suits, they make manifest the class ascendancy implicit in legal education. Most Latinas/os in the legal profession now occupy an economic niche considerably higher than that of our parents, our relatives, and frequently that of our students. Our speech, clothes, cars, homes, and lifestyle emphasize this difference.

The masks we choose can impede our legal representation and advocacy by driving a wedge between self, our *familias*, and our communities. As our economic security increases, we escape the choicelessness and lack of control over vital decisions that afflict communities of color. To remain connected to the community requires one to be Janus-faced, not in the conventional meaning of being deceitful but in having two faces and being able to simultaneously present one face to the larger society and another among ourselves. One face is the adult face that allows us to make our way through the labyrinth of the dominant culture. The other, the face of the child, is one of difference, free of artifice. This image with its dichotomized character fails to capture the multiplicity, fluidity, and interchangeability of faces, masks, and identities on which we rely.

Masking Within the Legal Environment

The legal profession provides ample opportunity for role-playing, drama, storytelling, and posturing. Researchers have studied the use of masks and other theatrical devices among practicing lawyers and in the law school environment. Mask imagery has been used repeatedly to describe different aspects of legal education, lawyering, and lawmaking. One distinctive example is the analysis by John T. Noonan, Jr., exposing the purposeful ambiguity and the duplicity of legal discourse.[4]

Some law students are undoubtedly attracted to the profession by the opportunity to disguise themselves and have no desire or need to look for their hidden selves. Some, however, may resent the role-playing they know to be necessary to succeed in their studies and in their relations with professors and peers. Understanding how and why we mask ourselves can help provide opportunities for students to explore their public and private personalities and to give expression to their feelings.

(Un)Masking Silence

My memories from law school begin with the first case I ever read in criminal law. I was assigned to seat number one in a room that held 175 students.

The case was *The People of the State of California v. Josefina Chavez*.[5] It was the only case in which I remember encountering a Latina, and she was the defendant in a manslaughter prosecution. In *Chavez*, a young woman gave birth one night over the toilet in her mother's home without waking her child, brothers, sisters, or mother. The baby dropped into the toilet. Josefina cut the umbilical cord with a razor blade. She recovered the body of the baby, wrapped it in newspaper, and hid it under the bathtub. She ran away but later turned herself in to her probation officer.

The legal issue was whether the baby had been born alive for purposes of the California manslaughter statute: If born alive, it was subject to being killed. The class wrestled with what it meant to be alive in legal terms. Had the lungs filled with air? Had the heart pumped blood?

For two days I sat mute, transfixed while the professor and the students debated the issue. Finally, on the third day, I timidly raised my hand. I heard myself blurt out, "What about the other facts? What about her youth, her poverty, her fear over the pregnancy, her delivery in silence?" I spoke for perhaps two minutes, and, when I finished, my voice was high-pitched and anxious.

An African American student in the back of the room punctuated my comments with "Hear! Hear!" Later other students thanked me for speaking up and in other ways showed their support.

I sat there after class had ended, in seat number one on day number three, wondering why it had been so hard to speak. Only later would I begin to wonder whether I would ever develop the mental acuity, the logical clarity to be able to sort out the legally relevant facts from what others deemed sociological factoids. Why *did* the facts relating to the girl-woman's reality go unvoiced? Why were her life, her anguish, her fears rendered irrelevant? Engaging in analyses about the law, her behavior, and her guilt demanded that I disembody Josefina, that I silence her reality that screamed in my head.

A discussion raising questions about the gender-, class-, and ethnicity-based interpretations in the opinion, however, would have run counter to traditional legal discourse. Interjecting information about the material realities and cultural context of a poor Latina's life introduces taboo information into the classroom. Such information would transgress the prevalent ideological discourse. The puritanical and elitist protocol governing the classroom, especially during the 1970s, supported the notion that one's right to a seat in the law school classroom could be brought into question if one were to admit knowing about the details of pregnancies and self-abortions or the hidden motivations of a *pachuca* (or a *chola*, a "homegirl," in today's Latino gang parlance). By overtly linking oneself to the life experiences of poor women, especially *pachucas*, one would emphasize one's differences from those who seemed to have been admitted to law school by birthright.

Information about the cultural context of Josefina Chavez's life would also transgress the linguistic discourse within the classroom. One would find it useful, and perhaps necessary, to use Spanish words and concepts to accurately describe and contextualize Josefina Chavez's experience. In the 1970s, however, Spanish was still the language of Speedy Gonzales, José Jimenez, and other racist parodies.

To this day, I have dozens of questions about this episode in Josefina Chavez's life. I yearn to read an appellate opinion that reflects a sensitivity to her story, told in her own words. What did it take to conceal her pregnancy from her *familia*? With whom did she share her secret? How could she have given birth with "the doors open and no lights . . . turned on"? How did she do so without waking the others in the house? How did she brace herself as she delivered the baby into the toilet? Did she shake as she cut the umbilical cord?

I long to hear Josefina Chavez's story told in what I call mothertalk and Latina-daughtertalk. Mothertalk is about the blood and mess of menstruation, about the every monthness of periods or about the fear in the pit of the stomach and the fear in the heart when there is no period. Mothertalk is about the blood and mess of pregnancy, about placentas, umbilical cords, and stitches. Mothertalk is about sex and its effects. Mothertalk helps make sense of our questions: How does one give birth in darkness and in silence? How does one clean oneself after giving birth? How does one heal oneself? Where does one hide from oneself after seeing one's dead baby in a toilet?

Latina-daughtertalk is about feelings reflecting the deeply ingrained cultural values of Latino families: in this context, feelings of *vergüenza de sexualidad* ("sexual shame"). Sexual experience comes enshrouded in sexual shame; have sex and you risk being known as *sinvergüenza*, "shameless." Another Latina-daughtertalk value is *respeto a la*

mama y respeto a la familia. *Familias* are not nuclear or limited by blood ties; they are extended, often including foster siblings and *comadres y compadres*, *madrinas y padrinos* (godmothers, godfathers, and other religion-linked relatives).

Josefina Chavez's need to hide her pregnancy (with her head-to-toe mask) can be explained by a concern about the legal consequences as well as by the *vergüenza* within and of her *familia* that would accompany the discovery of the pregnancy, a pregnancy that was at once proof and reproof of her sexuality. Josefina's unwanted pregnancy would likely have been interpreted within her community and her *familia* and by her mother as a lack of *respeto*.

I sense that students still feel vulnerable when they reveal explicitly gendered or class-based knowledge, such as information about illicit sexuality and its effects or personal knowledge about the lives of the poor and the subordinated. Even today there is little opportunity to use Spanish words or concepts within the legal academy. Students respond to their feelings of vulnerability by remaining silent about these taboo areas of knowledge.

The silence had profound consequences for me and presumably for others who identified with Josefina Chavez because she was Latina, or because she was female, or because she was poor. For me, the silence invalidated my experience. I reexperienced the longing I felt that day in criminal law class many times. At the bottom of that longing was a desire to be recognized, a need to feel some reciprocity. As I engaged in his/their reality, I needed to feel him/them engage in mine.

Embedded in Josefina Chavez's experience are lessons about criminal law specifically and about the law and its effects more generally. The opinion's characteristic avoidance of context and obfuscation of important class- and gender-based assumptions is equally important to the ideological socialization and doctrinal development of law students. Maintaining a silence about *Chavez*'s ethnic and socioeconomic context lends credence to the prevailing perception that there is only one relevant reality.

Over time, I figured out that my interpretations of the facts in legal opinions were at odds with the prevailing discourse in the classroom, regardless of the subject matter. Much of the discussion assumed that we all shared common life experiences. I remember sitting in tax class in the last row and being called on, questioned about a case involving the liability of a father for a gift of detached and negotiable bond coupons to his son. It was clear that I was befuddled by the facts of the case. Looking at his notes on the table, the professor asked with annoyance whether I had ever seen a bond. My voice quivering, I answered that I had not. His head shot up in surprise. He focused on who I was; I waited, unmasked. He became visibly flustered as he carefully described the bond with its tear-off coupons to me. Finally, he tossed me an easy question, and I choked out the answer.

This was one instance of feeling publicly unmasked. In this case, it was class-based ignorance that caused my masks to slip. Other students may also have lacked knowledge about bonds. Maybe other students, especially those from families with little money and certainly no trust funds, stocks, or bonds, also would have felt unmasked by the questioning. But I felt isolated and different because I could be exposed in so many ways: through class, ethnicity, race, gender, and the subtleties of language, dress, makeup, voice, and accent.

For multiple and overlapping reasons I felt excluded from the experiences of others, experiences that provided them with knowledge that better equipped them for the study of the law, especially within the upper-class domain that is Harvard. Not knowing about bonds linked the complexities of class jumping with the fearful certainty that, in the eyes of some, and most painfully in my own (my mother's) eyes, I would be seen as *greñuda*: dirty, ugly, dumb, and uncombed.

It was not possible for me to guard against the unexpected visibility—or, paradoxically, the invisibility—caused by class, gender, or ethnic differences that lurked in the materials we studied. Such issues were, after all, pervasive, and I was very sensitive to them.

Sitting in the cavernous classrooms at Harvard under the stern gaze of patrician jurists[6] was an emotionally wrenching experience. I remember the day one of the students was called on to explain *Erie v. Tompkins*.[7] His identification of the salient facts, his articulation of the major and minor issues, and his synopsis of the Court's reasoning were so precise and concise that it left a hush in the room. He had already achieved and was able to model for the rest of us the objectivity, clarity, and mental acuity that we aspired to.

The respect shown for this type of analysis was qualitatively different from that shown for contextual or cultural analysis. Such occurrences in the classroom were memorable because they were defining: Rational objectivity trumped emotional subjectivity. What They had to say trumped what I wanted to say but rarely did.

I have no memory of ever speaking out again to explain facts from my perspective as I had done that one day in criminal law. There was to be only one Latina in any of my cases, only one Josefina. While I was at Harvard, my voice was not heard again in the classroom examining, exploring, or explaining the life situations of either defendants or victims. Silence accommodated the ideological uniformity but also revealed the inauthenticity implicit in discursive assimilation.

As time went on, I felt diminished and irrelevant. It wasn't any one discussion, any one class, or any one professor. The pervasiveness of the ideology marginalized me, and others; its efficacy depended on its subtextual nature, and this masked quality made it difficult to pinpoint.

I had arrived at Harvard feeling different. I understood difference to be ineluctably linked with, and limited to, race, class, and gender.[8] The kernel of that feeling I first associated with Josefina Chavez, that scrim of silence, remains within me. It is still my experience that issues of race, ethnicity, gender, or class are invisible to most of my white or male colleagues. Issues of sexual orientation, able-bodiedness, and sometimes class privilege can be invisible to me. I still make conscious choices about when to connect such issues to the topic at hand and when to remain silent. I'm still unclear about strategies and tactics, about being frontal or oblique.

Issues of race or gender are never trivial or banal from my perspective. Knowing how or when to assert them effectively as others react with hostility, boredom, or weariness can be a crazy-making endeavor. Sometimes it seems that every interaction requires that I overlook the terms of the discourse or that I affirmatively redefine them. My truths require that I say unconventional things in unconventional ways.

Speaking out assumes prerogative. Speaking out is an exercise of privilege. Speaking out takes practice.

Silence ensures invisibility. Silence provides protection. Silence masks.

Trenzas: Braiding Latina Narrative

The law and its practice are grounded in the telling of stories. Pleadings and judicial orders can be characterized as stylized stories. Legal persuasion in the form of opening statements and closing arguments is routinely taught as an exercise in storytelling. Client interviews are storytelling and story-listening events. Traditionally, legal culture within law firms, law schools, and courthouses has been transmitted through the war stories told by seasoned attorneys. Narrative laces through all aspects of legal education, legal practice, and legal culture. Narrative is not new to the legal academy.

Only recently, however, has storytelling begun to play a significant role in academic legal writing. In the hands of Outsiders, storytelling seeks to subvert the dominant ideology. Stories told by those on the bottom, told from the subversive-subaltern perspective, challenge and expose the hierarchical and patriarchal order that exists within the legal academy and pervades the larger society.[9] Narrative that focuses on the experiences of Outsiders thus empowers both the storyteller and the story-listener by virtue of its opposition to the traditional forms of discourse.

Understanding stories told from different cultural perspectives requires that we suspend our notions of temporal and spatial continuity, plot, climax, and the interplay of narrator and protagonists. The telling of and listening to stories in a multicultural environment requires a fundamental reexamination of the text, the subtext, and the context of stories. The emphasis of critical scholarship (critical race theory, feminist jurisprudence, critical legal studies) on narrative affirms those of us who are Outsiders working within the objectivist orientation of the legal academy and validates our experimentation with innovative formats and themes in our teaching and in our scholarship.

Greñas: (Un)Braiding Latina Narrative

The Euro-American conquest of the Southwest and Puerto Rico resulted in informal and formal prohibitions against the use of Spanish for public purposes. So by situating myself in legal scholarship as *mestiza*, I seek to occupy common ground with Latinas/os in this hemisphere and others, wherever located, who are challenging "Western bourgeois ideology and hegemonic racialism with the metaphor of transculturation."[10]

As Latinas/os we, like many colonized peoples around the globe, are the biological descendants of both indigenous and European ancestors, as well as the intellectual progeny of Western and indigenous thinkers and writers. As evidenced by my names, I am the result of Mexican-Indian-Irish-French relations. I am also the product of English-speaking schools and a Spanish-speaking community. Making manifest our mixed intellectual and linguistic heritage can counteract the subordinating forces implicit in the monolinguality and homogeneity of the dominant culture. While I reject the idea that personal narratives can or should be generalized into grand or universalistic theories, our stories can help us search for unifying identifiers and mutual objectives. For example, the deracination of language purges words of their embedded racism, sexism, and other biases.

Using Spanish (or other outlaw languages, dialects, or patois) in legal scholarship could be seen as an attempt to erect linguistic barriers or create exclusionary discursive spaces, even among Outsiders with whom Latinas share mutual ideological, political,

and pedagogical objectives. Personal accounts of humiliation, bias, or deprivation told from within the academy may sound to some like whining or may be perceived as excessive involvement with the self rather than with the real needs of the Outsider communities. As I have argued, this view would be seriously wrong. Instead, linguistic diversity should be recognized as enhancing the dialogue within the academy by bringing in new voices and fresh perspectives. Incorporating Spanish words, sayings, literature, and wisdom can have positive ramifications for those in the academy and in the profession and for those to whom we render legal services.

NOTES

1. My mother, like most bilingual Latinas or Latinos, moved between English and Spanish in the same sentence. This type of language mixing has been dismissed as Tex-Mex or Spanglish. Analyses of this code switching have revealed that it is linguistically competent. See Rodolfo Jacobson, *The Social Implications of Intra-Sentential Code-Switching,* in New Directions in Chicano Scholarship 227, 240–41 (Richard Romo & Raymond Paredes eds., 1978) (observing that such code mixing is linked to psychological and sociological cues; for instance, some speakers switch to the stronger language when the topic relates to emotional issues and back to the other language when the conversation returns to general topics).

2. George Sanchez, *"Go After the Women": Americanization and the Mexican Immigrant Woman, 1915–1929* (1984) (unpublished manuscript, SCCR Working Paper No. 6, on file with the Stanford Center for Chicano Research), describes programs aimed at Mexican women established during the period 1915–1929 for the purpose of changing the cultural values of immigrant families. Two particular areas of focus were diet and health.

> In the eyes of reformers, the typical noon lunch of the Mexican child, thought to consist of a "folded tortilla with no filling," became the first step in a life of crime. With "no milk or fruit to whet the appetite" the child would become lazy and subsequently "take food from the lunch boxes of more fortunate children" in order to appease his/her hunger. "Thus," reformers alleged, "the initial step in a life of thieving is taken." Teaching immigrant women proper food values would keep the head of the family out of jail, the rest of the family off the charity lists, and save the taxpayers a great amount of money.

Id. at 17 (quoting Pearl Idelia Ellis, Americanization Through Homemaking 19–29 (1929)).

3. For analyses of the internalization of colonization, see, e.g., Frantz Fanon, Black Skin, White Masks (1967); Antonio Gramsci, in 2 Letters from Prison (Frank Rosengarten ed., Raymond Rosenthal trans., 1994); Albert Memmi, The Colonizer and the Colonized (1965).

4. In 1971, John T. Noonan, Jr., criticized law's emphasis on rationalized rules and the duplicity of legal language; he described the fictions employed by Holmes, Cardozo, and other famous judges and lawyers to suppress the humanity of those acting (e.g., "sovereign") or those being acted upon (e.g., "property" for slaves). Noonan's purposes were to show the dangers inherent in a system that fails to acknowledge human identity and to free the language of law from the masks and legal fictions that deny the humanity of different groups in society. See John T. Noonan, Jr., Persons and Masks of the Law (1976).

5. People v. Chavez, 176 P.2d 92 (Cal. App. 1947).

6. The classrooms at Harvard Law School feature large portraits of famous judges. Until the early 1990s all the paintings were of white men.

7. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

8. Learning about the varied experiences of students who had initially seemed to fit neatly into Us and Them categories was one of the profound lessons of law school. My life eventually was transformed by students of color from economically privileged backgrounds, self-described poor farm boys from Minnesota, the Irish daughters of Dorchester, and the courage of a student with cerebral palsy. These and other students challenged the categories into which I forced my world.

9. By displacing the more usual forms of academic writing on which the dominant order relies, Outsider stories work a formal as well as a substantive subversion. See Anne Dipardo, Narrative Knowers, Expository Knowledge: Discourse as a Dialectic 7 (Center for the Study of Writing, Occasional Paper No. 6, 1989) (reference omitted):

> While classical tradition bestowed preeminence on logical thought and the scientific revolution brought new prestige to empirically discerned fact, a different tradition sees storytelling as a vehicle for an equally rich, distinctly valuable sort of knowledge—indeed, the word "narrative" is derived from the Latin *gnarus*, denoting "knowing" or "expert."

10. Francoise Lionnet, Autobiographical Voices: Race, Gender, Self-Portraiture 15–16 (1989) (translating the Cuban poet Nancy Morejaeon).

68. Converging Stereotypes in Racialized Sexual Harassment

Where the Model Minority Meets Suzie Wong

SUMI K. CHO

> *I'll get right to the point, since the objective is to give you, in writing, a clear description of what I desire. . . . Shave between your legs, with an electric razor, and then a hand razor to ensure it is very smooth. . . .*
>
> *I want to take you out to an underground nightclub . . . like this, to enjoy your presence, envious eyes, to touch you in public. . . . You will obey me and refuse me nothing. . . .*
>
> *I believe these games are dangerous because they bring us closer together, yet at the same time I am going to be more honest about the past and present relationships I have. I don't want you to get any idea that I am devoting myself only to you—I want my freedom here. . . . The only positive thing I can say about this is I was dreaming of your possible Tokyo persona since I met you. I hope I can experience it now, the beauty and eroticism.*[1]

The preceding passage comes from a letter written by a white male professor to a Japanese female student at a major university. The more unsavory details referring to physical specifications and particularly demeaning and sadistic demands by the professor have been redacted. In her complaint against him, the student stated that the faculty member "sought out Japanese women in particular" and "uses his position as a university professor to impress and seduce Japanese women." The professor had a history of targeting Japanese women because "he believes they are submissive and will obey any parameters he sets for the relationship." According to the student's complaint, "He said that he wants sex slaves, that he considers and treats women as disposable. . . . He rarely takes precautions in a sexual relationship."[2]

Another Japanese female student and former officer of a campus Japanese student organization testified in support of the student's complaint that the same professor had approached her outside a convenience store near the campus and asked for her phone number, stating that he was interested in meeting Japanese women. The student

A version of this chapter previously appeared as Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. Gender Race & Just. 177 (1997). Originally published in the *Journal of Gender, Race and Justice*.

explained that she gave him her number "because I was the vice-president [of the Japanese student organization] and felt I should be gracious." Through the course of their conversations, the professor told the student that he "hangs around campus looking for Japanese girls" and asked "where [he] could meet them." He told her that "he was not popular in high school and college." However, "when he went to Japan he found out that he was popular" and was now "making up for lost time." The professor told the student that "[h]e liked Japanese females because they were easy to have sex with and because they were submissive."[3]

I have long been haunted by this case, which was unsuccessfully resolved because of the effective intimidation of the courageous student and those who sought redress. Victims of sexual harassment often fear coming forward precisely because of the type of administrative, legal, and community discouragement and intimidation that constituted the "secondary injury"[4] in this case. Here, the secondary injury was inflicted by the university's affirmative action office, which claimed to find no evidence of an actionable claim worth investigation; by the self-proclaimed "feminist law firm" that defended the predator-professor; and by the university attorney, who bolstered the intimidatory tactics of the professor's lawyer.

Converging Stereotypes and the Power Complex

Asian Pacific American women are at particular risk of being racially and sexually harassed because of the convergence of race and gender that produces sexualized racial stereotypes and racialized gender stereotypes. To understand the particular risks that such stereotypes pose to these women, one must grasp the social construction of Asian Pacific American women in the United States.

Before 1965, immigration laws discriminated both racially and on the basis of gender. The racial economy of pre–civil rights America preferred a bachelor society of single Asian men, who proved to be a source of cheap, vulnerable labor. This preference resulted in the creation of a yellow proletariat that helped keep wages low and served as a convenient scapegoat for the socioeconomic dislocations of an industrializing society.

This bachelor society led to the importation of Asian women as prostitutes. Because many Chinese prostitutes in California during the nineteenth century were *mui jai*, or indentured servants, and were perceived as hyperdegraded, they were favorite subjects for white female missionaries' rescue crusades, as well as for nativist politicians' justifications for restricting and excluding Chinese immigration. Sensational newspaper headlines reflected widespread images of Asian Pacific American women as the abused chattel of brutal Chinese proprietors, which effectively combined the racialized narrative of a harsh, heathen, and unassimilable Chinese culture with a gendered one of sexual slavery. Historical stereotypes of Chinese prostitutes, metaphorized as lotus blossoms, would remain intact in subsequent reformulations of Asian Pacific American women's identity. The domesticated lotus-blossom version of Asian female identity, however, coexisted with the foreign counterpoint known as the dragon lady—a conniving, predatory force who travels as a partner in crime with men of her own kind. These two Asian female identities covered the range of behavior from tragically passive to demonically aggressive, in one-dimensional and stereotypical forms.

The civil rights movement in the 1950s and 1960s changed popular stereotypes of Asian Pacific Americans. The model minority myth developed in the mid-1960s provided a counterexample to politically active African Americans. A much criticized racial stereotype of Asian Pacific Americans, this myth painted a misleading portrait of groupwide economic, educational, and professional supersuccess, as well as fostering images of political passivity and submissiveness to authority. But despite much writing by Asian Pacific Americans on the model minority stereotype, few have theorized how it specifically relates to Asian Pacific American women.

The stereotype of obedient and servile Asian Pacific women in popular culture is depicted, for example, in "China Girl," an episode from the 1978–1979 television series *How the West Was Won*. The opening sequence was narrated in a docu-fiction voice-of-God style:

> Of all the immigrants for whom America eventually became a permanent home, perhaps none were so manipulated, or suffered as many indignities, as the Chinese. Though 12,000 of them built the western half of the transcontinental railroad, they were not permitted to become citizens of this country, and they had no rights whatsoever. They could not even testify against a white man in court. *And seven years after the Emancipation Proclamation freed Black slaves, naked Chinese girls were being sold at auction to their own countrymen on the streets of San Francisco.* But with famines sweeping China still they came [by the] thousands seeking food for their bellies and hope for the future. In the beginning, they often labored sixteen hours a day for as little as twenty cents. But they somehow survived these hardships to become a vital part of a growing America as one of the finest and proudest chronicles in the history of the West.[5]

This episode embodies the key features of model minority texts: (1) Asian Pacific American political subjugation, (2) comparison to African Americans, and (3) eventual success through perseverance and compatibility with the Protestant work ethic. To the extent that it suggests that Chinese culture was somehow uniquely patriarchal, this passage is unremarkable as a racialized popular cultural form displaying an enlightened, albeit hypocritical, Western attitude toward Chinese culture. Note, also, its implicit characterization of Asian women as subordinate to whites because of their race and enslaved to Chinese men because of their gender. In this way, the model minority figure integrates the historical depiction of the dually subjugated Asian woman with the larger narrative of assimilationist success, to create "one of the finest and proudest chronicles in the history of the West."

Similarly, the process of objectification that women in general experience takes on a particular virulence with the overlay of race on gender stereotypes. Generally, objectification diminishes the contributions of all women, reducing their worth to male perceptions of female sexuality. In the workplace, objectification comes to mean that the value of women's contributions will be based not on their professional accomplishments or work performance but on male perceptions of their vulnerability to harassment. Asian Pacific women suffer greater harassment exposure because of racialized ascriptions (for example, they are exotic, hypereroticized, masochistic, desirous of sexual domination,

etc.) that set them up as ideal gratifiers of Western neocolonial libidinal formations. In a 1990 *Gentleman's Quarterly* article, "Oriental Girls," Tony Rivers rehearsed the racialized particulars of the "great western male fantasy":

> Her face—round like a child's, . . . eyes almond-shaped for mystery, black for suffering, wide-spaced for innocence, high cheekbones swelling like bruises, cherry lips.
>
> When you get home from another hard day on the planet, she comes into existence, removes your clothes, bathes you and walks naked on your back to relax you. . . . She's fun, you see, and so uncomplicated. She doesn't go to assertiveness-training classes, insist on being treated like a person, fret about career moves, wield her orgasm as a non-negotiable demand. . . .
>
> She's there when you need shore leave from those angry feminist seas. She's a handy victim of love or a symbol of the rape of third world nations, a real trouper.[6]

As the passage demonstrates, Asian Pacific women are particularly valued in a sexist society because they provide the antidote to visions of liberated career women who challenge the objectification of women. In this sense, this gender stereotype also assumes a model minority function, for it deploys this idea of Asian Pacific women to discipline white women, just as Asian Pacific Americans in general are frequently used in negative comparisons with their nonmodel counterparts, African Americans.

The passage is also a telling illustration of how colonial and military domination are interwoven with sexual domination to create the "great western male fantasy."[7] Military involvement in Asia, colonial and neocolonial history, and the derivative Asian Pacific sex tourism industry have established power relations between Asia and the West that in turn have shaped stereotypes of Asian Pacific women. Through mass media and popular culture, these stereotypes are internationally transferred so that they apply to women both in and out of Asia. Rivers suggests that the celluloid prototype of the "Hong Kong hooker with a heart of gold" (from the 1960 film *The World of Suzie Wong*) may be available in one's own hometown: "Suzie Wong was the originator of the modern fantasy. . . . Perhaps even now, . . . on the edge of a small town, Suzie awaits a call."[8] These internationalized stereotypes, combined with the inability of U.S. Americans to distinguish between Asian Pacific foreigners and Asian Pacific Americans, result in a globalized dimension to the social construction of Asian Pacific American women.

Given this cultural backdrop of converging racial and gender stereotypes, Asian Pacific American women are especially susceptible to racialized sexual harassment. The university, despite its image as an enlightened, genteel environment of egalitarianism, unfortunately is no different from other hostile work environments facing Asian Pacific American women. Consider now two cases in which Asian Pacific American women faculty were subjected to hostile environment and quid pro quo forms of harassment. Although racialized sexual harassment experienced by professionals should not be assumed to be identical to that facing women of color employed in blue- and pink-collar jobs, the social construction of the victims across settings may present an overarching commonality that allows for broader theoretical linkages.

The Jean Jew Case: Hostile Environment

Dr. Jean Jew came to the University of Iowa in 1973 from Tulane University. She was hired at the same time that another physician, who was also her mentor, was appointed chair of the anatomy department in the College of Medicine. Almost immediately, rumors began to circulate about an alleged sexual relationship between the two. These rumors would persist for the next thirteen years. Despite the increased number of incidents of harassment and vilification Dr. Jew experienced after joining the anatomy department, she was recommended for tenure by the department in December 1978. Her promotion, however, did not quiet her detractors. In a drunken outburst in 1979, for example, a senior member of the anatomy department referred to Dr. Jew as a "stupid slut," a "dumb bitch," and a "whore."[9] Dr. Jew and three other professors complained separately to the dean about the slurs.

Dr. Jew's tenure promotion not only failed to quiet her harassers but also apparently further fueled the rumor mill and provided colleagues with an opportunity to air personal grievances and exploit polarized departmental politics. Jean Jew was the only woman tenured in the College of Medicine's basic science departments and one of a few Asian Pacific American women among the University of Iowa faculty. In this homogenous setting, stereotypes flourished to such an extent that the faculty did not even recognize the difference between jokes and racial slurs. One faculty member who referred to Dr. Jew as a "chink" contended that he was merely "us[ing] the word in a very frivolous situation" and repeating a joke.[10] The model minority stereotype of competence and achievement fed existing insecurities and jealousies in a department that was already deeply polarized. In responding to these insecurities, a traditional gender stereotype informed by racialized ascriptions rebalanced the power relations. Gender stereotypes with racial overtones painted Dr. Jew as an undeserving Asian Pacific American woman who traded on her sexuality to get to the top. To Dr. Jew, this stereotyping and her refusal to accede to it played a large role in the no-win configuration of departmental power relations:

> If we act like the [passive] Singapore Girl, in the case of some professors, then they feel "she is [unequal to me]." If we don't act like the Singapore Girl, then [our] accomplishments must have derived from "a relationship with the chair." There were quite a few people that felt that way to begin with. They thought because I was working with the chair, I was his handmaiden. Many faculty testified that in inter-collaborative work, I was doing the work that led to publication but that he was the intellectual, with Jean Jew as his lackey. The term used was that I was the collaborative force, but not independent.[11]

Other colleagues also denigrated Dr. Jew. After he was denied tenure in 1991, one doctor filed a grievance with the university stating that his qualifications were better than those of Jew, who had been tenured. To support his case, the doctor submitted an anonymous letter to the dean, which claimed that Jew's promotion was because of her sexual relationship with the chair. The letter stated, in fortune-cookie style, "Basic science chairman cannot use state money to . . . pay for Chinese pussy."[12] Another doctor,

who wielded administrative responsibilities in the department, frequently posted, outside his office where students congregated, obscene *Playboy* magazine–type line drawings depicting a naked, copulating couple with handwritten comments referring to Dr. Jew and the department chair.[13] On the very day that the senior departmental faculty were to evaluate Jew for promotion to full professor, the following limerick appeared on the wall of the faculty men's restroom:

There was a professor of anatomy
Whose colleagues all thought he had a lobotomy
Apartments he had to rent
And his semen was all spent
On a colleague who did his microtomy.[14]

The faculty voted three in favor, five against Jean Jew's promotion, and she was denied full professorship.

The Rosalie Tung Case: Quid Pro Quo

Rosalie Tung joined the University of Pennsylvania Wharton School of Business in 1981 as an associate professor of management. In her early years at the business school, she earned praise for her performance. In the summer of 1983 a change in leadership brought a new dean and new department chair to the school. According to Tung, "Shortly after taking office, the chairman of the management department began to make sexual advances toward me."[15] In June 1984, the chair awarded Professor Tung a 20 percent increase in salary and praised her highly for her achievements in the areas of research, teaching, and community service.

However, when Tung came up for tenure review in the fall of 1984, the chair's evaluation of her performance changed dramatically. "After I made it clear to the chairman that I wanted our relationship kept on a professional basis," she stated, "he embarked on a ferocious campaign to destroy and defame me. He solicited more than 30 letters of recommendation from external and internal reviewers when the usual practice was for five or six."[16] Although a majority of the department faculty recommended tenure, the personnel committee denied Professor Tung's promotion. Contrary to the rules, the department chair deliberately withheld news of the decision for one week so that he could deliver it to Tung on Chinese New Year's Day. He offered no reason for her tenure denial. Tung later learned through a respected and well-placed member of the faculty that the justification given by the decision makers was that "the Wharton School is not interested in China-related research."[17] Tung understood this to mean that the business school did "not want a Chinese-American, Oriental" on their faculty. Of over sixty faculty in the management department, there were no tenured professors of color or tenured women. At the entire business school, which had over three hundred faculty, there were only two tenured people of color, both male.

Tung filed a complaint with the Equal Employment Opportunity Commission (EEOC) in Philadelphia alleging race, sex, and national-origin discrimination. She also filed a complaint with the university grievance commission. Tung's file and those of thirteen faculty who were granted tenure within the previous five years were turned over

to the grievance commission. During this process, the peer review files revealed that out of multiple batches of mailings, the department chair had arranged specifically to solicit negative letters—only three such letters were in her file—two of which were from the chair himself. One of the chair's negative letters was written only six months after his rave review in June 1984. Professor Tung's file constituted an impressive list of achievements, with over thirty letters consistently praising her as one of the best and brightest young scholars in her field, including one from a Nobel Prize laureate. Her peers had acknowledged her contributions by electing her to the board of governors of the Academy of Management, a professional association of over seven thousand management faculty. Tung was the first person of color ever elected to the board.

How the Convergence Shapes the Secondary Injury: The University Response

Following the denial of her application for full professorship in 1983, Dr. Jew registered a complaint of sexual harassment with the university affirmative action office, the Anatomy Review and Search Committee, and the university's academic affairs vice president. No action was taken on her complaint. In January 1984, her attorney, Carolyn Chalmers, submitted a formal written complaint alleging sexual harassment to the vice president. In response, the university appointed a panel to investigate Dr. Jew's charges. On November 27, 1984, the panel made four findings: (1) a pattern and practice of harassment existed, (2) defamatory statements were made by two members of the anatomy faculty, (3) there was inaction by the administration, and (4) there were resulting destructive effects on Dr. Jew's professional and personal reputation both locally and nationally. The panel recommended that the administration take immediate action to inform the department of their findings and that a "public statement [be] made on behalf of the University of Iowa."[18] The university took no meaningful action. In utter frustration at the university's unwillingness to correct the hostile work environment, Jew and Chalmers took the case to court.

Jean Jew's first suit in federal district court alleged that the University of Iowa failed to correct the hostile work environment from which she suffered. After fourteen days of testimony, Judge Vietor issued a ruling, finding that the University of Iowa had failed to respond to Jew's complaints that sexual bias played a significant role in her denial of promotion to full professor in 1983 and that four of the five professors who voted negatively on her promotion had displayed sexual bias. He ordered the university to promote Jew to full professor and awarded over $50,000 in back pay and benefits dating back to 1984. Jew also filed a defamation suit in state court in October 1985. The suit alleged that she was the victim of sexually based slander perpetrated by another member of her department. The six-woman, one-man jury unanimously found for Jew and awarded $5,000 in actual damages, and $30,000 in punitive damages.

One of the most disturbing aspects of the university's behavior in the Jew case was its attempt to use the defense of academic freedom as a shield for slanderous faculty comments and university inaction. The university attempted to dismiss Jew's complaint, arguing that the statements later found to amount to sex discrimination and sexual harassment were merely legitimate criticism and "speech protected from regulation by the First Amendment."[19] Thus, the university argued that it was under no obligation to

regulate speech privileged by the First Amendment's implied recognition of academic freedom.

Judge Vietor rejected the university's argument, and the university announced it would appeal. The Iowa Board of Regents governing the university provided the public rationale, stating that Vietor's decision made the university responsible "for policing the statements and behavior of faculty members in ways that appear inconsistent with academic life and constitutional protections."[20] "In an academic community, this is extremely disturbing," the statement continued. "The effect of chilling speech in a community dedicated to the free exchange of ideas and views—even unpleasant ones—requires that the board and the university pursue the matter further."[21]

Only when a storm of public criticism broke out did the university cut its losses and accept the verdict. It later came out that the University of Iowa had paid the legal expenses for the offending professor's defense in the defamation suit for over five years, as well as the $35,000 judgment entered against him by the court. One wonders to what extent the university's persistent litigiousness in the face of adverse administrative and legal findings reflects the prevalence of racial and sexual stereotypes, leading it to side with the harasser and formulate an aggressive legal strategy to bully a plaintiff perceived to be politically weak and passive.

In the Tung case, by contrast, following forty hours of hearings, the university grievance commission found that the university had discriminated against her. Despite a university administrative decision in her favor, the provost overseeing the matter chose to do nothing. Professor Tung suspects that race and gender stereotypes played a role in shaping the provost's inaction:

> [T]he provost, along with others in the university administration, felt that I, being an Asian, would be less likely to challenge the establishment, because Asians have traditionally not fought back. In other words, it was okay to discriminate against Asians, because they are passive; they take things quietly, and they will not fight back.[22]

Tung also noted the comments of one of her colleagues, who described her in a newspaper article as "elegant, timid, and not one of those loud-mouthed women on campus." Her colleague continued, "In other words, [Professor Tung was] the least likely person to kick over the tenure-review apple cart."[23]

Despite the university's nonresponse to its own internal committee's findings, Rosalie Tung pursued her EEOC claim. In its investigation, the EEOC subpoenaed her personnel file along with those of five male faculty members who had been granted tenure around the same time. The University of Pennsylvania refused to turn over the files, and the case, known as *University of Pennsylvania v. EEOC*, eventually reached the Supreme Court. Among its claims, the university asserted a First Amendment privilege of "academic freedom" as a defense to the subpoena. Rejecting those claims, the Court gave little weight to the university's assertion that compliance with the subpoena would violate its First Amendment rights. The unanimous decision in favor of Tung and the EEOC, by a conservative Rehnquist Court, set an important precedent in establishing baseline procedures for Title VII claims in academic employment. *University* of *Pennsylvania v. EEOC* represents the Court's willingness to alter (at least somewhat) its long-standing

tradition of absolute deference to higher education's decision-making processes in the face of allegations of egregious discrimination and harassment.

A Theory of Racialized Sexual Harassment

In light of converging racial and gender stereotypes of Asian Pacific American women as politically passive and sexually exotic and compliant (Suzie Wongs), serious attention must be given to the problem of racialized sexual harassment as illustrated by the two cases discussed. On a theoretical level, new frameworks that integrate race and gender should be developed to account for the multidimensional character of harassment that occurs and is challenged across races, social classes, and borders. The law's current dichotomous categorization of racial discrimination and sexual harassment (to name only two) as separate spheres of injury is inadequate. Both the *Jew* and *Tung* cases fall within the parameters of "usual" sexual harassment jurisprudence. *Tung* represents a case of sexual harassment in which the harassing party seeks to punish the would-be-victim for refusing his advances. Jew suffered from a more generalized form of sexual harassment, in which the harassing parties created a hostile work environment by repeated defamatory and gender-specific references designed to destroy her professional reputation. Both cases included injuries that became material when employment rights in the form of earned promotions were infringed.

However, both cases also contain elements of a unique form of injury that is not as readily captured in conventional terms. The specifically racialized feature of the injuries to Tung and Jew inheres in the harassers' and the institutions' processing of their victims as not only women but Asian Pacific American women. In both cases, racialized references were hostilely deployed against the women. In Tung's case, these include the chair's choice of Chinese New Year's Day to inform her of her denial and the explanation that Wharton was not interested in scholarship related to China. In Jew's case, repeated racial epithets and the use of fortune-cookie language to make insinuations about Jew's relationship to the chair were unambiguously racial.

Moreover, the *injuries* suffered by the women uniquely result from the synergy of race and gender. The injuries suffered by Tung and Jew materialized not only according to the set of abstract employment rights the law observes but also along the lines of their subjecthood as Asian Pacific American women. In both cases, harassers formulated their plans in full light of their advantages as white males vis-à-vis the Asian Pacific American women they targeted. To deter harassment such as this, the law should acknowledge the particular white male supremacist logic at work.

In a similar fashion, the law must incorporate a fuller conception of workplace power relations, so that the synergistic effects of race and gender are given the consideration they warrant. The behavior of the wrongdoers in these two cases was informed by a particular set of perceptions and preconceptions of the Asian Pacific American women involved. Both the isolation of the victims as Asian Pacific Americans and assumptions about their passivity led the wrongdoers to create a steamroller dynamic that was designed to further disadvantage and disempower their victims. These particularized forms of power imbalance, power deployment, and exploitation of stereotypes against women of color require a legal discourse that understands and addresses the unique subjecthoods of those it seeks to regulate and protect.

NOTES

1. This letter and other materials cited for this case are on file with the author, who is not at liberty to publicly disclose the sources related to this case.

2. Transcript of conversation with former vice president of Japanese student organization (on file with author).

3. *Id.*

4. See Martha Chamallas, *Jean Jew's Case: Resisting Sexual Harassment in the Academy*, 6 Yale J.L. & Feminism 71, 72 (1994) (identifying the "second injury" in her analysis of the Jew case as "the injury sexual harassment victims experience when they bring their claims to court").

5. See Darrell Hamamoto, Monitored Peril 43 (1994) (emphasis added).

6. Tony Rivers, *Oriental Girls*, Gentleman's Q. (Brit. ed.), Oct. 1990, at 158, 161, 163.

7. *Id.* at 158.

8. *Id.* at 163. Suzie Wong is the Hollywood prototype for the masochistic eroticism of Asian Pacific American women. In *The World of Suzie Wong*, Nancy Kwan portrays Suzie Wong, a prostitute who falls in love with a struggling American artist self-exiled in Hong Kong, played by William Holden. Suzie invites Holden's character to beat her so she can show her injuries to her Chinese girlfriends as a measure of his affection. In the final "love scene," Suzie pledges to stay with her American man until he says, "Suzie, go away." *The World of Suzie Wong* (Paramount Pictures, 1960).

9. Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment at 20, Jew v. University of Iowa, 749 F. Supp. 946 (S.D. Iowa 1990) (No. 86-169-D-2) (on file with Gender, Race, & Just.).

10. Jew v. University of Iowa, 749 F. Supp. 946, 949 (S.D. Iowa 1990).

11. Interview with Dr. Jean Jew in Berkeley, Cal. (Oct. 15, 1991), cited in Sumi Kae Cho, The Struggle for Asian American Civil Rights 40 (1992) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author) (citation omitted).

12. Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment at 19, Jew v. University of Iowa, 749 F. Supp. 946 (S.D. Iowa 1990) (No. 86-169-D-2). The harasser received his master's degree in physical education from the University of Iowa in 1960. He continued his education at Iowa and received his Ph.D. in physical education in 1967. He has neither an M.D. nor a Ph.D. in anatomy, unlike Dr. Jew.

13. *Jew*, 749 F. Supp. at 946, 949.

14. Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment at 6 of Timeline addendum, *Jew* (No. 86-169-D-2).

15. Out of three hundred faculty, for example, she was selected by her dean to represent the school at Harvard Business School's seventy-fifth anniversary in 1983. Rosalie Tung, Asian Americans Fighting Back, Speech at University of California, Berkeley (Apr. 1990), quoted in Rosalie Tung, *Tung Case Pries Open Secret Tenure Review*, Berkeley Graduate, Apr. 1991, at 12–13, 30–31 (copy and videotape of speech on file with author).

16. *Id.* at 12. According to Tung, the thirty letters were collected in batches. After an initial attempt to procure negative letters in the first set of letters, the chair mailed a second set of solicitations and then a third. *Id.*

17. University of Pa. v. EEOC, 493 U.S. 182, 185 (1990).

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69. Of Woman Born

Courage and Strength to Survive in the Maquiladoras of Reynosa and Río Bravo, Tamaulipas

ELVIA ROSALES ARRIOLA

As twenty-seven-year-old María Elena García Sierra pulled off her white socks to show me the recurring infection on her feet that had begun when she was seventeen, I struggled to contain my horror. I fumbled with a video camera to record the scars. Pointing to the injured areas, she continued speaking of her life as a maquiladora worker, which started with her first job, at age fifteen with Hamill de Mexico (now TRW). That job ended two years later because of the infection. "I can never wear open shoes, and in hot weather I must have on cotton socks to prevent the humidity from encouraging the fungus to reappear," she said. She pointed to dark scar tissue, mostly on the upper side of her feet, old scratch marks and evidence of once-ruptured skin, and what she referred to as remaining signs from a year-long period when her feet had first developed an unexplainable fungus and infection that had broken and rotted the skin so badly "that my own brothers and sisters would tell me to stay away from them because of the awful smell."

The doctors advised her that if she did not find a remedy and did not stop working in the environment that had contributed to the infection, she would lose her feet to gangrene. Her mother told her, "[A]lthough I appreciate the help from your working, I don't want you to lose your feet." So María Elena quit her job at Hamill, where for two years she had assembled the locking mechanism for thousands of automobile seatbelts. During that time she had been exposed to fine dust particles that covered her arms, hands, and exposed upper feet and caused this mysterious condition that to this date, she claims, has no known permanent cure. Only after months of home remedies and rest was she able to bring the infection under control. She moved on to another factory about a year later. María Elena's story saddened me, in part because I knew it to be just one of thousands of cases that illustrate how the health of many Mexican maquiladora workers has suffered because of the proliferation of the assembly plants under the North American Free Trade Agreement (NAFTA). My sadness turned to fear when I realized that government and trade officials are trying to implement as quickly as possible

A version of this chapter previously appeared as Elvia Rosales Arriola, *Of Woman Born: Courage and Strength to Survive in the Maquiladoras of Reynosa and Rio Bravo, Tamaulipas*, Women on the Border, June 23, 2011, http://womenontheborder.org/2011/06/courage-and-strength-to-survive/. Originally published in *Women on the Border*.

the Free Trade Area Agreement (FTAA), an ambitious global corporate project intended to extend the free-trade policies of NAFTA into the economies of thirty-four countries throughout the Western Hemisphere.

There Is Only Maquiladora Work Here

María Elena and I sat across from each other in a dingy hotel room I had rented in Reynosa, across the border from McAllen, Texas. I had traveled there with a friend and colleague to learn more from activists for the Comité Fronterizo de Obreras (CFO; Frontier Workers Committee) about how workers were managing their health and about labor problems at large employers in the area like Delphi Electronics and TRW. Later we were joined by a CFO volunteer from nearby Río Bravo, the site of recent violent confrontations between management and workers and host to an internationally publicized union election where fear and intimidation tactics had been used to crush the vote for an independent union.

María Elena's dark eyes flashed with a combination of anger and enthusiasm as she spoke of the need for workers to unite: "The only form of work here is maquiladora work . . . for those of us without a better education . . . who are so many, really the majority. . . . If we don't struggle to achieve a little more, a little better treatment, they will always treat us as nothing but 'mediocres.' That is how a Confederacíon de Trabajadores de México (CTM; Confederation of Mexican Workers) representative recently referred to us in a meeting with the workers . . . 'mediocre people.' 'You mediocre people fight and you don't know what you are fighting for.' He especially says that in reference to our acquiring support in our labor struggles from our U.S. allies."

Her introduction to the struggle for justice in the maquiladoras had begun early. "I came to this work because at a very young age my own mother, Virginia, had to go on strike against her employer, the Zenith company, a producer of TVs and radios. I was about twelve, and I remember helping to cook food and bring it to the women who were striking against Zenith." She remarked more than once that such experiences undoubtedly influenced her in becoming so outspoken against injustice today.

I came away from each session with the women I interviewed that weekend impressed by their strength as each told me a little more about herself and how she had come to work in the industry, or moved to the border, or supported herself and her family members. María Elena told me about the chemicals she remembers using in her seven years at Delnosa (now Delphi). For protection? "We were given common, yellow household gloves. At one time or another I worked with industrial alcohol, toluene, Freon, formaldehyde, lead (from soldering), oil-based paints, lasers, and ultraviolet light. My nose had a constant allergic dripping." She did not mention any long-term effects, and she was grateful that nothing serious appeared in her only child's birth. But then she went into great detail about the discovery of lead poisoning in her sister, a solderer at a different Delnosa plant. "I remember it well because I was pregnant at the time, and I took her to the hospital for tests. . . . I also remember that she had to take a radioactive pill for one year to remove the spot from her lungs."

I could not help but think that in return for miserly wages that average twenty-five to thirty-five U.S. dollars per week and barely support their families—the kinds of wages that are promised as a boon to economic growth and development under NAFTA or the

stalled FTAA—women like María Elena have all paid a higher price with their health and prognosis for a long life by going into the only work available to them. Just over the Mexican border today, more than one million people work in the maquiladora industries, but the appeal of free trade has nurtured the industries' development far beyond the U.S.-Mexico border, into regions like Yucatán. Although NAFTA's promoters promised increased prosperity in all three signing countries (Canada, the United States, and Mexico), the reality is that while many stockholders prosper, many more workers see exactly the opposite.

Trade liberalization translated into working conditions that for women routinely brought sexual harassment and physical abuse, violence, mandatory pregnancy testing, and denial of the basic human right to organize collectively to demand better wages and treatment.

Recently a few dozen workers filed a historic complaint with the National Administration Office against two *maquilas* in the Matamoras-Brownsville region charging severe medical injuries traceable to working in the maquilas without adequate safety gear. As I collect stories like María Elena's, I wonder how often the health and well-being of our brothers and sisters in the global family are included in contemporary talk of economic development and the global village.

Women, Men, and Union Leadership

Because she is an activist for the CFO, María Elena focused her attention during our meeting on the problems for Reynosa workers at Delphi Electronics where her husband, Juan, works. Workers at his plant had been trying to get new union representatives installed and were also highly concerned about the regular exposure of workers to lead. She had spent the weekend preparing a letter with her colleague Verónica Quiroz that they planned to deliver to Juan's union delegate.

Outwardly, María Elena seemed very shy, while Verónica was more outgoing and a take-control kind of person. Verónica, who had been organizing longer than María Elena, had also worked from the time she was fifteen and had supported several members of her family on her meager income. At twenty-seven years old, Verónica has a steeliness about her that no doubt came from a life of hard work and little play. She is extremely witty and obviously intelligent.

One of the most emotional moments in my interview with Verónica was during discussion of when the money from her first job bought the land on which she built, literally with her own hands and her grandfather's help, the home her mother lives in today. This is no small task, as the customary materials for building in Mexico are huge cement blocks and mortar. Verónica stands about 5 feet 3, so as she recounted that period of her life, I was in sheer awe of her and her felt need, be it typically maternal, feminine, or cultural, to take care of her family. With hearing of that experience and so many other of her personal experiences that were marked by pain, loss, and struggle, I understood how Verónica could switch in a flash from looking like an aged woman, at twenty-seven, to wearing the achingly sweet smile of a little girl. Humor and control have become tools Verónica uses to cope in the world.

María Elena and Verónica related to me their strategies for getting a union assembly to help the Delphi workers. They were employing their wit to overcome the brute power

of men, they explained, in a letter they had written to a union delegate that made reference to the delegate's boasts about his strength. It was hoped that by complimenting the man's strength he might be inclined to use his powers to rehire an unjustly fired, popular female coworker who the employees wanted as their shop union delegate.

María Elena and Verónica also used humor to counter workers' resistance to fighting for change. I have a flyer drafted by Verónica and María Elena and later channeled to Delphi workers through the surreptitious efforts of María Elena's husband that asked workers to consider where their mandatory union fees were going and what good the fees were doing when workers were clearly not thriving on their average paychecks of 400 pesos per week (about thirty-eight U.S. dollars). The caricature depicted a union steward shouldering a huge bag of money—the dues paid by workers that filled the pockets of a nonresponsive, lazy, management-allied entity.

Workers Teach Each Other

Some of the most bitter conflicts at Delphi have centered on the unyielding power of the existing union leadership, which sided with investor interests to prevent workers from obtaining living wages and better health and safety protections in the workplace. María Elena and Verónica both spoke about the simplicity of their message to the workers, which is that people should work together for their common interest. However, they encountered difficulties in getting their message across to workers exhausted from long workdays and workweeks and timid about rocking the boat and jeopardizing their job security.

Now and then a worker referred to me for an interview by the CFO surprised me with her answers, like thirty-year-old Sofía (not her real name). Of Mayan descent and standing beautifully at about 4 feet 6 inches, Sofía said she had never had a problem talking back to her TRW supervisors about unfair treatment. Because she was a fast worker, Sofía frequently met the work quota earlier in the day than other workers and would have time to sit idly. "They put me to mop[ping] the whole factory, and one time I got hurt, by having my IUD [intrauterine device] dislodged, because the door and the equipment were too big for me to hold open so I could throw the water out. After that I would not let them give me those assignments, . . . and I would ask for a pass to leave. I got along pretty well with the supervisors, but they are very, very negligent about training the workers, and it doesn't take much before a worker has hurt herself, or cut a finger, or whatever. I was lucky to have only one bad experience that healed easily."

On the whole, however, worker education is tackled with patience and love by the CFO volunteers hoping for an eventual outcome of workers united against the company and union. Of course, the work María Elena and Verónica were doing at Delphi by distributing their flyers and helping the workers convene a union assembly barely hints at the conflicts that can arise in a Mexican border town where old and established union-management alliances are unable or unwilling to bring about improvements in the lives of maquila workers and their families.

Oppression in Río Bravo

The situation in Río Bravo, about twelve miles east of Reynosa, at the Duro Bag Company, where shopping and gift bags are assembled and exported to the United States for

companies such as Hallmark illustrates well the bitterness that can develop when union and company interests merge. Since June 2000 hundreds of the mostly female workers have been trying to form an independent union, but the conflict has become so intensely violent as to call into question the company's strategies for opposing the independent union and the nature of the opposition toward it. It is as if the industry, one that has historically preferred young females as workers on the basis of the stereotyped belief that they'll be more submissive and easier to control, cannot fathom a collective voice of hundreds of women saying, "No!" to the male plant and union leadership. Could misogyny explain the violent resistance to the creation of an independent union in Río Bravo?

A few women representing the striking Duro workers spoke of the awesome power of over a hundred women, many of them single mothers and grandmothers, to endure betrayal by their supposed union leaders in the form of hazardous workspaces and slave wages. They spoke of an equally strong opposition that led to beatings of striking pregnant and disabled workers. Opposition leadership brought all its economic and political power to bear by calling in the local police and the Mexican military to intimidate the workers who by now were fired from their jobs. In the fall, the home of a principal strike organizer was torched and burned down; a flyer calling the workers together to protest working conditions was found in the ashes miraculously untouched by the "accidental" fire.

The workers' ten-month-long struggle to achieve independent union representation eventually produced a union election, but it was an undemocratic one. The establishment forces once again displayed their combined economic and political strength. Workers reported having their campaign literature torn down and destroyed. International observers were stopped at the gate and could not witness the election process. They also saw weapons being unloaded from the back of a car and taken into the maquiladora. This they believed was another attempt at intimidating the workers. The sham election produced a "winner": a union with a new name but the same figureheads.

Feminist Organizing?

The adequacy of representation of maquila workers is mixed. I have now visited three cities along the U.S.-Mexico border, each with a different story to tell about failures and successes in bringing about fairer pay or better working conditions. At the Duro Bag Company, the economic superiority of the company overcame the workers' efforts, but in Reynosa continued activism yielded success. The losses at Duro, in a community so close to Reynosa but with no clear alliance with the CFO, did not prevent people like María Elena or Verónica from supporting workers in the ways they have learned. They teach workers their rights under Mexico's Federal Labor Law and show them how to initiate grievances, speak up against supervisor conduct in flagrant violation of the law, and invoke entitlements to medical treatment and disability pay in Mexico's socialized system of benefits for work-related injuries.

The CFO maintains its organizing principles: the voice, cause, and interest of the workers. Adhering to its principles means not making a move until it has secured the support of all or most of the workers. It means teaching workers the importance of unity when struggling for a cause. The CFO methods seemingly work because they place a premium on organizing safely, by meeting people where they are emotionally and

physically, whether in their fear of talking about their needs as workers or their fear of meeting at or near the workplace to complain about work issues. Thus home meetings are important for creating friendships, as is establishing alliances with people in Mexico and abroad who will provide not just physical support but also the emotional kind for the tough times. As an outside observer I have found the group to have a strong feminist appeal in its valuing of relationships over hierarchical structures of power as the basis for developing strength to overcome the enemy.

It is risky work, however, because as María Elena noted, the population of the maquiladoras comprises people who are largely uneducated and at the mercy of the maquilas for finding work. In the border area, the only other viable employment for women without an education is domestic service. And so disdain for the uneducated worker class and an undercurrent of misogyny in response to the rise of a predominantly female worker class intersect in union leaders when appealed to for more fair representation: "There you go again, you bunch of mediocres. . . . You go and you fight, and you don't know what you're getting yourself into." Of course, they do know what they are getting into. As María Elena says, "This is hard work, fighting against labor injustice, but it is good work. I have to make sacrifices, . . . especially when there are meetings at all hours and I need my mother's help in the care of my little girl. But I also like it a lot. I may appear very quiet, but when I'm ready to speak up I will."

Despite the outcome at Duro, María Elena continued to work with many other CFO volunteers to empower the workers at Delphi Electronics, who recently held an election at the plant and overwhelmingly supplanted their existing union representatives with ones of their own choosing. Throughout the campaign the workers were advised by the CFO. This victory for the workers rests on the courage and the strength of women like María Elena and Verónica, who continue to challenge trade liberalization policies that harm Mexican families and strain women's ability to care for themselves and their loved ones.

From the Editors

Issues and Comments

Is adopting the outlaw role that Monica Evans suggests a healthy means of survival for women and societies of color who are subject to daily assaults on their persons and self-esteem?

Should women like the ones Margaret Montoya and Sumi Cho write about insist on bringing their backgrounds and ethnicities to the fore in their teaching, scholarship, and interactions with fellow students and colleagues? If so, is this bravery or is it foolhardy, suicidal, and calculated to interfere with assimilation, acceptance, and learning? Is it instead, as Montoya suggests, a source of strength and jurisprudential richness?

How can men of color help in women's struggles (for example, in the maquiladoras)—and why does this happen so rarely?

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PART XV

CRITICISM AND SELF-ANALYSIS

SOMETIMES A MOVEMENT'S themes and distinctive contours will emerge most clearly in the crucible of criticism, both external and internal. Part XV begins with an excerpt of a famous article by Harvard law professor Randall Kennedy, a leading civil rights scholar. Kennedy, an African American, takes three leading critical race theory writers to task for exaggerating the importance of race and elevating a writer's race virtually to a requirement of standing.

Alan Freeman, a sympathetic white scholar who has contributed important critical work, expresses doubts about some of critical race theory's bleak perspectives on the possibility of racial change. In an excerpt from a review of Derrick Bell's casebook, he questions whether readers and law students will not be left feeling discouraged from working for racial justice because of the hopelessness of many of Bell's analyses.

Daniel Farber and Suzanna Sherry contribute a searching critique of the legal storytelling movement, one of critical race theory's main tools. And Richard Sander contributes a systemic analysis of affirmative action by the nation's law schools, concluding that it just injures blacks and reduces the number of African American lawyers, primarily through a cascading effect.

70. Racial Critiques of Legal Academia

RANDALL L. KENNEDY

This chapter analyzes recent writings that examine the effect of racial difference on the distribution of scholarly influence and prestige in legal academia. These writings articulate two interrelated theses. The first—the exclusion thesis—is the belief that the intellectual contributions of scholars of color are wrongfully ignored or undervalued. As early as 1979, Professor Derrick Bell expressed this concern, protesting what he viewed as the undue extent to which "white voices have dominated the minority admissions debate."[1] Subsequently, Professor Richard Delgado criticized what he described as "white scholars' systematic occupation of, and exclusion of minority scholars from, the central areas of civil rights scholarship."[2] Later, Professor Mari Matsuda decried what she perceives as "segregated scholarship."[3] Although the legal academic establishment has been the main target of commentators who seek to delineate illicit racial hierarchy in the organization of legal scholarship, the critical legal studies movement, the major bulwark of leftism in legal academic culture, has also been criticized for being "imperialistic"[4] and for "silencing" scholars of color.[5]

The second tenet of the writings I analyze is the racial distinctiveness thesis: the belief (1) that minority scholars, like all people of color in the United States, have experienced racial oppression; (2) that this experience causes minority scholars to view the world with a different perspective from that of their white colleagues; and (3) that this different perspective displays itself in valuable ways in the work of minority scholars. Bell expresses one version of the distinctiveness thesis when he writes that "[r]ace can [be an important positive qualification] in filling a teaching position intended to interpret . . . the impact of racial discrimination on the law and lawyering."[6] Delgado asserts that important race-based differences exist that distinguish the race-relations law scholarship of whites from that of people of color, differences involving choice of topics, tenor of argument, and substantive views.[7] Matsuda insists that "those who have experienced discrimination speak with a special voice to which we should listen,"[8] that "the victims of racial oppression have distinct normative insights,"[9] and that "[t]hose who are oppressed in the present world can speak most eloquently of a better one."[10]

A version of this chapter previously appeared as Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 Harv. L. Rev. 1745 (1989). Originally published in the *Harvard Law Review*.

The exclusion thesis and the distinctiveness thesis intersect in the idea that the value of intellectual work marked by the racial background of minority scholars is frequently either unrecognized or underappreciated by white scholars blinded by the limitations of their own racially defined experience or prejudiced by the imperatives of their own racial interests.

The writings by Professors Derrick Bell, Richard Delgado, and Mari Matsuda have placed on scholarly agendas questions that have heretofore received little or no attention, questions that explore the nature and consequences of racial conflict within legal academia. Before then, some of the most provocative studies of the history and sociology of legal academia emerged from the legal realist and critical legal studies movements.[11] Like certain proponents of legal realism and current advocates of critical legal studies, proponents of racial critiques are insurgent scholars seeking to transform society, including, of course, the law schools. Unlike previous academic rebels, however, the proponents of racial critiques tap as their primary sources of emotional and intellectual sustenance an impatient demand that all areas of legal scholarship show an appreciation for the far-reaching ways race relations have impinged on every aspect of our culture and a resolute insistence on reforming all ideas, practices, and institutions that impose or perpetuate white racist hegemony. Thus inspired, they have succeeded in making "the race question" a burning issue for a substantial number of persons in legal academia.

At the same time, the writings reveal significant deficiencies—the most general of which is a tendency to evade or suppress complications that render their conclusions problematic. Stated bluntly, they fail to support persuasively their charges of racial exclusion or their insistence that legal academic scholars of color produce a racially distinctive brand of valuable scholarship. My criticism of the Bell-Delgado-Matsuda line of racial critiques extends further, however, than their descriptions of the current state of legal academia. I also take issue with their politics of argumentation and with some of the normative premises underlying their writings. More specifically, I challenge (1) the argument that, on intellectual grounds, white academics are entitled to less standing to participate in race-relations law discourse than academics of color are; (2) the argument that, on intellectual grounds, the minority status of academics of color should serve as a positive credential in evaluating their work; and (3) explanations that assign responsibility for the current position of scholars of color overwhelmingly to the influence of prejudiced decisions by white academics.

The Cultural Context of Racial Critiques

Racial critiques of legal education mirror anxieties that haunt our culture, anxieties that stem from the problematic relationship between knowledge and power. Racial critiques exemplify a development that Louis Wirth memorably described over three decades ago:

> In the light of modern thought and investigation much of what was once taken for granted is declared to be in need of demonstration and proof. The criteria of proof themselves have become subjects of dispute. We are witnessing not only a general distrust of the validity of ideas but of the motives of those who assert them.[12]

Like the sociology of knowledge, and various Marxist and feminist analyses of culture, the racial critiques make critical reflection on the relationship between knowledge and power a central topic of concern. Unlike these kindred strains of analysis, however, racial critiques are primarily rooted in the history of American race relations.

Two related aspects of this history are particularly relevant for understanding the origins of the racial critiques. First, of all the many racially derogatory comments about people of color, particularly Negroes, none has been more hurtful, corrosive, and influential than the charge that they are intellectually inferior to whites.[13] In the age of slavery, the image of Negro intellectual inferiority became entrenched in the minds of proslavery and antislavery whites alike[14] and helped rationalize denying educational resources to blacks. Throughout the century following the abolition of slavery, efforts by blacks to participate equally in American intellectual culture continued to encounter the skepticism of those who held a low opinion of the intellectual capacity of Negroes and the opposition of those who believed that educated Negroes posed a special menace to a well-ordered society. As students, teachers, and writers in the humanities, sciences, and professions, Negroes confronted exclusionary color bars in every imaginable context. W. S. Scarborough, an accomplished Negro scholar of Greek and Latin, found that academia in late nineteenth-century America simply had no place for him, "not even at the predominantly Negro Howard University, where the white members of the Board of Trustees took the position that the chair in classical languages could be filled only by a Caucasian."[15]

Alongside invidious discrimination perpetrated by individuals or private organizations was discrimination authorized or compelled by government.[16] In considering racial critiques of legal academia, one must remember that the struggle against de jure segregation was primarily one against segregation in *education*, and that before *Brown v. Board of Education*[17] the desegregation of state law schools was a major locus of controversy.[18] Also of particular relevance, given the claims of the racial critique literature, is that although the overt forms of racial domination described thus far were enormously destructive, *covert* color bars have been, in a certain sense, even more insidious. After all, judgments based on expressly racist criteria make no pretense about evaluating the merit of the individual's work. Far more cruel are racially prejudiced judgments that are rationalized in terms of meritocratic standards.[19] Recognizing that American history is seeded with examples of intellectuals of color whose accomplishments were ignored or undervalued because of race[20] is absolutely crucial for understanding the bone-deep resentment and distrust that finds expression in the racial critique literature.

Many white academics manifested the same racist attitudes in their intellectual work as in their institutional practices. For example, Ulrich B. Phillips's apologetic account of slavery[21] and William A. Dunning's pejorative portrayal of Reconstruction[22]—both of which were enormously influential and long considered to constitute sound scholarly learning—reflected the limitations of a culture in which whites believed that racial minorities were simply unfit to participate as equals in the cultural, social, or political life of the nation.[23] These same cultural assumptions have affected legal scholarship as wel1.[24] There was a time, not so long ago, when articles and notes in law reviews *defended* segregation,[25] questioned the legality and desirability of the Fifteenth Amendment,[26] and even condoned (albeit with qualifications) the practice of lynching.[27] Although we now inhabit a very different political, social, and cultural environment, it is useful to

question—as the racial critiques invite us to do—whether racial prejudices continue to affect to some degree the governance and scholarship of legal academia.

A 1983 boycott of a race-relations law course at Harvard Law School indicated the continuing potency of some of these sentiments. The boycotted course was taught by Jack Greenberg, a white civil rights attorney who was then the director-counsel of the NAACP Legal Defense Fund (LDF), and Julius Chambers, a prominent black civil rights attorney.[28] The boycott dramatized a variety of objections, including primarily a dissatisfaction with Harvard's failure to add more minority professors to its faculty; of sixty-four full-time faculty members, only two were persons of color.[29] Chambers' participation in the course was seen as unresponsive to this concern since he was a practicing attorney who clearly was not interested in an academic career. Moreover, some protesters felt affronted by Greenberg's long-standing position as director-counsel of the LDF, the nation's leading private organization devoted to civil rights litigation. They viewed him as the archetypal white liberal who facilitates black advancement in society at large but retards it in his immediate environment by exercising authority in a way that precludes the development of black leadership. Furthermore, in the view of at least some of the boycotters, that the course involved race-relations law made the racial background of the professor especially relevant. In addition to the special insight a minority instructor was presumed to provide, some boycotters and their supporters believed that with respect to race-relations law, it could safely be assumed that a substantial pool of suitably qualified minority teachers awaited.

The boycott was harshly criticized by a broad array of observers.[30] At the same time, some academics supported, or at least defended, it. Arguing that race should be a consideration in matching instructors to course offerings, Harvard Law School professor Christopher Edley, Jr., maintained that "[r]ace remains a useful proxy for a whole collection of experiences, aspirations and sensitivities. . . . [W]e teach what we have lived."[31] Similarly, Professor Derrick Bell argued that "[r]ace can create as legitimate a presumption as a judicial clerkship in filling a teaching position intended to interpret . . . the impact of racial discrimination on the law and lawyering."[32] Racial background can properly be considered a credential, he observed, because of "[t]he special and quite valuable perspective on law and life in this country that a black person can provide."[33]

One reason why many black intellectuals feel moved to assert proprietary claims over the study of race relations and the cultural history of minorities is the perceived need to react defensively to the enhanced ability of whites, because of racial privilege, to exploit popular interest in these subjects. Even at the height of popular interest in the black power movement, the conditioned reflexes of many editors and publishers produced a veritable bonanza for white commentators. Moreover, the privileging of whites in cultural enterprise is pervasive. James Baldwin once wrote that "[i]t is only in his music . . . that the Negro in America has been able to tell his story."[34] The color line, however, has cast long shadows over that area of cultural accomplishment as well. In the 1950s, for instance, when rhythm and blues played a major role in transforming the sensibilities of many young whites, the color bar prevented black musicians from capitalizing fully on the popularity of a genre they had done much to establish; instead, white cultural entrepreneurs typically reaped the largest commercial rewards—a pattern still visible today, albeit in less dramatic form.

Given the pervasiveness and tenacity of racial prejudice in American culture, it is readily imaginable that current practice and discourse in legal academia could be tainted by biases of the sort that some commentators claim to have identified. There is a considerable difference, however, between plausible hypotheses and persuasive theories. What separates the two is testing.

Race, Standing, and Scholarship

In *The Imperial Scholar*, Professor Delgado asks, "What difference does it make if the scholarship about the rights of group *A* [i.e., people of color] is written by members of group *B* [i.e., whites]."[35] He answers this question by applying to the world of scholarship juridical concepts of standing, "which in general insist that *B* does not belong in court if he or she is attempting, without good reason, to assert the rights of, or redress the injuries to *A*."[36] Elaborating on this analogy, he writes:

> [I]t is possible to compile an *a priori* list of reasons why we might look with concern on a situation in which the scholarship about group *A* is written by members of group *B*. First, members of group *B* may be ineffective advocates of the rights and interests of persons in group *A*. They may lack information; more important, perhaps, they may lack passion, or that passion may be misdirected. *B*'s scholarship may tend to be sentimental, diffusing passion in useless directions, or wasting time on unproductive breast-beating. Second, while the *B*'s might advocate effectively, they might advocate the wrong things. Their agenda may differ from that of the *A*'s; they may pull their punches with respect to remedies, especially where remedying *A*'s situation entails uncomfortable consequence for *B*. Despite the best of intentions, *B*'s may have stereotypes embedded deep in their psyches that distort their thinking, causing them to balance interests in ways inimical to *A*'s. Finally, domination by members of group *B* may paralyze members of group *A*, causing the *A*'s to forget how to flex their legal muscles for themselves.[37]

Delgado argues that "[a] careful reading of [race-relations law scholarship by white academics] suggests that many of the above mentioned problems and pitfalls are not simply hypothetical, but do in fact occur."[38] They occur, Delgado suggests, because white scholars have not suffered the analogue to "injury in fact."[39] Without the suffering that comes from being a person of color in a society dominated by whites, white scholars cannot see the world from the victim's perspective, and will, to that extent, be prevented from creating scholarship fully attuned to the imperatives of effective struggle against racial victimization. They presumably have neither the information required for such a task, first-hand experience as a victim of white racism, nor the motivation generated by victimization, the drive to rescue oneself and one's people from subjugation.

Delgado need not resort to standing doctrine to object to ignorant, sloppy, misleading, or sentimental scholarship. He looks to standing doctrine for assistance because that doctrine underscores the importance of a party's *status*. Standing is a status-based limitation on the ability of a party to invoke the jurisdiction of a court. It is a limitation that, in theory, looks not to the substance of a given party's argument but to the relationship of the party to the injury prompting litigation. Delgado is similarly concerned with

status. He does not identify the body of work to which he objects solely on the basis of perceived intellectual deficiencies. Rather, he identifies and criticizes "imperial scholarship" largely by reference to the ascribed racial characteristics of its authors.

Concepts of status-based standing in the intellectual arena have a long and varied history.[40] Professor Delgado's ideas, in other words, are by no means isolated. Some commentators have argued that within the subject area embraced by black studies, white intellectuals have no standing whatsoever. Others have contended that while there are some race-related subjects white intellectuals can usefully investigate, there are others that whites should avoid because of their racial status.[41] A related position is that while white scholars can perhaps contribute significantly to the study of people of color, they cannot realistically aspire to be *leading* figures.[42]

Delgado does not contend that white scholars should be precluded altogether from participating in discourse on race-relations law. He leaves the distinct impression, though, that readers should view white commentators as suspect. Moreover, he argues that white academics should, on their own, quietly leave the field. "The time has come," Delgado writes, "for white liberal authors . . . to redirect their efforts and to encourage their colleagues to do so as well. . . . As these scholars stand aside, nature will take its course [and] the gap will quickly be filled by talented and innovative minority writers and commentators."[43]

The concept of race-based standing functions to achieve two overlapping but discrete goals. One is to redistribute on racial lines academic power—jobs, promotions, and prestige. The analogy to standing is well-suited to accomplish this end; it provides a device for excluding or disadvantaging white scholars to the benefit of scholars of color. A second goal is to promote those best able to provide useful analyses of racial issues. It seems to be implicitly argued that race-based standing furthers this purpose because the intellectual shortcomings of analyses provided by white academics are sufficiently correlated with their racial background that whiteness can appropriately serve as a proxy for these shortcomings. Seen in this light, placing restrictions on white scholars pursuant to the concept of race-based standing is not simply a device for protecting the market position of scholars of color; it is a device that advances a broader social interest.

There are a variety of problems with Delgado's conception of racial standing and the way he articulates it. First, his criticism of "[d]efects in Imperial Scholarship" is itself problematic. According to Delgado, scholars of color and white scholars typically differ in articulating justifications for affirmative action. He suggests that scholars of color characteristically justify affirmative action as a type of reparations, while the white authors in the "inner circle" "generally make the case on the grounds of utility or distributive justice."[44] He contends that this theoretical divergence stems from racially conditioned differences in perspective and deems the reparations theory analytically superior to its competitors.[45] He writes that justifications of affirmative action based on utilitarian or distributive-justice theories are "sterile."[46] These theories, he says, enable "the writer to concentrate on the present and the future and overlook the past . . . [thereby] rob[bing] affirmative action programs of their moral force."[47] Delgado, however, offers no persuasive reason for labeling as "sterile" the theories he derides. Although Delgado criticizes liberal writers for "overlook[ing] the past,"[48] a fair reading of their work belies that charge. In an article that Delgado singles out for criticism,[49] Professors Kenneth Karst and Harold Horowitz advocate the implementation of affirmative

action, expressly stating that "[i]n order to prevent past discrimination from acting as a psychological inhibitor of present aspirations, we need to see large numbers of black, Chicano, Native American and other minority faces in every area of our society."[50] Contrary to Delgado's assertions, they do acknowledge the nation's long and brutal history of racial oppression. They suggest, however, that appeals to that history alone may not suffice as a convincing rationale for racial preferences. They therefore articulate and refine alternative and supplementary justifications—a course that should hardly be objectionable to advocates of affirmative action.[51]

Delgado also argues that scholarship by white scholars is preoccupied with procedure. He complains that many of the articles of "imperial scholarship" that he listed

> were devoted, in various measures, to scholarly discussions of the standard of judicial review that should be applied in different types of civil rights suits. Others were concerned with the relationship between federal and state authority in antidiscrimination law, or with the respective competence of a particular decisionmaker to recognize and redress racial discrimination. One could easily conclude that the question of who goes to court, what court they go to, and with what standard of review, are the burning issues of American race-relations law.[52]

These issues, of course, are not the only ones important to understanding race-relations law. And if Delgado's point is simply that the body of work he reviews dwells unduly on procedural and legalistic issues to the exclusion of extralegal studies, including sociology, history, and psychology, I agree with him, at least in part.[53] But if he means to say what his language most plausibly suggests, I must demur in astonishment because race-relations law, like every other field of law, is vitally shaped by answers to questions involving jurisdiction,[54] institutional competence,[55] and standards of judicial review.[56]

A second and far more troubling problem with Delgado's conception of racial standing involves his linkage of white scholars' racial background to the qualities in their work that he perceives as shortcomings.[57] On the one hand, he concedes that there are at least some white scholars who produce work that transcends the failings he notes.[58] On the other hand, there are an appreciable number of scholars of color whose work is marked by the features that Delgado associates with white academics.[59] Against this backdrop, it is unclear what is white about the intellectual characteristics to which Delgado objects.

If the tables were turned—if a commentator were to read articles by twenty-eight scholars of color, describe deficiencies found in some of them, acknowledge that some black scholars produced work that avoided these pitfalls but nonetheless conclude that manifestations of these flaws were attributable to the *race* of the twenty-eight authors—there would erupt, I suspect (or at least hope), a flood of criticism. Part of the criticism would stem from concerns over accuracy: using race as a proxy would rightly be seen as both over- and underinclusive. However, a deeper concern would likely arise, stemming from the peculiar place of race in American life. There are many types of classification that negate individual identity, achievement, and dignity. But racial classification has come to be viewed as paradigmatically offensive to individuality. We often resort to proxies with no feeling of moral discomfort, knowing that they will yield results of varying degrees of inaccuracy. But the use of *race* as a proxy is specially disfavored because, even when relatively accurate as a signifier of the trait sought to be identified,

racial proxies are especially prone to misuse. By the practice of subjecting governmentally imposed racial distinctions to strict scrutiny, federal constitutional law recognizes that racial distinctions are particularly liable to being used in a socially destructive fashion. Two features of Delgado's analysis are thus deeply worrisome: first, the casualness with which he uses negative racial stereotypes to pigeonhole white scholars and, second, the tolerance, if not approbation, of that aspect of his critique.

Implicit in Delgado's conception of standing is a belief that one reason why white scholars produce deficient race-relations scholarship is that they are outsiders to the colored communities that are deeply affected by such law. But that same logic puts into doubt the position of scholars of color; after all, they could be said to be outsiders to white communities affected by race-relations law.

Apart from that difficulty, moreover, is the problematic assumption that the mere status of being an outsider is intellectually debilitating. Being an outsider or stranger may *enhance* opportunities for gathering information and perceiving certain facets about a given situation. As Professor Patricia Hill Collins has noted, the stranger's salutary "composition of nearness and remoteness, concern and indifference" suggests that he may "see patterns that may be more difficult for those immersed in the situation to see."[60] Tocqueville, Lord Bryce, and Gunnar Myrdal are examples of insightful outsiders. Professor Collins adds to this list the work of certain black feminists, noting that "for many Afro-American female intellectuals, 'marginality' has been an excitement to creativity."[61] The point here is not that an outsider is necessarily or even presumptively insightful; to make such an assertion would simply replicate in reverse Delgado's error of assigning to a given social status too much determinative influence on thought. Rather, the point is that distance or nearness to a given subject—outsiderness or insiderness—are simply social conditions; they provide opportunities that intellectuals are free to use or squander, but they do not in themselves determine the intellectual quality of scholarly productions; *that* depends on what a particular scholar makes of his or her materials, regardless of his or her social position.

Widespread application of Delgado's conception of intellectual standing would be disastrous. First, it would likely diminish the reputation of legal scholarship about race relations. Already, the field is viewed by some as intellectually soft. To restrict the field on a racial basis would surely—and rightly—drive the reputation of the field to far lower depths. By requesting that white scholars leave the field or restrict their contributions to it, Delgado seems to want to transform the study of race-relations law into a zone of limited intellectual competition.

Second, widespread application of Delgado's conception of standing would likely be bad for minority scholars. It would be bad for them because it would be bad for *all* scholars. It would be bad for all scholars because status-based criteria for intellectual standing are anti-intellectual in that they subordinate ideas and craft to racial status. After all, to be told that one lacks standing is to be told that no matter what one's message—no matter how true or urgent or beautiful—it will be ignored or discounted because of *who* one is. Furthermore, as is so often the case in our society, the negative consequences of misconceived policy will fall with particular harshness on racial minorities. Accepting the premises of race-based standing will tend to fence whites out of certain topics to the superficial advantage of black scholars. But acceptance might also tend to fence blacks out of certain subjects. If inferences based on sociological generalities permit us to use

presumptions that disadvantage white scholars in relation to blacks in race-relations law, why should we not indulge a reverse set of presumptions in, say, antitrust, corporate finance, or securities regulation? Both presumptions would be improper because scholars should keep racial generalizations in their place, including those that are largely accurate. Scholars should do so by evaluating other scholars as individuals, without prejudgment, no matter what their hue. Scholars should, in other words, inculcate what Gordon Allport referred to as "habitual open-mindedness," a skeptical attitude toward all labels and categories that obscure appreciation of the unique features of specific persons and their work.

Evaluative judgments linked to the race of authors should be seen as illegitimate if the purpose of evaluation is to reach a judgment about a given piece of work. Perhaps in some situations race can serve as "a useful proxy for a whole collection of experiences, aspirations and sensitivities."[62] But for purposes of evaluating a novel, play, law review article, or the entire written product of an individual, there is no reason to rely on such a proxy because there exists at hand the most probative evidence imaginable—the work itself.

Another negative aspect of the racial standing doctrine is illuminated by an essay by Richard Gilman significantly titled *White Standards and Black Writing*.[63] In this essay, Gilman declared that, as a white man, he was disqualified from evaluating certain forms of "black writing" that were autobiographical and polemical. Discussing Eldridge Cleaver's *Soul on Ice*, Gilman maintained that it was a book "not subject . . . to approval or rejection by those of us who are not black."[64] Ironically, although Gilman was undoubtedly attempting to react sympathetically, the conclusion he reached actually cast *Soul on Ice* into a cultural ghetto, one in which black writing could be read by whites but not critically evaluated by them. More troubling still is the route by which Gilman reached his conclusion. Voicing an extreme version of the racial distinctiveness thesis, he averred that "[t]he black man doesn't feel the way whites do, nor does he think as whites do. . . . [B]lack suffering is not of the same kind as ours."[65] Apart from its extraordinary racialism, that claim is also ironic because, at the very moment Gilman confesses ignorance, he tells readers that blacks neither think nor even suffer the way that whites do.

Illuminating in a different way is an article by Professor Alan Freeman.[66] Freeman's earlier article *Legitimizing Racial Discrimination Through Antidiscrimination Law*[67] articulated one of the most useful concepts we have for analyzing the jurisprudence of race relations—the distinction between the "victim" and the "perpetrator" perspective.[68] Yet after having contributed creatively to the development of a critical, antiracist approach to race-relations law, Freeman stated, in the course of responding to racial critiques of critical legal studies:

> My personal commitment is to participate in the development of answers [to problems posed by the continuing presence of racist ideas and practices in American culture]. My whiteness is of course an inescapable feature of that participation. I have tried hard to listen, to understand, to gain some empathetic connection with victims of racist practice. I have no illusion of having crossed an uncrossable gap; yet I believe I can make a contribution. It is true that I am not compelled by color to participate in this struggle; I could stop any time, but I haven't.[69]

The most interesting facet of this poignant statement is the note of apology with which Freeman writes that he is not "compelled by color" to participate in the struggle against racism. This comment was probably prompted by Professor Matsuda's suggestion that people of color, because of their race, are stronger partisans in this struggle because of their supposedly *compelled* commitment.[70] Both Freeman and Matsuda are mistaken, however, in believing that a person's racial status compels him to contribute to struggles against racism. Frederick Douglass did not have to join the abolitionist movement, thereby putting himself at risk; plenty of other blacks chose not to. Rather, he joined and contributed mightily to that movement by virtue of his own volition. Harriet Tubman was not compelled by her color to perform her remarkably heroic feats on the Underground Railroad. She might have considered herself obligated by her racial kinship to other slaves to pursue the career she followed. But feelings of subjective compulsion are themselves elements of personal character. After all, most runaway slaves avoided putting themselves at risk of re-enslavement, and some did little or nothing to aid those whom they had left behind in bondage.

Participation in struggles against racial tyranny or any other sort of oppression is largely a matter of choice, an assertion of will. That is why we honor those who participate in such struggles. Such individuals are admirable precisely because they choose to engage in risky and burdensome conduct that was avoidable. Many people of color have *chosen* to resist racial oppression; many others have not. The same holds true for whites. There is, then, no reason for Professor Freeman to feel apologetic, embarrassed, or deficient simply because he is a white person who seeks to contribute in the intellectual arena to struggles against racial inequality. There is reason, however, to be apprehensive about a style of thought that induces unwarranted feelings of guilt or inadequacy and that exalts necessity over choice.

NOTES

1. Derrick Bell, Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 Calif. L. Rev. 1, 4 n.2 (1979). Illustrating the basis of his concern as it applied to legal academia in the immediate aftermath of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Professor Bell observed:

> At least five "mainstream" law reviews [*Columbia Law Review*, *Santa Clara Law Review*, *Southwestern Law Review*, *Virginia Law Review*, and *University of Chicago Law Review*] have published symposia or workshop papers on the minority admissions issue. All papers published on the issue from these five symposia or conferences were by white scholars. Many of them support minority admissions programs, but support or opposition is less important than the seeming irrelevance of minority views on the subject. As one symposium coordinator responded to my expressed concern that none of the major papers at his conference would be presented by minorities: "We tried to obtain the best scholars we could get." Although candor requires acknowledgment that few minority academics have national reputations or are frequently published in the major law reviews, this admission largely reflects the exclusion of minorities from the professions.

Id.

See also Derrick Bell, *Minority Admissions as a White Debate*, in Race, Racism And American Law §7.12.1, at 445–48 (2d ed. 1980) (arguing that minorities had been excluded from participation in the *Bakke* litigation).

2. R. Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. Pa. L. Rev. 561, 566 (1984) (also see Chapter 63, this volume).

3. M. Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 Harv. Women's L.J. 1, 2–4 & n.12 (1988).

4. See R. Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 Harv. C.R.-C.L. L. Rev. 301, 307 (1987).

5. See H. Dalton, *The Clouded Prism*, 22 Harv. C.R.-C.L. L. Rev. 435, 441 (1987).

6. Derrick Bell, *A Question of Credentials*, Harv. L. Rev., Sept. 17, 1982, at 14, col. 1; see also Derrick Bell, *Minority Admissions as a White Debate*, *supra* note 1, at 445 n.2 (noting that, in the decisive opinion in *Bakke*, "Justice Powell cited ten law review articles, all of which were written by well-known white professors," a fact that, according to Bell, suggests that "prestige counted for more than minority viewpoint in Justice Powell's selections").

7. See Delgado, *The Imperial Scholar*, *supra* note 2, at 566–73.

8. M. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323, 324 (1987).

9. *Id*. at 326.

10. *Id*. at 346.

11. See, e.g., K. Llewelyn, *Some Realism About Realism*, 44 Harv. L. Rev. 1222 (1931); L. Keyserling, *Social Objectives in Legal Education*, 33 Colum. L. Rev. 437 (1933); D. Kennedy, Legal Education and the Reproduction of Hierarchy (1983); A. Konefsky & H. Schlegel, *Mirror, Mirror on the Wall: Histories of American Law Schools*, 95 Harv. L. Rev. 833 (1982); M. Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 Tex. L. Rev. 1307 (1979).

Studies focusing on the gender question in legal academia emerged around the same time as the racial critiques. See, e.g., C. Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. Miami L. Rev. 29 (1987); M. Minow, *Feminist Reason: Getting It and Losing It*, 38 J. Legal Educ. 47 (1988); D. Rhode, *Perspectives on Professional Women*, 40 Stan. L. Rev. 1163 (1988); D. Rhode, *The "Woman's Point of View,"* 38 J. Legal Educ. 39 (1988); A. Scales, *The Emergence of Feminist Jurisprudence*, 95 Yale L.J. 1373 (1986); C. Weiss & L. Melling, *The Legal Education of Twenty Women*, 40 Stan. L. Rev. 1299 (1988); Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1 (1988); Joan Williams, *Deconstructing Gender*, 87 Mich. L. Rev. 797 (1989).

12. L. Wirth, *Preface* to K. Mannheim, Ideology and Utopia, at xiii (1954).

13. See, e.g., S. Gould, The Mismeasure of Man (1981); J. Haller, Jr., Outcasts from Evolution: Scientific Attitudes of Racial Inferiority, 1859–1900 (1971); L. Kamin, The Science and Politics of IQ (1974); W. Stanton, The Leopard's Spots: Scientific Attitudes Toward Race in America, 1815–1859 (1960); J. Howard & R. Hammond, *Rumors of Inferiority: The Hidden Obstacles to Black Success*, New Republic, Sept. 9, 1985, at 17.

14. See generally G. Fredrickson, The Black Image in the White Mind (1971); W. Jordan, White over Black: American Attitudes Toward the Negro, 1550–1812 (1968). Robert Allen notes that, in the North, free blacks censured white abolitionists who "set a double standard of achievement which strongly suggested black inferiority. Thus, whites who expected less of black pupils in the classroom or who accepted shoddy performances by black ministers and teachers, were themselves subjected to stringent criticism." R. Allen, Reluctant Reformers: Racism and Social Reform Movements in the United States 37 (Anchor Books 1975).

15. J. Franklin, *The Dilemma of the American Negro Scholar*, in Soon, One Morning 70 (H. Hill ed., 1963).

16. On the eve of the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), eighteen jurisdictions made segregated public schools mandatory, while four permitted but did not require segregation. See R. Leflar & W. Davis, *Segregation in the Public Schools-1953*, 67 Harv. L. Rev. 377, 378 n.3 (1954).

17. 347 U.S. 483 (1954).

18. See, e.g., Sweatt v. Painter, 339 U.S. 629, 636 (1950) (ordering the admission of a Negro plaintiff to the University of Texas Law School); Sipuel v. Board of Regents, 332 U.S. 631, 632–33 (1948) (ordering the state to provide equal law school facilities to a Negro plaintiff); Missouri *ex. rel*. Gaines v.

Canada, 305 U.S. 337, 348–52 (1938) (ordering the state to furnish legal education within the state to a Negro plaintiff since it furnished legal education within the state to white citizens); Pearson v. Murray, 169 Md. 478, 489, 182 A. 590, 594 (1936) (ordering the admission of a Negro plaintiff to the only law school in the state). See generally R. Kluger, Simple Justice (1975); M. Tushnet, The NAACP's Legal Strategy Against Segregated Education, 1925–1950 (1987).

19. In his history of desegregation in major league baseball, Jules Tygiel notes that, on the eve of Jackie Robinson's dramatic breakthrough in 1946, "[s]ome baseball 'experts' argued that the absence of blacks in the majors stemmed from their lack of talent, intelligence, and desire." J. Tygiel, Baseball's Great Experiment: Jackie Robinson and His Legacy 32 (1983). More recently, some observers have ascribed the absence of black managers in professional baseball to a lack of administrative ability. See, e.g., P. Gammons, *The Campanis Affair*, Sports Illustrated, Apr. 20, 1987, at 31 (describing the controversy that erupted when the vice president of the Los Angeles Dodgers professional baseball team stated that the reason that baseball had no black manager is that blacks "may not have some of the necessities" to hold such positions); see also H. Edwards, *The Collegiate Athletic Arms Race: Origins and Implications of the "Rule 48" Controversy*, in Fractured Focus: Sport as a Reflection of Society 30–33 (R. Lapchick ed., 1986) (giving statistics indicating a dearth of blacks in managerial positions in college and professional sports).

20. See, e.g., K. Manning, Black Apollo of Science (1983) (delineating in moving detail how Ernest Just's achievements as a biologist were minimized and undermined by racism in the American scientific community between approximately 1910 and 1940). As a white colleague noted soon after Just's death, "An element of tragedy ran through all Just's scientific career due to the limitations imposed by being a Negro in America." *Id.* at 329 (quoting 2 F. Lil-lie, Science 95 (1942)). The social history of intellectuals of color is a neglected subject in dire need of the sort of careful, detailed study that is exemplified by Professor Manning's work.

21. See U. Phillips, American Negro Slavery (1918).

22. See W. Dunning, Reconstruction, Political And Economic, 1865–1877 (A. Hart ed., 1907). For a brief discussion of the baneful influence of such accounts of Reconstruction on judicial decision making in race-relations cases, see R. Kennedy, *Reconstruction and the Politics of Scholarship*, 98 Yale L.J. 521, 527–28 (1989).

23. See Fredrickson, *supra* note 14, at xii–xiii; R. Logan, The Betrayal of the Negro 359–92 (new enlarged ed. 1965); C. Vann Woodward, The Strange Career of Jim Crow 67–109 (3d rev. ed. 1974).

24. See R. Kennedy, *The Tradition of Celebration*, 86 Colum. L. Rev. 1622, 1622–23 (1986).

25. See, e.g., S.S. Field, *The Constitutionality of Segregation Ordinances*, 5 Va. L. Rev. 81 (1917); Note, *Constitutionality of Segregation Ordinances*, 16 Mich. L. Rev. 109 (1917); Comment, *Unconstitutionality of Segregation Ordinances*, 27 Yale L.J. 393 (1918).

26. See A. Machen, *Is the Fifteenth Amendment Void?*, 23 Harv. L. Rev. 169 (1910).

27. See C. Bonaparte, *Lynch Law and Its Remedy*, 8 Yale L.J. 335 (1899). In his article, future U.S. attorney general Charles Bonaparte wholly ignored the use of lynching as a device for reinforcing the ideology and practice of white supremacy. See M. Belknap, Federal Law and Southern Order 1–26 (1987).

28. The LDF is an organization mainly devoted to the protection and enlargement of blacks' rights through recourse to litigation. Its accomplishments include *Shelley v. Kraemer*, 334 U.S. 1 (1948), which invalidated state court enforcement of a racially restrictive covenant; *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), which invalidated de jure segregation in public schools; and the virtual abolition of capital punishment in the decade before 1976. See Kluger, *supra* note 18; M. Meltsner, Cruel and Unusual: The Supreme Court and Capital Punishment (1973); Tushnet, *supra* note 18; C. Vose, Caucasians Only (1959); E. Muller, *The Legal Defense Fund's Capital Punishment Campaign*, 4 Yale L. & Pol'y Rev. 158 (1985).

Jack Greenberg succeeded Thurgood Marshall as the director-counsel of LDF and guided its operation until 1983. He has distinguished himself as both an advocate, participating in scores of cases before the Supreme Court, including *Brown*, and a scholar. See, e.g., J. Greenberg, Race Relations and American Law (1959); J. Greenberg, *Capital Punishment as a System*, 91 Yale L.J. 908 (1982).

See generally J. Kaufman, Broken Alliances: The Turbulent Times Between Blacks and Jews in America 85–123 (1988) (providing a biographical portrait of Greenberg).

Julius Chambers has long been one of the nation's leading civil rights attorneys. Among the several cases he has argued before the Supreme Court are *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975); and *Patterson v. McLean Credit Union*, No. 87-107 (U.S. filed Oct. 5, 1987). At the time of the boycott at Harvard, he served as president of LDF and in 1983 succeeded Greenberg as director-counsel. See generally M. Carroll, *Rights Unit's New Leader*, N.Y. Times, June 13, 1984, at A17, col. 1.

29. In an open letter to the Harvard Law School community, the Third World Coalition stated that it advocated boycotting the course taught by Greenberg and Chambers because of

> (1) the extremely low number of Third World professors at the Law School, (2) the appropriateness of a Third World instructor to teach the Constitutional Law and Minority Issues course, (3) the availability of qualified Third World legal professionals to teach this course in particular and teach at the Law School in general, and (4) the inadequate efforts of Harvard Law School to find these professionals and the biased criteria it uses to judge prospective Third World faculty candidates.

Letter from the Third World Coalition to the Harvard Law School Community (May 24, 1982) (on file at the Harvard Law School Library).

30. See, e.g., *Blind Pride at Harvard*, N.Y. Times, Aug. 11, 1982, at A22, col. 1 (editorial); R. Kennedy, *On Cussing Out White Liberals*, Nation, Sept. 4, 1982, at 169, 171; see also Race as a Problem in the Study of Race Relations Law (unpublished compilation of materials on the Greenberg-Chambers controversy) (on file at the Harvard Law School Library). Critics of the boycott included Carl Rowan, see *id.* at 76, Max Freedman, see *id.* at 97, Bayard Rustin, *id.* at 73, and the North Carolina Daily News, *id.* at 89.

31. C. Edley, *The Boycott at Harvard: Should Teaching Be Colorblind?*, Wash. Post, Aug. 18, 1982, at A23, col. 3.

32. Derrick Bell, *A Question of Credentials*, *supra* note 6, at 14, col. 1.

33. *Id.*

34. J. Baldwin, Notes of a Native Son 24 (1949).

35. Delgado, *The Imperial Scholar*, *supra* note 2, at 566.

36. *Id.* at 567.

37. *Id.* (citation omitted).

38. *Id.*

39. See *id.* at 567–69. The Supreme Court has held that to invoke the power of a federal court a litigant must show injury in fact, which means that he must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (quoting Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)). See generally L. Tribe, American Constitutional Law §§3–16, at 114–29 (2d ed. 1988) (discussing "injury in fact" requirement for standing in federal court).

It is interesting that proponents of the racial critique unqualifiedly embrace a rather narrow conception of standing. After all, that conception has long been criticized as an unfair impediment to judicial relief needed by politically weak persons or groups, including, of course, racial minorities. See, e.g., R. Fallon, *Of Justiciability, Remedies, and Public Law Litigation*, 59 N.Y.U. L. Rev. 1 (1984); B. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials*, 88 Colum. L. Rev. 247, 295–313 (1988); G. Nichol, *Abusing Standing: A Comment on* Allen v. Wright, 133 U. Pa. L. Rev. 635 (1985); S. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371 (1988).

40. Scholars of color are not alone in giving vent to the urge to oust outsiders from discussions on topics over which the purported owners of the field assert proprietary claims. Mary McCarthy reports that in the early 1960s, when she engaged in debate over Hannah Arendt's *Eichmann in Jerusalem* (1964), some Jewish intellectuals made her feel "like a child with a reading defect in a class of normal readers—or the reverse. It [was] as if *Eichmann in Jerusalem* had required a special pair of Jewish

spectacles to make its 'true purport' visible." M. McCarthy, *The Hue and the Cry*, in The Writing on the Wall and Other Literary Essays 55 (1970). Commenting on some of the broader issues raised by the debate over *Eichmann in Jerusalem*, Daniel Bell asked whether one can "exclude the existential person as a component of the human judgment." Daniel Bell, *The Alphabet of Justice: Reflection on* Eichmann in Jerusalem, 30 Partisan Rev. 417, 428 (1963). Answering in a curiously ambiguous fashion, he replied that, "[i]n this situation, one's identity as a Jew, as well as *philosophe*, is relevant." *Id.*

A fate similar to McCarthy's has befallen some men who have sought to contribute to feminist studies. In an essay strikingly similar to *The Imperial Scholar*, Elaine Showalter expressed skepticism regarding male literary critics who apply feminist literary criticism, doubt about their ability to think and speak in an authentically feminist way, and apprehension about the consequences of their work for women feminist critics. See E. Showalter, *Critical Cross-Dressing: Male Feminists and the Woman of the Year*, in Men in Feminism 116 (A. Jardine & P. Smith eds., 1987); see also A. Jardine, *Men in Feminism: Odor di Uomo or Compagnons de Route?*, in Men in Feminism, *supra*, at 60 ("[O]ur male allies should issue a moratorium on talking about feminism/women/femininity/female sexuality/feminine identity/etc.").

Perhaps the most dismal chapters in the history of the concept of intellectual standing were supplied by the Nazis, who contrasted "the access to authentic scientific knowledge by men of unimpeachable Aryan ancestry with the corrupt versions of knowledge accessible to non-Aryans." R. Merton, *Insiders and Outsiders: A Chapter in the Sociology of Knowledge*, 78 Am. J. Soc. 9, 12 (1972). In a fascinating article, Michael H. Kater observed that, after the Nazis discovered that the great jazz musician Benny Goodman was Jewish, they "forbade the importation of records with any 'Jewish content' whatsoever." M. Kater, *Forbidden Fruit? Jazz in the Third Reich*, 94 Am. Hist. Rev. 11, 21 (1989). Ironically, "The fact that nothing was ever said about blacks was probably due to the confusion by Nazi experts as to which jazzmen were to be considered black." *Id.*

41. See, e.g., Robert Blauner & David Wellman, *Toward the Decolonization of Social Research*, in The Death of White Sociology 328–29 (I. Ladner ed., 1973).

> We do not argue that whites cannot study Blacks and other non-whites today; our position is rather that, in most cases, it will be preferable for minority scholars to conceive and undertake research on their communities and group problems. . . . There are certain aspects of racial phenomena . . . that are particularly difficult—if not impossible—for a member of the oppressing group to grasp empirically and formulate conceptually. These barriers are existential and methodological as well as political and ethical. We refer here to the nuances of culture and group ethos; to the meaning of the oppression and especially psychic reactions; to what is called the Black, the Mexican-American, the Asian and the Indian experience. . . . Today the best contribution that white scholars could make toward [study on race relations] is not first-hand research but the facilitation of such studies by people of color.

Id.

42. In the preface to his biography of Zora Neale Hurston, Robert Hemenway writes that while he attempts to show why Hurston "deserves an important place in American literary history," he makes no attempt to produce a "definitive" work about her. "[T]hat book remains to be written," he writes, "and by a black woman." R. Hemenway, Zora Neale Hurston xx (1977). Professor bell hooks writes that "[a]s a black female literary critic, I have always appreciated [Hemenway's] statement. . . . By actively refusing the position of 'authority', Hemenway encourages black women to participate in the making of Hurston scholarship and allows for the possibility that a black woman writing about Hurston may have special insight." b. hooks, Talking Back 46 (1989).

43. Delgado, *The Imperial Scholar*, *supra* note 2, at 577. Delgado does not specify why he addresses white liberals as opposed to whites generally. I interpret him as signifying a belief that, among whites, only liberals and radicals would even consider the proposal he advocates.

44. *Id.* at 569.

45. See *id.* at 569–73.

46. See *id.* at 570.

47. *Id.* According to Delgado, recourse to utilitarian or distributive-justice justifications facilitates avoidance of history and the discussion of

> unpleasant matters like lynch mobs, segregated bathrooms, Bracero programs, migrant farm labor camps, race-based immigration laws, or professional schools that, until recently, were lily white. The past becomes irrelevant; one just asks where things are now and where we ought to go from here, a straightforward social-engineering inquiry of the sort that law professors are familiar with and good at.

Id.

48. See *id.*

49. See *id.* at 569 n.43 (citing K. Karst & H. Horowitz, *Affirmative Action and Equal Protection*, 60 Va. L. Rev. 955 (1974)).

50. Karst & Horowitz, *supra* note 49, at 966. Delgado also singled out F. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7, 13 (1969), as representative of distributive-justice rationales for increasing minority representation. See Delgado, *The Imperial Scholar*, *supra* note 2, at 569 n.44. In his *Foreword*, however, Michelman did not address himself specifically to racial issues but instead to the broader problem of poverty—a problem that, in my view, highlights the moral and practical limits of reparative appeals to history as the basis for racial preferences as opposed, say, to nonracial preferences intended to break the grip of entrenched class oppression.

51. For other efforts to ground affirmative action on bases other than appeals to history, see O. Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107, 147–70 (1976); and C. Sullivan, *The Supreme Court, 1986 Term—Comment: Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 Harv. L. Rev. 78, 96–98 (1986).

52. Delgado, *The Imperial Scholar*, *supra* note 2, at 568–69 (footnotes omitted).

53. See R. Kennedy, *Martin Luther King's Constitution: Montgomery*, 98 Yale L.J. 999, 1004 (1989).

54. See, e.g., Dred Scott v. Sandford, 60 U.S. 393 (1857) (holding that Negroes lack federal citizenship and are thus precluded from invoking federal judicial protection); Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (holding that the Supreme Court lacked jurisdiction to adjudicate a dispute because the Cherokee Nation was not a "foreign" state).

55. See, e.g., Giles v. Harris, 189 U.S. 475 (1903) (holding that the Court's inability to enforce an order requiring black voter registration precluded granting requested relief).

56. See, e.g., San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1(1973) (applying rational basis scrutiny to school funding system that discriminates on basis of wealth).

57. This is the flip side of the problem arising from the positive stereotyping of work by minority academics.

58. See Delgado, *The Imperial Scholar*, *supra* note 2, at 569.

59. See text *supra*.

60. P. Collins, *Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought*, Soc. Probs., Dec. 1986, at S15.

61. *Id.* at S14.

62. Edley, *supra* note 31, at A23, col. 3.

63. R. Gilman, *White Standards and Black Writing*, in The Confusion of Realms 3 (1969).

64. *Id.* at 9. Gilman goes on to write:

> I know this is likely to be misunderstood. We have all considered the chief thing we should be working toward is that state of disinterestedness, of "higher" truth and independent valuation, which would allow us, white and black, to see each other's minds and bodies free of the distortions of race, to recognize each other's gifts and deficiencies as gifts and deficiencies, to be able to quarrel as the members of an (ideal) family and not as embattled tribes. We want to be able to say without self-consciousness or inverted snobbery that such and such a Negro is a bastard or a lousy writer.
>
> But we are nowhere near that stage and in some ways we are moving farther from it as polarization increases.

Id.

65. *Id.* at 5.

66. A. Freeman, *Racism, Rights, and the Quest for Equality of Opportunity*, 23 Harv. C.R.-C.L. L. Rev. 295 (1988).

67. 62 Minn. L. Rev. 1049 (1978).

68. See *id.* at 1052.

69. Freeman, *supra* note 66, at 299.

70. See Matsuda, *Looking to the Bottom, supra* note 8, at 348. Illustrating her point, Matsuda says, for instance, that while "[w]hites became abolitionists out of choice; blacks were abolitionists out of necessity." *Id.* at 348 n.110.

71. Derrick Bell—Race and Class

The Dilemma of Liberal Reform

ALAN D. FREEMAN

All too often, one greets the newest edition of a law school text with something less than enthusiasm. Typically, the new edition is the old book, with a few new cases and articles and footnotes jammed into the old form, which maintains the structure, analytic framework, and perspective of the original edition. Derrick Bell could easily have gotten away with the typical ploy. He had already produced an exciting and unconventional book,[1] rich in material on the historical and social context of legal developments, refreshingly insistent in its unabashed quest for racial justice. Instead of merely replicating a previous success, however, Bell has written a new book,[2] drawing on the strengths of the earlier edition while offering a new form, a new perspective, and a basis for a serious critical appraisal of civil rights law.

If one goes no further than the summary table of contents, the book looks rather conventional, what one would expect from a civil rights text. There is a fifty-page historical chapter followed by eight substantive chapters dealing with interracial sex and marriage, public facilities, voting rights, administration of justice, protests and demonstrations, education, housing, and employment. A mere glance at the detailed table of contents, however, suggests that there is something different about this book. One sees topic headings such as "The Principle of the Involuntary Sacrifice," "Reserved Racial Representation," "Racial Interest-Convergence Principles," "Minority Admissions as a White Strategy," and "Employment and the Race-Class Conflict." In these sections as well as in ones with more conventional names, Bell introduces, develops, and amplifies a number of themes that run through the book.

A major theme is that there is one and only one criterion for assessing the success or failure of civil rights law—results. Bell's approach to legal doctrine is unabashedly instrumental. The only important question is whether doctrinal developments have improved, worsened, or left unchanged the actual lives of American blacks (the book focuses almost exclusively on black-white relationships because it is in that context that most of the doctrine has developed). Bell eschews the realm of abstract, ahistorical, normative debate; he focuses instead on the relationships between doctrine and concrete

A version of this chapter previously appeared as Alan D. Freeman, *Derrick Bell—Race and Class: The Dilemma of Liberal Reform*, 90 Yale L.J. 1880 (1981). Originally published in the *Yale Law Journal*.

change and whether doctrine can be manipulated to produce more change. With respect to voting rights, for example, Bell offers three prerequisites to effective voting—access to the ballot, availability of political power, and motivation to participate in the political process[3]—and then argues for recognition of aggregate voting rights and affirmative action in filling electoral positions.[4] Similarly, with respect to education, the issue for Bell is not desegregation, if that implies integration as the remedial goal, but how to obtain effective education for black children, with or without busing or racial balance.[5] In its instrumentalism and result orientation, the new book resembles the first edition, although many arguments have been developed further. The critical perspective of the new book, however, sets a strikingly different tone from that of the old one.

The problem addressed by Bell confronts everyone currently teaching civil rights law who is committed to achieving measurable, objective, substantive results: These results have for the most part not been achieved, and legal doctrine has evolved to rationalize the irrelevance of results. In 1973, when Bell's first edition came out, one could, despite the Burger Court, look with optimism at civil rights litigation. Perhaps the Court was going to dismantle the rights of the accused and soften the First Amendment, but it was remaining firm on civil rights. Decisions like *Swann*,[6] *Wright*,[7] and *Griggs*[8] not only allayed fears but actually contributed to a spirit of utopianism. Since then, and beginning in 1974, we have experienced, among other Supreme Court cases, *Milliken v. Bradley*,[9] *Pasadena Board of Education v. Slangler*,[10] *Beer v. United States*,[11] *City of Mobile v. Bolden*,[12] *International Brotherhood of Teamsters v. United States*,[13] *Washington v. Davis*,[14] *Warth v. Seldin*,[15] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[16]

It is tempting to regard these decisions as aberrations, as cases that could just as easily have gone the other way with better legal argument or incremental changes in judicial personnel (a fantasy becoming even more remote in the political environment of the time). Bell could, consistently with his result orientation, have simply offered new legal arguments or ways of distinguishing the worst cases and seized on the few deviant decisions, however ambiguous their reasoning, as substantial sources of hope. The alternative approach is to try to put the doctrinal developments in perspective by asking what could have been expected from modern civil rights law, in whose interest the enterprise really functioned anyway, and whether what has actually happened is more consistent with fundamental patterns of American society than what was once expected.

From the very beginning of the book, Bell develops such an alternative perspective. In the preface he suggests:

> We have witnessed hard-won decisions, intended to protect basic rights of black citizens from racial discrimination, lose their vitality before they could be enforced effectively. In a nation dedicated to individual freedom, laws that never should have been needed face neglect, reversal, and outright repeal, while the discrimination they were designed to eliminate continues in the same or a more sophisticated form.[17]

The historical chapter provides background information and argues that what we have just gone through is best understood as a second Reconstruction, perhaps less successful than the first. Bell's discussion of the Emancipation Proclamation leads him to offer some generalizations intended to echo throughout the book:

> First, blacks are more likely to obtain relief for even acknowledged racial injustice when that relief also serves, directly or indirectly, to further ends which policymakers perceive are in the best interests of the country. Second, blacks as well as their white allies are likely to focus with gratitude on the relief obtained, usually after a long struggle. Little attention is paid to the self-interest factors without which no relief might have been gained. Moreover, the relief is viewed as proof that society is indeed just, and that eventually all racial injustices will be recognized and remedied. Third, the remedy for blacks appropriately viewed as a "good deal" by policymaking whites often provides benefits for blacks that are more symbolic than substantive; but whether substantive or not, they are often perceived by working class whites as both an unearned gift to blacks and a betrayal of poor whites.[18]

Moreover, Bell takes serious issue with the liberal myth of "the civil rights crusade as a long, slow, but always upward pull that must, given the basic precepts of the country and the commitment of its people to equality and liberty, eventually end in the full enjoyment by blacks of all rights and privileges of citizenship enjoyed by whites."[19]

In support of this alternative perspective, Bell marshals a diverse array of sources. In the historical chapter, he cites historian Edmund Morgan for the view that "slavery for blacks led to greater freedom for poor whites"[20] and develops that view a few pages later into a principle of "involuntary sacrifice" of blacks.[21] He uses a quotation from Justice Holmes about the powerlessness of law to define a notion of "democratic domination."[22] In a wonderfully inside out (and somewhat ironic) treatment of Herbert Wechsler's famous "neutral principles" argument, Bell suggests that Wechsler may have been normatively wrong but descriptively all too accurate:

> To the extent that this conflict is between "racial equality" and "associational freedom," used here as a proxy for all those things whites will have to give up in order to achieve a racial equality that is more than formal, it is clear that the conflict will never be mediated by a "neutral principle." If it is to be resolved at all, it will be determined by the existing power relationships in the society and the perceived self-interest of the white elite.[23]

Bell is not at all hesitant in citing and taking advantage of the work of more radical critics. W.E.B. Du Bois is cited for his perception that the *Brown* decision would not have been possible "'without the world pressure of communism'" and the self-perceived role of the United States as leader of the "Free World."[24] Lewis Steel is quoted for his perception that doctrinal changes in the law governing sit-ins and demonstrations were attributable to the fact that blacks ceased to be "'humble supplicants seeking succor from White America'" and became more militant, with the resultant decisions amounting to a "'judicial concession to white anxieties.'"[25] From Frances Piven and Richard Cloward comes the perception that "the poor gain more through mass defiance and disruptive protests than by organizing for electoral politics and other more acceptable reform policies" and that the latter kind of activity actually undermines effectiveness.[26] And I discovered myself cited for the proposition that "the probable long-term result of the civil rights drive based on integration remedies will result in the bourgeoisification of some

blacks who will be, more or less, accepted into white society," with the great mass of blacks remaining in a disadvantaged status,[27] and I am quoted at some length for my own perceptions about the ideology of antidiscrimination law.[28]

In the last chapter of the book, Bell offers three generalizations about employment discrimination law that, he suggests, are equally applicable to other areas of antidiscrimination law:[29]

1. Employment discrimination laws will not eliminate employment discrimination.
2. Employment discrimination laws will not help millions of nonwhites.
3. Employment discrimination laws could divide those blacks who can from those who cannot benefit from its protection.

Generalizations like these, in the context of this book, trigger a realization in the reader that a significant line has been crossed between the two editions of *Race, Racism, and American Law.* That line represents the difference between teaching students to *do* civil rights law and teaching them *about* the unhappy history of modern civil rights law. It is not that the doctrinal materials are missing. To the extent that arguments remain available, one can find them in the book or find the materials from which to formulate one's own. In many instances, doctrinal developments have already played themselves out to depressing conclusions. In at least one instance in which Bell ends a chapter in the second edition on a tentative and limited note of optimism, a subsequent Supreme Court case has reached the depressing conclusion.[30]

Despite the presence of doctrinal materials, the book in its dominant tone is impatient with legal doctrine and despairing; the book reflexively yet almost unwillingly offers legal arguments unlikely ever to be accepted. For some, Bell's emphasis will be regarded as merely cynical; others will find it realistic. At this point, my first serious issue reappears. What is one supposed to do in teaching this course? The simplest, but perhaps too facile, answer is tell the truth. Yet if the truth seems so hopeless and dismal, and the generation of more legal argument so pointless, then one is dealing with something other than the usual law school enterprise of helping students fashion a measure of craft, skill, and insight to deal with the needs and hopes of social life.

The dissonance becomes more striking when one considers the students who typically take a course in civil rights law. Based on my own eight years of teaching the course, I can report that the students who elect it tend to be the most committed to the goal of seeking social justice through law, the most believing in the possibility of such an outcome. Thus, one finds oneself not only offering a cynical perspective on one of the most idealistic areas of legal endeavor but sharing that perspective with the students most likely to carry on with the endeavor in the future. One must let those students know that civil rights doctrine depends on and gains its legitimacy through a number of presuppositions. The world depicted in the doctrine is one of autonomous and responsive law, shared values (for example, individualism, color blindness), monolithic whiteness or blackness (that is, no class structure), and gradual yet linear progress. To question these presuppositions is to suggest the gap between the mythical world of legal doctrine and the real world in history—where law is relatively autonomous at best and responsive to power more than to powerlessness; where values are contradictory, conflicting,

and bound up with patterns of domination and hierarchy; where class relationships exist alongside racial ones; and where cyclical failure is as plausible as linear progress. Then what?

A number of teaching strategies are possible. One is simply to promote the self-conscious manipulation of legal doctrine to achieve whatever results are possible. This approach emphasizes playing the law game but refuses to accord the game any legitimacy other than in using the forms of argument the players must adopt. Along with this approach comes the frank recognition that structural change will not come through litigation (or legislation, given the political process of the time) and that all one can do is win occasional cases and improve the lives of some people.

A second strategy would extend the first and call for maximal politicization of the doctrinal activity—pushing the legal forms for explicitly political reasons to reveal contradictions and limits, promote public awareness, and even win cases. A variant of the second strategy would take off from the Piven and Cloward insight about mass movements and seek to promote legal activity that maximizes the force and protects the integrity of large, noisy, disruptive political activity, which is the real method of extracting concessions from power.

In some fashion, however, each of these strategies preserves the myths of liberal reform. To avoid these myths, one must simultaneously consider civil rights doctrine as immersed in social and historical reality. Such an approach assumes that negative, critical activity that self-consciously historicizes areas of legal doctrine like civil rights law will lead both to more self-aware and effective employment of legal forms and to a more realistic appraisal of the comparative utility of mechanisms for social change. The issue is not one for legal teaching alone; its implications are precisely parallel for both practice and scholarship. Yet it is one thing to call for—and show the need for—the historicization of civil rights law and quite another to write the history. The task of unmasking, of exposing presuppositions, of delegitimizing is easier than that of offering a concrete historical account to replace what is exposed as inadequate.

NOTES

1. D. Bell, Race, Racism, and American Law (1st ed. 1973).
2. D. Bell, Race, Racism, and American Law (2d ed. 1980).
3. *Id.* at 155.
4. *Id.* at 197–206.
5. *Id.* at 411–31.
6. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).
7. Wright v. Council of Emporia, 407 U.S. 451 (1972).
8. Griggs v. Duke Power Co., 401 U.S. 424 (1971).
9. 418 U.S. 717 (1974).
10. 427 U.S. 424 (1976).
11. 425 U.S. 130 (1976).
12. 446 U.S. 55 (1980).
13. 431 U.S. 324 (1977).
14. 426 U.S. 229 (1976).
15. 422 U.S. 490 (1975).
16. 429 U.S. 252 (1977).
17. Bell, *supra* note 2, at xxiii.
18. *Id.* at 7. See also *id.* at 230, 266–67, 303–04.

19. *Id*. at 8.
20. *Id*. at 25.
21. *Id*. at 29–30.
22. *Id*. at 127, 231.
23. *Id*. at 435.
24. *Id*. at 412.
25. *Id*. at 303.
26. *Id*. at 306.
27. *Id*. at 565.
28. *Id*. at 658–59.
29. *Id*. at 657.
30. Bell devotes a section to voter dilution cases in the Fifth Circuit, finding some basis for the most cautious of optimism for some voters in that circuit. See *id*. at 181–86. The principal case relied on was reversed by the Supreme Court in 1980. See City of Mobile v. Bolden, 446 U.S. 55 (1980), *rev'g* Bolden v. City of Mobile, 571 F.2d 238 (1978).

72. Telling Stories out of School

An Essay on Legal Narratives

DANIEL A. FARBER AND SUZANNA SHERRY

Once upon a time, the law and literature movement taught us that stories have much to say to lawyers, and Robert Cover taught us that law is itself a story. Instead of living happily ever after with that knowledge, some feminists and critical race theorists have taken the next logical step: telling stories, often about personal experiences, on the pages of the law reviews. By 1989, legal storytelling had risen to such prominence that it warranted a symposium in a major law review.[1] Thus far, however, no one has offered any systematic appraisal of this movement. We agree with the storytellers that taking the movement seriously requires engaging its ideas and that it is time for a "sustained, public examination of this new form of legal scholarship."

Initially, it may be helpful to say a few words about what we mean by legal storytelling. Reliance on case studies and other narratives is hardly new to legal scholarship. After reading the literature, however, we have identified three general differences between the new storytellers and conventional legal scholars. First, the storytellers view narratives as central to scholarship while deemphasizing conventional analytic methods. Second, they particularly value stories from the bottom—stories by women and people of color about their oppression. Third, they are less concerned than conventional scholars about whether stories are either typical or descriptively accurate, and they place more emphasis on the aesthetic and emotional dimensions of narration. These three differences combine to create a distinctive mode of legal scholarship.

As with many intellectual movements, it is easier to point to examples of legal storytelling than to provide a crisp definition. Although legal storytelling takes many forms, Patricia Williams's "Benetton" story might be considered a classic example of the genre.[2] In this story, she describes at length how she was refused admission to a Benetton store and how she encountered difficulties in persuading a law review to publish a full account of the episode. It is not extraordinary that this narrative would be published; what is new and noteworthy is that a book consisting of a series of such autobiographical narratives would be hailed as a major work of legal scholarship.

A version of this chapter previously appeared as Daniel A. Faber and Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 Stan. L. Rev. 807 (1993). Originally published in the *Stanford Law Review*.

After providing an overview of the legal storytelling movement, we evaluate its claims. Rather than asking whether storytelling is, generally speaking, a beneficial activity, we focus on the appropriate role of storytelling in legal scholarship. That task, however, requires consideration of some subsidiary questions, including whether women and people of color write in a different voice. After concluding that stories can contribute significantly to our understanding of the law, we suggest that although storytelling has no necessary gender-based, racial, or ideological connection, some special benefits may flow from stories from the bottom. Having established that at least some storytelling is a legitimate form of legal scholarship, we turn to the question of how to evaluate scholarly efforts of this kind. How do we determine the validity of these stories? How do we assess the quality of this form of scholarship? And what do "validity" and "quality" mean in this setting?

In general, we conclude that legal storytelling can contribute to legal scholarship but that storytellers should take greater steps to ensure that their stories are accurate and typical, to articulate the legal relevance of the stories, and to include an analytic dimension in their work.

Storytelling in a Different Voice

The body of literature asserting that women and people of color have unique perspectives to contribute to legal scholarship is vast and growing rapidly. Feminist legal scholars who embrace this view often speak of women's "different voice," harkening back to Carol Gilligan's ground-breaking book by that title.[3] Prominent scholars of color who subscribe to a distinctive voice of color have often denominated their own scholarship as critical race theory. Because different-voice feminists and critical race theorists have much in common, we refer to both groups collectively as different-voice scholars, differentiating among them as necessary.

So far as we are aware, there is no serious disagreement that some differences exist between the average life experiences of white males and those of other groups. It is plausible to assume that these differences in experiences cause some variations in attitudes and beliefs, particularly in those areas most closely connected with the differences in experience. Thus, for example, it would not be surprising to discover that blacks and whites have different attitudes about school busing or that men and women tend to disagree about what constitutes sexual harassment. Our understanding of the different-voice thesis, however, is that it goes beyond assuming differences only in the average attitudes and beliefs of different groups. Instead, it also postulates that members of different groups have different methods of understanding their experiences and communicating their understandings to others. This becomes relevant to storytelling through the claim that abstract analysis and formal empirical research are less appropriate than stories for communicating those understandings.

Feminism

In 1982, Carol Gilligan published *In a Different Voice*, which asserted that men and women may approach moral questions differently. Since then, scholars in a variety

of disciplines, including law, have suggested that women have a general worldview that differs in significant respects from that of men. Although the details differ, these scholars share a common description of the differences between male and female perspectives: Women are inherently both more connected to others and more contextual than men.

Although rarely made explicit, the connection between this description of women's voice and the methodology of storytelling is obvious. If legal reasoning, especially its grand theory form, is overly abstract, objective, and empirical, then the antidote is legal storytelling, which usually focuses on the narrator's experience of events. Stories supply both the individualized context and the emotional aspect missing from most legal scholarship. Thus, personal narrative is described as a feminist method.

Critical Race Theory

Because the feminist version of different-voice theory is older and therefore better developed than the critical race theory version, we found arguments regarding the voice of color particularly difficult to evaluate. However debatable Gilligan's conclusions regarding women's different voice may be, critical race theory has not yet established a comparable empirical foundation. We know of no work on critical race theory that discusses psychological or other social science studies supporting a voice of color. Most critical race theorists simply postulate a difference, often citing feminist scholarship for support and thus implicitly equating a male voice with a white voice. One scholar denies that the existence of a distinct voice of color can or need be proven, because it is solely a matter of authorial intent: Those who intend to speak in the voice of color do so.[4] The best evidence supporting the existence of a voice of color is said to be that minority "scholarship raises new perspectives—the perspectives of minority groups."[5] Thus far, however, there has been no demonstration of how those new perspectives differ from those underlying traditional scholarship.

Related to the lack of evidence for a distinct voice of color, we have found little exploration of the content of such a voice. Although descriptions of how women focus on context and connection may be vague, laden with impenetrable jargon, and sometimes even inaccurate, they are often detailed and rich with examples. In contrast, descriptions of the voice of color are less common in the literature and, again, often piggyback on feminist scholarship. The voice of color is described as contextualized, opposed to abstraction and detachment, and "grounded in the particulars of . . . social reality and experience." The most concrete description we could find is that the voice of color "rejects narrow evidentiary concepts of relevance and credibility."[6]

These vague descriptions fail to identify the content of a distinct voice of color. Because the few examples offered focus on racially charged issues such as affirmative action and hate speech regulations, they provide little insight into any broad differences between voices of color and supportive white voices. Indeed, Mari Matsuda suggests that "multiple consciousness," her term for the perspective of women of color, is accessible to everyone. And Patricia Williams, a feminist often cited as one of the foremost voices of color, implies that this voice has at least entered into that of Western humanity generally when she argues that "people of color have always been part of Western Civilization."[7]

A recent book by an African scholar suggests that the commonality of African cultures is a white myth invented to dominate blacks. Of course, the difficulty in describing the voice of color does not disprove its existence, but it does make analysis more difficult.

Finally, although many critical race theorists posit a special affinity between storytelling and the voice of color, the connection is unclear. First, several critical race scholars note that minority cultures have a strong tradition of storytelling, as opposed to more formal types of literature. Second, storytelling is said to be a method of communication that can convey new truths that "cannot be said by using the legal voice." Thus, Richard Delgado suggests that "counterhegemonic" storytelling is one cure for the prevailing racist mentality. Indeed, Alex Johnson contends that white men do not tell stories because they would have to tell of their own dominance.[8]

The problem, then, is to identify the distinctiveness of stories told in the voice of color. Like many recent feminist voices, the voice of color sometimes seems to be defined on the basis of content: It embodies a certain view of race or gender relations (and occasionally other hot political topics). This becomes most apparent when we examine critical race scholars' attempts to explain the source of the voice of color. While an occasional statement suggests that culturally ingrained differences account for the distinct voice, most critical race theorists attribute the voice of color to the experience of domination and marginal status. Matsuda notes that outsider scholarship concerns itself with such issues as affirmative action, pornography, and hate speech regulation because those with a different voice "recognize that this has always been a nation of dominant and dominated, and that changing that pattern will require affirmative, non-neutral measures designed to make the least the most."[9] She also suggests that the purpose of storytelling is to demonstrate how the pain caused by racism outweighs that of ending it. Alex Johnson characterizes the voice of color as any voice that addresses "the plight of people of color."[10] Jerome Culp describes the voice of color as "based not on color, but on opposition to racial oppression."[11] And Richard Delgado asserts that the purpose of storytelling is to "subvert" the status quo.[12] Finally, Toni Massaro characterizes the goal of the new storytellers, including critical race theorists, as "a hope that certain specific, different, and previously disenfranchised voices . . . will prevail."[13] According to this view, then, the true voice of color belongs only to a subgroup of people of color who have certain political views.

It would be helpful to have a more complete explanation of how black law school professors—whose occupation confers social and economic privilege and who may come from privileged backgrounds similar to those of their white counterparts—have a special claim to represent the views of poor blacks in urban ghettos. Indeed, there is evidence that they do not fully share the views of most African Americans. Stephen Carter points out that while most critical race theorists are politically to the left of their academic colleagues, most studies show African Americans to be considerably more conservative than whites on many issues. This suggests that perhaps only a minority of African Americans truly speak with a political voice of color.

Because critical race theorists have not articulated their claims as fully as feminists have, their theories are more difficult to evaluate. Without a clearer conception of the voice of color, it is difficult to assess the arguments on behalf of its existence. If those who argue for the existence of fundamental cognitive differences between races or genders have the burden of proof, they clearly have failed to carry that burden.

The Virtues of Narratives

The strongest arguments in favor of legal storytelling are best understood in connection with the current intellectual reaction against formalism and grand theory. A broad array of recent legal commentary has suggested there is a movement away from these dominant forms of legal analysis, which focus on abstract, deductive reasoning from high-level principles or general rules, toward something new, sometimes called practical reason or pragmatism. Storytelling is allied with pragmatism in its rejection of formalism and with practical reason in its regard for concreteness. Pragmatist theories of practical reason, we believe, illuminate both the uses and limitations of storytelling.

As Frank Michelman observes, practical reason "seems always to involve a combination of something general with something specific," so that judgment "mediates between the general standard and the specific case."

Similarly, Martha Nussbaum suggests that stories about difficult moral decisions help us understand the process of moral reasoning. On this neo-Aristotelian account, stories can augment personal experience in developing the kind of background necessary to make sound moral judgments. The process Nussbaum describes is not unlike that by which experts—ranging from chess masters to radiologists—learn to make good judgments. That process entails both personal practice and careful study of case histories (or in the case of chess masters, past games). One of us has likewise suggested that some judicial decisions function as models, providing lawyers with examples of how best to analyze problems in a given area of the law.

Finally, on an empirical level, study of concrete situations provides an obvious source of information. Case histories and fieldwork have long found use in such disciplines as psychoanalysis, anthropology, political science, and medicine. Familiar methodological risks accompany these techniques. Nevertheless, even the social scientists who consider these techniques less reliable than more formalized statistical and experimental methods would be hard-pressed to dismiss them as useful starting points, which can then be subjected to more rigorous testing procedures. For example, by closely examining the record in a leading case, lawyers may formulate general theories about an area of the law.

The uniqueness of legal storytelling thus does not lie in its focus on the concrete rather than the abstract. That focus is characteristic of the much broader movement away from formalism and grand theory in contemporary scholarship. Rather, legal storytelling's most distinctive claim is that particular types of concrete examples—those drawn from the experiences of the downtrodden—have a special claim on our attention.

Stories from the Bottom

One frequent claim on behalf of storytelling is that stories build solidarity among the members of an oppressed group, thereby providing psychological support and strengthening community. We have no reason to question these effects; nevertheless, we do not believe that they in themselves are sufficient to validate the stories as scholarship. As Kathryn Abrams says, "It seems reasonable to ask of narrators who are, in fact, legal scholars that their stories be framed in such a way as to shed light on legal questions."[14] Community building may be valuable, but it is an enterprise quite distinct from increasing understanding of the law.

Supporters of storytelling also maintain that stories by the oppressed can transform the consciousness of readers who are members of the dominant group by introducing them to a radically different worldview. For example, Richard Delgado has suggested that "[s]tories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place."[15] Delgado argues that the mind-set of the dominant group is the "principal instrument" of subordination and for this reason concludes that storytelling has greater potential to produce radical social change than other techniques like litigation.

Yet if whites did inhabit a socially constructed reality wholly distinct from people of color, it would be difficult to understand how communication across this gulf could take place. Any sentence uttered by a person of color, under this assumption, would be connected with one coherent worldview in the mind of the speaker, but a white listener could understand the sentence only within her own, equally coherent but quite different, worldview. In essence, the speaker would be using one language and the hearer would be listening to a completely different one, even though the words of both languages would sound identical. Thus this view calls into question the enterprise of storytelling itself as a means of communication.

Despite the many assertions about how narratives can transform the political perspective of insiders, conversion stories are notably scarce. As storytelling advocates admit—and as cognitive psychologists would predict—responses by insiders are typically defensive or dismissive. Stories undoubtedly can enhance public attitudes, yet current storytelling seems unlikely to do so. Effective communication requires bridging the gap between the viewpoints of speaker and listener, rather than simply presenting the speaker's views without regard to the standpoint of the listener. But in our extensive reading of the storytelling literature, we have found few efforts to connect the events in the stories with the experiences of white or male readers. Thus, whatever potential storytelling might have to change attitudes is unlikely to be realized by the current generation of efforts.

Stories, Cases, and Legal Scholarship

Although current storytelling efforts are unlikely to have a major impact on public attitudes, stories from the bottom may still help identify and eliminate biases in the legal system. The storytelling literature contains a good deal of rhetoric, such as the following eloquent statement by David Luban, suggesting that the legal system silences certain stories:

> Equally important is the parallel power over local narratives, the power of the victor to build whatever facts he or she wishes into the fabric of legal decisions by (re)interpreting the record. Just as in the case of political narratives, losers endure not only the material burdens of defeat, but also the ignominy of helplessly witnessing their own past edited, their own voices silenced in the attempt to tell that past. And thus the fight of those voices that have been silenced by the law—and those obviously include not only the voices of miscreants and justifiably unsuccessful litigants, but also the voices of racial minorities, of women, of

> homosexuals, of the poor—is, as [Walter] Benjamin put it, "the fight for the oppressed past."[16]

The metaphor of silencing is powerful but elusive. In what respect, for instance, is losing a lawsuit the same as being gagged? Losers are in fact often very vocal, perhaps more so than victors (who seem just as likely to enjoy their victory in smug silence). In part, the silencing metaphor invokes some broader concepts about the relationship between power and truth, but it does not elucidate that relationship. The basic idea seems to be that we fail to receive information about the experiences of outsiders because the legal system itself filters out these stories or our present sample of them is biased.

One source of bias is simply that people tend to associate with those similar to themselves and, consequently, possess few informal methods of tracking the experience of other groups. A related problem is that our perceptions of the frequency of a problem may depend on vantage point. For example, if relatively few men engage in sexual harassment, men might think sexual harassment occurs relatively infrequently. Women, on the other hand, may view it as a widespread problem if, for instance, each of a small number of men harasses many women. Moreover, behavior that is widespread may seem trivial to members of a dominant group but quite significant to members of subordinated groups. Because legal analysis is often based on informal experience and folk wisdom rather than rigorous social science, these problems may lead to mistaken policy recommendations.

Legal storytelling is unlikely to correct these forms of bias because the problems themselves stem from broader social conditions. More effective solutions include integration and affirmative action, both of which attack the problem directly by broadening the personal contacts of the individuals involved. And to the extent that vicarious contacts through stories can supplement these direct solutions, the publication of stories in law reviews is not the best solution. For example, novels can provide much more textured versions of individual experiences, while movies and television have greater dramatic impact and reach far larger audiences than law review prose. Moreover, one might question whether the personal stories of middle-class law professors can accurately convey the perspectives of the truly disadvantaged.

The more interesting sources of bias stem directly from the legal system itself. First, as several advocates of storytelling have pointed out, the facts in appellate opinions are usually stated in terms most favorable to the victor. As a result, stories told in appellate opinions are likely to be biased in favor of a group consisting of successful litigants. This group will therefore systematically exclude individuals whose problems are not yet addressed by existing legal rules, since they will have lost the litigation. For example, if the legal system provides no remedy for victims of hate speech, they will not win lawsuits, and their version of the facts will not appear in appellate opinions. Although most legal scholars recognize that appellate opinions are highly unreliable and biased sources of empirical evidence, we are all prone to rely on them nonetheless, given that they are so easily accessible.

Second, some facts are filtered out even before the opinion-writing stage. For example, if the legal system disallows damages for emotional distress, evidence of these damages will be considered irrelevant. Cases turning on certain fact patterns will simply not be brought if the law clearly offers no remedy. Hence, lawyers, judges, and scholars may

be unaware of widespread problems. For instance, before sexual harassment became a potential cause of action, a victim of harassment would have had no reason to bring a clearly futile lawsuit. Therefore, male legal observers would be unaware that this was a widespread problem. Similarly, prosecutors may be reluctant to bring acquaintance rape cases, which may lead criminal law specialists to assume that this form of rape is uncommon.

Some cases may not be brought because they fail to fit existing legal categories. For example, allegations about heterosexual abuse often surface in divorce cases. But because the law does not recognize lesbian marriages and thus cannot recognize lesbian divorces, information about physical abuse between lesbians is less likely to come to the attention of the legal system. More subtly, in the effort to force grievances into existing legal categories, lawyers may strip away crucial aspects of the victim's experience.

A third source of bias emerges from the impact of legal rules on conduct. When legal rules disfavor certain kinds of conduct, we may rarely observe such conduct and conclude that few people are motivated to engage in it. For example, if the legal system generally disfavors altruism, it may produce a self-confirmatory body of evidence about the weakness of altruistic motivations. This evidence might then mislead legal theories into rejecting altruism as a potentially powerful social force. An even clearer case is that of intentional racism. Given the existence of Title VII, only a very poorly informed employer will ever explicitly state that he is firing an employee out of racial animus. In the absence of such cases, lawyers and scholars may conclude that racial animosity has vanished from the workplace.

Ways of correcting such biases other than storytelling offer themselves. Survey research, for example, may document the existence of behavior that the legal system overlooks. Still, storytelling can at least suggest areas where more formal social science research might be helpful. The use of narratives can also provide several other special benefits.

Stories may be useful to counteract weaknesses in the ways we process information. Vivid examples often influence us more than statistical evidence, which explains, for example, why many people are more afraid of airplane crashes (which are statistically rare) than car crashes (which are statistically more common but less horrifying). Also, statistical information is subject to framing effects: A treatment with an 80 percent survival rate sounds better than one with a 20 percent mortality rate, even though the two are equivalent. If used carefully, stories can help counter these distortions.

Standards for Evaluating Stories as Scholarship

We have seen that stories can make a legitimate contribution to legal scholarship, defined broadly as writing that increases our understanding of the legal system. This says nothing, however, about the validity or quality of any particular exercise in storytelling.

Evaluating scholarship, particularly scholarship of a new type, raises two separate issues. The first is the question of validity: When should a story be considered a valid source of insight? One might view this as the question of whether the raw data of the stories themselves are sufficiently reliable that they can be put to further use, regardless of whether the information is new or important. Just because a text contains valid material,

however, does not necessarily mean that it is good scholarship. Thus, the second issue entails determining the standards for evaluating quality.

Validity Issues

The Problem of Fiction

Legal scholars use the fictional form in a variety of ways. Sometimes, it serves simply as the framework for developing an argument, as in Plato's *Republic*. In this form, the author does not claim to be narrating true events but merely claims to be presenting true ideas. The work must stand or fall on its conceptual merits. Similarly, a story may be an extended hypothetical, used to work out in detail the consequences of a given position. These forms of scholarship pose no inherent challenge to conventional intellectual standards.

The fictional form might also be used to suggest a new hypothesis or provide an empathetic understanding of a situation. A story may still serve these functions well even if it is a composite of many people or episodes, rather than a precise depiction of particular events. The more fictionalized the story, however, the more troublesome its use as empirical evidence becomes. This risk heightens when the author of the fiction is a scholar, publishing in a scholarly journal, because the audience is unsure whether the author is speaking as a scholar or solely as an artist.

Truthfulness in Nonfiction

Relatively little legal storytelling bills itself as fiction. Rather, the majority of stories are presented as descriptions of specific experiences, whether of the author or of someone else. Thus, the author is claiming that the stories are true. Some advocates of storytelling, however, question whether empirical accuracy is an important aspect of these stories. While we acknowledge that the meaning of "truth" is itself contested, we do not believe it necessary to explore philosophical disputes over the nature of truth to resolve the standards for assessing nonfictional stories. In particular, we need not subscribe to any form of positivist or correspondence theory of truth. The real question here is not objective truth but honesty: Is the author's account what it purports to be?

Methods of Judging Truthfulness

A major difficulty with storytelling is verifying the truthfulness of particular stories. One genre of storytelling for which challenging accuracy is particularly troublesome is the first-person agony narrative, in which the author's experience of pain serves as a vehicle to criticize a social practice. Just as lawyers normally are not allowed to offer testimony at trial or to vouch for witnesses, scholars should not be readily allowed to offer their own experiences as evidence. The norms of academic civility hamper readers from challenging the accuracy of the researcher's account; it would be rather difficult, for example, to criticize a law review article by questioning the author's emotional stability or veracity.

We do not mean to assert that legal scholars should consider only evidence meeting formal social science standards. We cannot always afford the luxury of waiting for definitive findings. Furthermore, practical reasoning allows other forms of experience to

supplement formalized research. Nevertheless, we need to be aware of the risks in relying on unverified narratives and take whatever steps are possible to guard against those risks.

Typicality

Even if a story is true, it may be atypical of real-world experiences. The importance of typicality depends partly on the use of a particular story. If the story aims to suggest a hypothesis or a possible causal mechanism, then a prior showing of typicality is unnecessary. On the other hand, if the story is being used as the basis for recommending policy changes, it should be typical of the experiences of those affected by the policy.

It bears repeating that typicality is unrelated to any commitment to objectivity as a philosophical position. Instead, we are merely asking, "If we checked with more people in the same situation, how many of them would tell similar stories?" If most of their stories would be different, then the informational value of the particular story selected by the author is limited. Moreover, to ignore the typicality concern would be to allow an unrepresentative individual to speak for a group, in effect silencing other members.

Stories that lack minimum safeguards for truthfulness and typicality do not qualify as scholarship, much less good scholarship. Although some of the stories currently appearing in law reviews seem shaky when measured by these criteria, we are confident that other stories will meet the threshold requirements. We therefore turn to issues of quality.

Assessing Quality

Questions about the quality of academic scholarship arise in many different situations. When we discuss the latest scholarship with colleagues, we make judgments about what we have read. When we write, we choose which works to cite or to build on and which to ignore. On occasion, we make judgments about the quality of a candidate's scholarship in connection with personnel decisions. And when we teach, we must decide which scholarship can best contribute to the education of our students.

Within the profession, what constitutes poor, competent, or outstanding legal scholarship is in dispute. Much of the dispute stems from disagreements about the purposes of legal scholarship: Are we writing for each other or for legal decision makers outside academia? Is doctrinal analysis the core of legal scholarship, or is it too pedestrian and practice oriented? Should we engage in internal critiques of legal rules or external critiques of legal practice (including the practice of scholarship)? Must our work be prescriptive, or ought it to be mainly descriptive?

Although most of this debate concerns the distinctive nature and purposes of legal scholarship, our concern here is with the more basic question of what qualifies as good scholarship in general, in any academic discipline. Most academics would agree that traditional standards of merit do exist. And most would concede that the standards can often be applied unevenly or too leniently. We are not suggesting that all extant scholarship does meet the standards we propose, only that it aspires to.

Different-voice theorists argue, however, that those traditional standards operate unfairly against the scholarship of women and people of color in general and against storytelling in particular. They are thus demanding to be exempt from conventional

standards, which differentiates their work from other scholarship (including traditional but substandard scholarship).

The issue of evaluating scholarship often arises in personnel decisions. Attacks on faculty hiring and promotion practices have, by and large, moved away from claims of intentional discrimination, and most critics now concede that the same standards are usually applied to everyone, at least superficially. The more common argument is that the universal standard of merit is ideologically and culturally defined in a way that excludes the unconventional voices of women and people of color. To remedy this problem, different-voice scholars, especially critical race theorists, argue that one should not apply traditional standards to the work of minority scholars.

Alex Johnson, for example, argues that "the meritocratic evaluative standard . . . embodies white, majoritarian norms" and that that standard is "inappropriate when applied to scholarship written in a distinct voice of color," because it is "culturally biased against the inclusion of a voice of color."[17] Similarly, Richard Delgado states that the meritocratic standard "measures the black candidate through the prism of preexisting, well-agreed-upon criteria of conventional scholarship and teaching. Given those standards, it purports to be scrupulously meritocratic and fair."[18] Despite this purported fairness, however, Delgado suggests that "merit criteria may be the source of bias, rather than neutral instruments by which we determine whether or not that bias exists." Indeed, according to Delgado, merit is "potentially hostile to the idea of voice," has "a special affinity for procedural racism," and is "the perfect excluder of 'deviant' or culturally stigmatized groups."[19]

These arguments assume that the work of women and minority scholars is different—so much so that it cannot be judged by conventional standards of merit. As noted earlier, available evidence does not support such a strong claim about different voices. The critique of traditional standards as biased appears to be based largely on the failure of the works of some outsider scholars to fare well under those standards. As Randall Kennedy points out, however, this might be because those specific works lacked merit.[20] The arguments also assume that people of color cannot meet the traditional standards of merit, a suggestion that many scholars of color naturally find demeaning and for which no evidence exists.

Thus, we find little support for the assertion that traditional standards are inherently unfair to work by women and minorities. A narrower, and more interesting, claim is that these standards are inappropriate for assessing legal storytelling as a particular genre of scholarship.

Different Standards

Little has been written about what standards ought to apply to different-voice scholarship in place of traditional standards. Richard Delgado argues that it is too soon to apply any standards, leaving one to wonder how the work of these scholars ought to be evaluated for purposes of promotion and tenure or even for purposes of deciding what readings to recommend to others.

Mary Coombs has proposed a pragmatic standard: The scholarship should be judged "in terms of its ability to advance the interests of the outsider community," with the caveat that any criteria for evaluating new articles must "definitionally give high marks to the works of" the movement's own heroes, Patricia Williams, Catharine MacKinnon,

Martha Fineman, Mari Matsuda, Derrick Bell, and Richard Delgado.[21] Judging scholarship by its political effect suffers from several flaws. First, it is questionable whether academic work should be judged solely by its influence.

Another problem is that Coombs implies that "we"—those whose views have been transformed—includes only the outsider community, which itself seems to be limited to individuals whose views have been transformed by these scholars. A storyteller who tells a more conservative story, however skilled in the techniques exemplified by the benchmark scholars, is not likely to be rated highly. For example, how many of the outsider scholars would support the recent Supreme Court decision to allow introduction of victim impact statements in criminal trials, which surely can be as poignant and well-crafted as the stories in law reviews? A more useful approach might be to analyze why benchmark scholars' work is particularly meritorious, rather than defining merit by its presence in their work. This would force Coombs (or her informants) to defend the choice of benchmarks and thus to confront directly the potential for bias.

Several scholars have suggested that stories ought to be judged by aesthetic standards, perhaps similar to those we apply to works of fiction (whatever those might be). In this regard, storytelling might serve the same functions as novels or plays in helping us to understand our lives. Martha Nussbaum argues that great works of fiction can develop philosophical positions that cannot be articulated as well in conventional discursive prose. For example, she finds deep insights on some issues of moral philosophy in the novels of Henry James.

Without denigrating the abilities of legal storytellers, we see no reason to expect them to produce great literary works of the caliber of a Dostoevsky (or a Virginia Woolf or a Toni Morrison, for that matter).

In rejecting the creation of literature as a form of legal scholarship, we are admittedly indulging a mild presumption in favor of institutional specialization. While works of literature may well be a source of important insights for lawyers, we contend that creating literature has little nexus with the specific institutional traits of law schools and seems far more congenial to other settings such as creative writing departments. Thus, we do not believe that the production of literature ought to be considered part of the mission of law schools. Just because something is worthwhile does not mean that it should take place under a law school umbrella. Indeed, to the extent that fictional or fictionalized accounts profess to be scholarship, they jeopardize the credibility of legal scholarship. Unlike other critics, we believe that storytelling—and outsider scholarship in general—can and should be judged by standards that include the requirement of an analytic component.

Application of Conventional Standards

Almost everyone would agree that a work of scholarship should be comprehensible to its audience, say something new, and demonstrate familiarity with the relevant literature.

Reason and analysis are the traditional hallmarks not only of legal scholarship but of scholarship in general. According to one scholar, neither the exercise of power nor "strategic arguments designed to persuade by their emotional effect on the listener" are acceptable scholarly techniques.[22] The new storytellers, however, challenge this view of scholarship as overly narrow and culturally biased. Consequently, the standards they propose for evaluating stories do not consider analysis or reasoned arguments essential

to good scholarship. Rather, the emotive force of the stories is seen as their primary appeal. In our view, however, emotive appeal is not enough to qualify as good scholarship.

The point of all scholarship—including the nontraditional forms—is to increase the reader's understanding (here, of law). The goal of conveying ideas helps distinguish scholarship from other forms of communication, which might be designed primarily to give pleasure or to influence action. A second distinguishing feature of scholarship is that it invites reply. Whether it purports to describe the world or to prescribe human action, scholarship is addressed, at least in part, to other scholars engaged in the same activity. Because articles are part of an ongoing scholarly dialogue, even biting criticism is preferable to silence from other scholars.

Because scholarship is an interactive activity, the reader must be able to disagree with the author and dispute her ideas. What we propose here is a weaker version of the scientific doctrine of falsifiability: Something cannot be scholarship if it cannot be disputed. Persuasion, the ultimate goal of all scholarship, requires the active participation of the reader and thus must admit some form of counterargument. Personal narratives devoid of analysis generally do not satisfy this requirement because it will often be impossible to make counterarguments to them.

Stories can also deceive in subtle ways. As a form of rhetoric, stories can "tak[e] the other in, deflecting her on unacknowledged, perhaps deliberately hidden grounds."[23] Often this is the unintentional result of using first-person narratives. Thus, the accounts may be mistaken or distorted. Stories also tend to favor those who are near at hand, ignoring more distant voices. Sometimes the deception, whether intentional or not, is the result of treating complex human dramas as morality plays. Occasionally, it stems from willful ignorance. A valid exercise in storytelling must include efforts to ensure the truthfulness and typicality of the story. Because these attributes are not self-documenting, the author must present some analysis to show that the story is credible and representative. This is similar to how a historian must defend her credibility judgments about historical sources and the inferences she has made from the historical record.

NOTES

1. Symposium, *Legal Storytelling*, 87 Mich. L. Rev. 2073 (1989).

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3. Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (1982).

4. Alex M. Johnson, Jr., *Racial Critiques of Legal Academia: A Reply in Favor of Context*, 43 Stan. L. Rev. 137, 138, 160–61 (1990).

5. Sharon Elizabeth Rush, *Understanding Diversity*, 42 Fla. L. Rev. 1, 22 (1990).

6. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, Address at the Yale Law School Conference on Women of Color and the Law (Apr. 16, 1988), in 11 Women's Rts. L. Rep. 7, 9 (1989).

7. Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 Mich. L. Rev. 2128, 2136 (1989).

8. Alex M. Johnson, Jr., *The New Voice of Color*, 100 Yale L.J. 2007, 2047 n.170 (1991).

9. Matsuda, *supra* note 6, at 10.

10. Johnson, *supra* note 8, at 2016.

11. Jerome McCristal Culp, Jr., *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy* 1992 Duke L.J. 1095, 1097.

12. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411, 2413 (1989).

13. Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 Mich. L. Rev. 2099, 2113 (1989).

14. Kathryn Abrams, *Hearing the Call of Stories*, 79 Cal. L. Rev. 971, 1030 (1991).

15. Delgado, *supra* note 12, at 2413.

16. David Luban, *Difference Made Legal: The Court and Dr. King*, 87 Mich. L. Rev. 2152, 2155–56 (1989) (citation omitted).

17. Johnson, *supra* note 8, at 2018 n.47.

18. Delgado, *supra* note 12, at 2421.

19. Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 Va. L. Rev. 95, 101 (1990).

20. Randall Kennedy, *Racial Critiques of Legal Academia*, 102 Harv. L. Rev. 1745, 1765–66, 1774–75, 1814 (1989) (also see Chapter 70, this volume).

21. Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. Colo. L. Rev. 683, 713 (1992).

22. Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 Mich. L. Rev. 1835, 1846 (1988).

23. Richard Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 Mich. L. Rev. 543, 568 (1988).

73. A Systemic Analysis of Affirmative Action in American Law Schools

RICHARD H. SANDER

For more than four decades, American higher education has been engaged in a massive social experiment: to determine whether the use of racial preferences in college and graduate school admissions could speed the process of fully integrating American society. Since 1978,[1] universities have tended to justify affirmative action by reason of its contributions to diverse classrooms and campuses. But the overriding justification for affirmative action has always lain in its impact on minorities. Few of us would enthusiastically support preferential admission policies if we did not believe they played a powerful, irreplaceable role in giving nonwhites in America access to higher education, entrée to the national elite, and a chance of correcting historic underrepresentations in the leading professions.

Yet over the years of this extraordinary, controversial effort, no one has carried out a comprehensive assessment of the relative costs and benefits of racial preferences in any field of higher education. Ambitious works like *The Shape of the River* and *The River Runs Through Law School*[2] have provided valuable evidence that the beneficiaries of affirmative action at the most elite universities tend, by and large, to go on to the kinds of successful careers pursued by their classmates. This is helpful, but it is only a tiny part of what we need to know. What would have happened to minorities receiving racial preferences had the preferences not existed? How much do the preferences affect what schools students attend, how much they learn, and what types of jobs and opportunities they command when they graduate? Under what circumstances are preferential policies most likely to help, or harm, their intended beneficiaries? And how do these preferences play out across the entire spectrum of education, from the most elite institutions to the local night schools?

These are the sorts of questions that should lie at the heart of the affirmative action debate. Remarkably, they are rarely asked and even more rarely answered, even in part. They are admittedly hard questions, and we can never conduct the ideal experiment of rerunning history over the past several decades—without preferential policies—to observe

A version of this chapter previously appeared as Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004). Originally published in the *Stanford Law Review*.

the differences. But we can come much closer than we have to meaningful answers. The purpose of this chapter is to pursue these questions within a single realm of the academy: legal education in the United States. Several remarkable data sets on law schools and the early careers of young lawyers have recently emerged. Together, they make it possible to observe and measure the actual workings of affirmative action to an unprecedented degree. Here I begin the application of those data to the question of how much affirmative action across American law schools helps and hurts blacks seeking to become lawyers. The results do not aim to be definitive, only to take us several steps in a new direction.

My goal is to be systemic—to analyze legal education as a complete, interlocking system. As we shall see, the admissions policies of law schools, as within any discipline, are necessarily interdependent. Individual schools have less freedom of action than an outsider might assume. Moreover, one cannot understand the consequences of racial preferences without understanding the relative trade-offs for students attending schools in different tiers of the education system. In many ways, law schools are an ideal subject for this type of systemic approach. The vast majority of states have fairly uniform educational requirements for lawyers, and the vast majority of law schools are licensed by the same national organizations. Nearly all aspirants to law school go through a similar application process and take a uniform exam, the Law School Admission Test (LSAT). First-year law students across the country follow similar curricula and are graded predominantly on a curve. Nearly all graduates of law school who want to practice law must take bar exams to begin their professional careers. These uniformities enable comparisons within the legal education system. At the same time, the 180-odd accredited law schools in the United States encompass a very broad hierarchy of prestige and selectivity; like the legal profession itself, legal education is more stratified than most nonlawyers realize. This makes legal education an excellent candidate for the systemic analysis of affirmative action. If racial preferences are essential anywhere for minorities to vault into the elite strata, they should be so here.

My focus is on the effects racial preferences in admissions exert on the largest class of intended beneficiaries: black applicants to law school. The principal question of interest is whether affirmative action in law schools generates benefits to blacks that substantially exceed the costs to them. The costs to blacks that stem from racial preferences are often thought of, in the affirmative action literature, as rather subtle matters, such as the stigma and stereotypes that might result from differential admissions standards. These effects are interesting and important, but I give them short shrift for the most part because they are hard to measure and not enough data are available that are thorough or objective enough for my purposes. The principal cost I focus on is the lower actual performance that usually results from preferential admissions. A student who gains special admission to a more elite school on partly nonacademic grounds is likely to struggle more, whether that student is a beneficiary of a racial preference, an athlete, or a legacy admittance. If the struggling leads to lower grades and less learning, then a variety of bad outcomes may ensue: higher attrition rates, lower pass rates on the bar, problems in the job market. The question is how large these effects are and whether their consequences outweigh the benefits of greater prestige.

No writer can come to the subject of affirmative action without any biases, so let me disclose my own. I am white and grew up in the conservative rural Midwest. But much of my adult career has revolved around issues of racial justice. Immediately after college,

I worked as a community organizer on Chicago's South Side. As a graduate student, I studied housing segregation and concluded that selective race-conscious strategies were critical, in most cities, to breaking up patterns of housing resegregation. In the 1990s, I cofounded a civil rights group that evolved into the principal enforcer (through litigation) of fair housing rights in Southern California. My son is biracial, part black and part white, and so the treatment and fortunes of nonwhites in higher education give rise in me to all the doubts and worries of a parent. As a young University of California at Los Angeles School of Law faculty member, I was deeply impressed by the remarkable diversity and sense of community the school fostered, and one of my first research efforts was an extensive and sympathetic analysis of academic support as a method of helping the beneficiaries of affirmative action succeed in law school. Yet as I began my studies of legal education in the early 1990s, I found myself troubled by much of what I found. The first student survey I conducted suggested that UCLA's diversity programs had produced little socioeconomic variety; students of all races were predominantly upper crust.[3] Black-white performance gaps were very large, with visible effects on classroom interaction. I began to ask myself some of the questions I explore in this selection, but for years the lack of data seemed an insuperable barrier to anything more than casual speculation. At the same time, I was somewhat dismayed by the lack of candor of many architects of racial preferences about how these preferences operated. It seemed to me that debate and discussion in the area were unduly circumscribed; academics rarely asked hard questions about what we were doing—in part, admittedly, because of the desire to protect the delicate sense of community.

I therefore consider myself to be someone who favors race-conscious strategies in principle if they can be pragmatically justified. Racial admissions preferences are arguably worth the obvious disadvantages—the sacrifice of the principle of color blindness, the political costs—if the benefits to minorities substantially exceed the costs to minorities. By the same token, if the costs to minorities substantially exceed the benefits, then it seems obvious that existing preference programs should be substantially modified or abandoned. Even if the costs and benefits to minorities are roughly a wash, I am inclined to think that the enormous social and political capital spent to sustain affirmative action would be better spent elsewhere.

What I find and describe here is a system of racial preferences that, in one realm after another, produces more harms than benefits for its putative beneficiaries. The admission preferences extended to blacks are not only very large; they do not successfully identify students who will perform better than one would predict on the basis of their academic indices. Consequently, most black law applicants end up at schools where they will struggle academically and fail at higher rates than they would in the absence of preferences. The net trade-off of higher prestige but weaker academic performance substantially harms black performance on bar exams and in the job market. Perhaps most remarkably, a strong case can be made that, in the legal education system as a whole, racial preferences end up producing fewer black lawyers each year than would be produced by a race-blind system. Affirmative action as currently practiced by the nation's law schools does not, therefore, pass even the easiest test one can set. In systemic, objective terms, it hurts the group it is most designed to help.

The chapter is organized as follows: After briefly recounting the development of racial preferences in legal education admissions, I examine whether racial preferences are

limited to the most elite schools, as is often claimed. I find that the current structure of preferences creates a powerful cascade effect that gives low- and middle-tier schools little choice but to duplicate the preferences offered at the top. I then consider whether the numerical predictors heavily used by law schools are biased or useless in predicting actual outcomes and present comprehensive data on how blacks and whites actually perform in law school. In the vast majority of American law schools, median black grade point averages (GPAs) at the end of the first year of law school are between the fifth and tenth percentile of white GPAs; they rise somewhat thereafter only because those black students having the most trouble tend to drop out. The black-white gap is the same in legal writing classes as it is in classes with timed examinations. Because of low grades, blacks complete law school less often than they would if law schools ignored race in their admissions process.

Last, I explore how affirmative action affects black success on bar examinations. At most law schools in most of the United States, ultimate bar passage rates for graduates are above 80 percent. If we use regression analysis to predict bar passage, we find that going to an elite school helps a little but getting good grades is much more important. Blacks and whites at the same school with the same grades perform identically on the bar exam; but since racial preferences have the effect of boosting blacks' school quality but sharply lowering their average grades, blacks register much higher failure rates on the bar than do whites with similar LSAT scores and undergraduate GPAs. Affirmative action thus substantially depresses the rate at which blacks pass the bar. This finding combined with the attrition discussed earlier leads to the conclusion that many blacks admitted to law school with the aid of racial preferences face long odds against ever becoming lawyers.

Origins

In a recent year, roughly 3,400 blacks were enrolled in the first-year classes of accredited law schools in the United States, constituting about 7.7 percent of total first-year enrollment. This is very close to the proportion of blacks (8.9 percent in 2001) among college graduates—the pool eligible to apply to law schools. Although blacks are underrepresented in law school compared to their numbers among all young adults (by a factor of nearly two to one), law schools compare well with other areas of graduate education in their recruitment and enrollment of black students.

It was not always so. In 1964, there were only about three hundred first-year black law students in the United States, and one-third of these were attending the nation's half-dozen historically black law schools. Blacks accounted for about 1.3 percent of total American law school enrollment, and since blacks also accounted for about 1.1 percent of all American lawyers, we can infer that their relative enrollment numbers had been flat for quite some time. The story was much the same for Mexican Americans, Puerto Ricans, and Asians (though of course the relative numbers of these groups were much smaller at the time). Minorities were generally underrepresented by a factor of five or six in graduate education, but they fared particularly badly in law schools.

During the 1964–1967 period, when civil rights issues dominated public discourse but affirmative action programs were still largely unknown, many within the legal

education community identified low black enrollment as a problem and began to think systematically about solutions.

During these early years, no bones were made about the application of different standards to minority applicants. Indeed, it was widely argued that elemental fairness required them; the LSAT in particular was regarded as a culturally biased test that substantially understated the academic potential of black students. Moreover, it was believed that conventional standards were most inapplicable to socioeconomically disadvantaged minorities, so black and Latino students from low-income families were admitted under especially relaxed standards.

Racial preferences in American law schools were quite large during the period from 1980 to 1990. The size of preferences probably changed little after *Bakke* or possibly even shrank at some schools, but for other reasons black law school enrollment began a second period of growth in the mid-1980s.

In June 2003, the Court handed down deeply split opinions in both *Grutter* and *Gratz*.[4] Justice Sandra Day O'Connor found in *Grutter* that diversity in a university environment was a compelling state interest.[5] The boundary between the acceptable and unacceptable use of race lay in the degree to which race was considered in a mechanical, or automatic, fashion, as opposed to an individualized process in which race was one of many relevant factors.

So the matter stands. But was the consideration of race producing the good results that had been advanced on its behalf?

While conducting research, my associate and I submitted Freedom of Information Act (FOIA) requests to thirteen public law schools across the United States. We chose all of the elite public law schools and a random sample of other schools. In all, we collected data on twelve admissions cycles over 2002 and 2003 from seven law schools.

The Cascade Effect of Racial Preferences

The conventional wisdom about university-based affirmative action holds that it is largely confined to the most elite schools. The black-white gap in test scores and grades produces a shortage of blacks at the top of the distribution, so—the argument goes—the most elite institutions must use racial preferences to recruit an adequate number of blacks. In the middle of the distribution, in contrast, there are plenty of blacks to go around. The logical misstep is not realizing that if enough midrange blacks are snapped up by elite schools, the midrange schools will face their own shortage of blacks admissible through race-blind criteria. The lack of good empiricism on this issue results from the tendency of scholars to focus on the glamorous schools and to give only passing attention to those in the trenches.

In fact, the evidence within the law school world shows conclusively that a very large majority of American law schools not only engage in affirmative action but engage in the types of racial boosting that, if made explicit, would probably not survive judicial scrutiny.

Affirmative action thus has a cascading effect through American legal education. The use of large boosts for black applicants at the top law schools means that the highest-scoring blacks are almost entirely absorbed by the highest tier. Schools in the next tier

have no choice but to either enroll very few blacks or use racial boosts or segregated admissions tracks to the same degree as the top-tier schools. The same pattern continues all the way down the hierarchy.

Because of the cascade effect, the only schools that truly benefit from the preferential policies are those at the top—perhaps the top forty law schools. In a race-blind system, the numbers of blacks enrolling in the top twenty schools would be quite small, but the numbers would be appreciable once one reached schools ranked twentieth to thirtieth, and blacks would steadily converge toward a proportional presence as one moved down the hierarchy of schools. At the bulk of law schools, the very large preferences granted to blacks only offset the effects of preferences used by higher-ranked schools.

It is important to understand that a nearly identical dynamic process would follow the decision of any but the lowest-tier American law schools to become "race-blind" in admissions. If the nonelite school treated all students according to its existing "white" standards, it would lose almost all of its black students because those admitted under these standards would have far more attractive offers from higher-ranked schools. If the school treated all students according to its existing "black" standards, it would fall in the rankings and, again, eventually lose its black students to higher-ranked schools.

In this sense, affirmative action in American law schools is not so much a set of policies adopted by individual schools as a system in which the freedom of action of any single school is largely circumscribed by the behavior of all the others. Nearly any school that switched to truly race-neutral practices would find its number of enrolled blacks rapidly dropping toward zero. And any school that did so voluntarily would not only appear to be racist—how could this school be segregated when every other law school has something approaching proportional representation?—but also find itself under intense pressure from all its constituency groups to enroll more blacks and Hispanics.

The Value of Academic Indices

The foregoing effectively demonstrates, I hope, three basic points: (1) law school admissions offices rely primarily on academic indices in selecting their students; (2) because the number of blacks with high indices is small, elite law schools achieve something close to proportional representation by either maintaining separate black and white admissions tracks or giving black applicants large numerical boosts; and (3) the use of these preferences by elite schools gives nearly all other law schools little choice but to follow suit. The result is a game of musical chairs in which blacks are consistently bumped up several seats in the law school hierarchy, producing a large black-white gap in the academic credentials of students at nearly all law schools.

Defenders of affirmative action say that the credentials gap has little substantive significance. They cite an eclectic band of critics who have attacked the reliance on academic numbers in general, and standardized tests in particular, as misguided and unfair. Let us consider several of their principal criticisms.

Usefulness

Predictive indices (like the LSAT–undergraduate GPA [UGPA] index) don't predict very well. The correlation (usually denoted by *r*) of such indices with first-year law school

grades at individual schools ranges from about .25 to .50. The square of the correlation coefficient (the r^2) describes how much of the variation in the outcome variable (in this case, first-year grades) is explained by the measurement variable (in this case the academic index). Since the squares of 0.25 and 0.50 are, respectively, 0.0625 and 0.25, one can argue that these predictive indices are only explaining 6 percent to 25 percent of the individual variation in law school performance. If that's as good as the indices are at predicting first-year grades, presumably they are even less able to predict more distant events—third-year grades, bar exam results, or future careers. Why should we take so seriously numbers that provide such poor guides to future outcomes? These arguments can be called the usefulness critique.

Fairness

American standardized tests are unfair to non-Anglos in general and blacks in particular. It is intrinsically unreasonable to consider a test taken in a few hours to have as much weight as or more weight than four years of college work. The examinations largely test knowledge of culture-specific vocabularies. The widespread perception that blacks perform badly on such tests has produced a stereotype threat among blacks that further hinders performance. Affluent whites, meanwhile, enroll in expensive coaching classes to maximize their scores. Actual scores are highly correlated with socioeconomic status. The tests simply perpetuate privilege and are illegitimate. These arguments can be called the fairness critique.

The battlefield staked out by these two critiques is bloody and littered with corpses. For the most part, my approach is to sidestep the field by presenting new, real, and systematic data on the actual consequences of affirmative action. Because if we actually know black-white differences in law school grades, retention rates, and bar passage, theoretical arguments about predictive indices become in some sense moot. However, since many of the arguments just outlined are so widely believed, are so often repeated, and have gained so much apparent legitimacy in recent years, I offer a few comments.

Since the students at any given school are chosen largely on the basis of the academic indices themselves, their scores are fairly compressed (creating the restriction-of-range problem), and to the extent that nonindex factors are used in admissions, persons with lower academic scores often have offsetting strengths. When a correction is made for these (compression) problems, grade correlations with academic indices tend to go up about 20 points, to a range of 0.45 to 0.65.

Correlations based on individual behavior almost always sound unimpressive, largely because individuals are extremely complex, and their behavior is shaped by a literal multitude of factors. Even though we know cigarette smoking causes cancer and takes years off the average smoker's life, the individual-level correlation between smoking and longevity is only about 0.2 Even though we know that the opportunities we have in life are heavily shaped by the environment in which we grow up (and by our genes), the correlation between the incomes of adult brothers is also only about 0.2.

In such cases, the modest strength of the individual correlation belies what is, when applied to large numbers, a powerful and highly predictive association. The fate of individual cigarette smokers is hard to predict, but the comparative fates of large numbers of smokers and nonsmokers can be foreseen with great accuracy. In the same sense, the

individual-level correlation of an academic index with first-year grades at a law school may be only 0.41, but if we make predictions about groups of twenty students based on academic indices, the correlation between predictions and actual performance jumps to 0.88. If we make predictions about groups of one hundred students, the correlation is 0.96.

Just as the predictive power of a correlation increases when it is applied to larger groups, so it increases when it is applied to larger disparities.

When a law school admits a class, it is making judgments about large numbers of people—how to select a few hundred students from several thousand applicants. Even though the success of any individual applicant is largely guesswork, the average success of groups of applicants with similar academic credentials is highly predictable. This is why it is legitimate—indeed, essential—for schools to pay attention to academic numbers.

Effects of Affirmative Action on Academic Performance in Law School

In many discourses, the point of affirmative action is to give someone the chance to prove herself. Individuals who receive preferences, it is said, gain the opportunity to get a better education than they would receive under a race-blind system. Since many of the beneficiaries of affirmative action suffered from low-quality, underfunded schooling in the past, the second chance provided by affirmative action is an opportunity to blossom.

Such is the argument, and it is far from implausible. As noted earlier, blacks benefiting from affirmative action receive much larger preferences than are generally acknowledged, and the academic indices used to sort candidates for admission are both strong and unbiased predictors of law school performance. Nonetheless, one could reasonably argue that those blacks who have received the fewest opportunities in the past might outperform their credentials.

One could conversely argue, with equal plausibility, that with such large credentials gaps at the outset of law school, it will be particularly difficult for blacks to stay afloat. The question of how affirmative action beneficiaries actually perform in law school is, therefore, of great practical and conceptual interest. Remarkably, I have been unable to find any study published in the past thirty years that has tried to systematically document an answer. Even researchers who have gained access to systematic data have avoided publishing it or, worse, have given misleading accounts of what the data show.

Law School Admissions Council–Bar Passage Study data provide a uniquely comprehensive resource for examining law school performance. The 163 schools that participated in the study provided grade data for over twenty-seven thousand 1991 matriculants. Although the data do not identify individual schools, the LSAC converted each student's first-year GPA and graduation GPA into a number standardized for each school, in which the mean GPA at the school has a value of zero and other grades are measured by the number of standard deviations they lie above or below the mean. It is a simple matter, then, to compute any student's class standing.

The data show that blacks are heavily concentrated at the bottom of the grade distribution: 52 percent of all blacks, compared to 6 percent of all whites, are in the bottom decile. Put somewhat differently, this means that the median black student got the same first-year grades as the fifth- or sixth-percentile white student. Only 8 percent of the black students placed in the top half of their classes.

Low black performance is not a result of test anxiety (the gap is similar or greater in legal writing classes) or some special difficulty blacks in general have with law school. It is a simple and direct consequence of the disparity in entering credentials between blacks and whites at elite schools.

In other words, the collectively poor performance of black students at elite schools does not seem to be due to their being black (or any other individual characteristic, like weaker educational background, that might be correlated with race). The poor performance seems to be simply a function of disparate entering credentials, which in turn is primarily a function of the law schools' use of heavy racial preferences. It is only a slight oversimplification to say that the performance gap is a by-product of affirmative action.

Moreover, we see similar patterns of black performance across most of the spectrum of legal education. In the second, third, fourth, and fifth groups of law schools identified in the LSAC-BPS data, blacks are heavily concentrated at the bottom of the grade distribution. Generally, around 50 percent of black students are in the bottom tenth of the class and around two-thirds in the bottom fifth. Group 3, midrange public schools, with the largest credentials gap, also has the worst aggregate performance among blacks. Only in Group 6, made up of the seven historically minority law schools, is the credentials gap, and the performance gap, much smaller.

During the second and third years of law school, we might expect the grade gap between blacks and whites to narrow significantly, for a variety of reasons. As we have noted, a common premise of affirmative action programs is that the more time disadvantaged students have to catch up with more advantaged peers, the better they will do. And in law school, changes in the environment in the second and third years provide particularly good opportunities for students in academic difficulty to catch up: competition is less intense, fewer courses are graded on a curve (which generally means fewer low grades), and students have far more discretion in choosing subjects. Not least, professors' methods of grading students are probably more heterogeneous in the second and third years of law school than in the first, so timed exams probably play a less critical role.

The LSAC-BPS data include the cumulative GPA of students at the end of their first year and at the time of law school graduation. In relative terms, the grades of black law students actually go down a little from the first to the third year. The average drop is a little less than one-fifth of a standard deviation. The weaknesses in black performance engendered by the large gap in entering credentials—in turn engendered by large admissions preferences based on race—are not an artifact of the first year. They do not shrink over time. Indeed, they grow a bit.

The most immediate danger posed by poor performance in law school is withdrawal or expulsion from law school. Attrition has long been a major problem facing blacks admitted during the early years of affirmative action.

To be more specific, affirmative action has two separate negative effects on black graduation rates. The first result—our main focus in this discussion—is the boosting of blacks from schools they might have attended and where they would have had average grades (and graduated) to schools where they often have very poor grades. For blacks as a whole, this phenomenon adds four to five points to the black attrition rate. The second result follows from the cascade effect. Lower-tier schools admit blacks who would not be admitted to any school in the absence of preferences. These are the students with very

low index scores (low four hundreds and below), who have very high attrition rates. This second phenomenon adds another six or seven points to the overall black attrition rate. Together, these results account for the eleven-point gap between white and black attrition rates we have seen in the LSAC-BPS data.

These attrition effects are disturbing, but by themselves they may strike many readers as not all that important. It turns out, however, that these mechanisms merely foreshadow a much larger effect: the consequences of racial preferences for black performance on bar exams.

Effects of Affirmative Action on Passing the Bar

The formal power to license professionals in America resides with the states, nearly all of which require prospective lawyers to earn a degree from an accredited law school and take an examination created by the National Commission of Bar Examiners. But to this multistate test, each individual state adds its own exam, usually a series of essay questions and sometimes a simulation of real-life practitioner problems.

In most states and for most students during the 1980s and 1990s, passing the bar was regarded as a relatively modest hurdle. In the LSAC-BPS data (covering 1994–1996), about 88 percent of accredited law school graduates taking the bar for the first time passed it. The eventual passage rate for this group was approximately 95 percent.

For blacks, the bar exam poses a substantially higher hurdle. Only 61.4 percent of black takers passed the bar on their first attempt, and blacks were four times as likely to fail on their first attempt as whites. The pass rate for blacks through five attempts was just 77.6 percent; the failure rate was more than six times that of whites.

The large racial disparities in bar passage rates will not come as news to most deans and law professors, who seem to have rather wearily accepted the idea that blacks "have trouble" on the bar exam. But the evidence suggests that blacks have trouble with the bar exam for reasons that have nothing to do with race and everything to do with preferential policies.

If we want to predict in advance who will pass a bar examination in a particular state and who will fail, the overwhelming determinant of success is one's law school GPA. For example, at my own law school (UCLA), students who are in the top 40 percent of the class upon graduation have a 98 percent passage rate, while for those in the bottom 10 percent of the class the rate is 40 percent. Law school grades have a higher correlation with bar exam scores than any combination of the LSAT and undergraduate grades has with law school grades. If we know someone's law school grades, we can make a very good guess about how easily she will pass the bar. If we also know her LSAT score, her undergraduate GPA, and the eliteness of her law school, we can do even better. When we control for these other factors, men have a very slight advantage over women (their pass rate is about half of 1 percentage point higher). But knowing someone's race seems irrelevant—if we know the other information. Blacks qua blacks, and Hispanics qua Hispanics, do no worse on the bar than anyone else.

The implications of this regression—which hold up consistently under many different formulations—are profound, though they take a while to digest. For most blacks benefiting from affirmative action by law schools, the issue is not whether they will get

into a law school but, rather, how good of a law school. Going to a better school, we have seen, carries with it a higher risk of getting poor grades; going to a much better school creates a very high risk of ending up close to the bottom of the class. Prospective law students tend to assume automatically that going to the most prestigious school possible is always the smart thing to do, but we can now see that there is, in fact, a trade-off between more eliteness and higher performance. And the regression results mean that, if one's primary goal is to pass the bar exam, higher performance is more important. If one is at risk of not doing well academically at a particular school, one is better off attending a less elite school and getting decent grades.

Blacks with an LSAT-UGPA index score of, say, six hundred will tend to end up at much more elite schools than will whites with index scores of six hundred, but as a result the blacks will end up with lower law school grades. When they take the bar exam, they will get a small lift from going to a more elite school but a big push down from getting lower grades. The net effect will be a markedly lower bar passage rate.

These data tell a powerful story: Racial preferences in law school admissions significantly worsen blacks' individual chances of passing the bar exam by moving them up to schools at which they will frequently perform badly. I cannot think of an alternative, plausible explanation. If any other factor somehow disadvantaged blacks—for example, if blacks had more trouble affording bar-preparation classes and were therefore more likely to go it alone—then this would make being black an independently significant causal factor in bar passage rates. But it is not.

As with attrition rates, the black-white gap in bar passage rates seems largely driven by two by-products of affirmative action. The first is the pattern I just discussed: blacks having lower passage rates because of low GPAs, which in turn are a function of racial preferences. The second is a by-product of the cascade effect: with blacks consistently pulled up the prestige ladder by preferences, low-tier schools must choose between having no blacks at all or admitting blacks with very low numbers. Most of these schools follow the latter course, with the result that a large number of blacks enter law school with very low academic credentials. Since the black students admitted in this range are also usually competing against higher-index peers, they also suffer the disadvantages of low GPAs. In other words, these students face very long academic odds indeed. In the LSAC-BPS study, only 22 percent of the blacks who started law school with academic indices below five hundred ended up getting a law degree and passing the bar on their first attempt.

Many of the causal mechanisms underlying these findings have not been very mysterious. If one believes the regression results and accepts that academic credentials have a lot to do with ultimate performance, it is not hard to understand why admitting students with very poor credentials would lead to lower graduation rates and lower performance on the bar. And it makes sense that if racial preferences lead to lower law school grades for blacks, then they will experience higher attrition. But it may not be obvious to many readers why it should be that black students with good credentials should lower their chances of passing the bar exam simply by attending a better school.

The basic idea is that a black student who, because of racial preferences, gets into a relatively high-ranked school (say Vanderbilt, ranked between fifteenth and twentieth in most surveys) will have a significantly lower chance of passing the bar exam than the

same student would have had if she had attended a school that admitted her on the basis of academic credentials alone (say, University of Tennessee, ranked between fortieth and sixtieth in most surveys). As we have seen, the evidence shows that a student's race has nothing to do with her chances on the bar exam; her law school grades have everything to do with it. This seems logical enough within an individual school. But why exactly should the same student have a lower chance of passing the bar exam if she gets Cs at Vanderbilt than if she gets Bs at the University of Tennessee?

The hypothesis in the back of my mind when I started this research was that students simply learn less when they are academically mismatched with their peers. I drew on a painful personal experience to flesh out this idea. Foreign languages are my academic Achilles' heel. In my public high school, French was always my poorest subject, but I was a strong enough student generally that I did not labor under any special handicap in French and kept pace with my friends. A few years later, while an undergraduate at Harvard, a misplaced interest led me to sign up for elementary German. Although it was a beginning class, my basic aptitude was weak enough that I had great difficulty keeping up. Most of the class caught on with what seemed to me a nearly supernatural speed, and the teacher was soon racing along. As I fell behind, I felt more and more lost; soon I was attending class only to keep up appearances. My confusion fed on itself all semester, and I came within a whisker of flunking—not an easy thing to do in any Harvard course. There seemed little doubt to me that despite my weak linguistic skills, I would have learned far more German in a class with less talented peers.

I observe a similar pattern as a law teacher. Students who stumble at the beginning of a course often become progressively more confused as the semester wears on. What is initially just a shaky handle on the course vocabulary becomes a serious handicap in remaining engaged with classroom discussion, and problems feed on themselves. By the end of the semester, the gap I observe between the C finals and the B finals is more than just a matter of degree—many C students seem to have missed fundamentals. In a less competitive school, the same student might well thrive because the pace would be slower, the theoretical nuances a little less intricate, and the student would stay on top of the material. The student would thus perform better in an absolute as well as a relative sense.

This academic mismatch hypothesis has struck a number of legal educators as a likely explanation for students whose academic credentials are significantly weaker than those of their classmates. Others have suggested that similar effects might come from slightly different causes. A stress theory suggests that students who are at a relative disadvantage in class will experience higher stress, which will get in the way of learning. A disengagement theory suggests that students who do poorly in a relative sense will initially be disappointed in themselves, but as they continue to struggle they will tend to blame the system—the professor, the school, or legal education generally—and will reduce effort. Both the stress and disengagement theories suggest plausible ways that doing worse in a relative sense leads to doing worse in an absolute sense.

NOTES

1. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

2. William G. Bowen & Derek Bok, The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions (1998); Richard O. Lempert et al.,

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3. Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. Legal Educ. 472 (1997).

4. Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

5. *Grutter*, 539 U.S. at 325.

From the Editors

Issues and Comments

How does critical race theory differ from liberal or conservative thought on race reform? If it is tantamount to a paradigm change, then critics of the movement must beware the mistake of applying to it criteria of judgment taken from the old liberal paradigm. Do any of critical race theory's critics fall into this trap?

Does Randall Kennedy have a point when he argues that anyone, including whites of good will, can write and act effectively on behalf of black causes? Kennedy's critique spurred numerous responses, some noted in the Suggested Readings immediately following. Alan Freeman and others replied to the "too downbeat" criticism, noting that Derrick Bell urged his followers to soldier on, even in the face of impossible odds.

Daniel Farber and Suzanna Sherry criticize storytelling for engaging in distortion and wallowing in subjectivity. But do white people not tell stories, too, but consider them "the truth"?

Could Richard Sander be correct that affirmative education in university admissions sets up a cascading effect in which a black with strong, but not genius-level, credentials gets into Harvard, where he struggles for three years, instead of State U., where he might have been successful and well adjusted?

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PART XVI

CRITICAL RACE PRAXIS

IS CRITICAL RACE theory just that—theory? Or does it have lessons for real-world, on-the-ground activists and litigators interested in pursuing law reform or working with flesh-and-blood clients in the poor community or communities of color? Should a lawyer advocating on behalf of a particular community live there, instead of in a nice condo in the trendy part of town? Or learn another language if it is the dominant one in that community? If one is successful in employing a legal strategy on behalf of an individual client—for example, the cultural defense—can one sometimes unwittingly stigmatize the group of which the client is a member by implying that they are all weak, superstitious, or explosive? When is mentioning a racial consideration tantamount to playing the race card? In working on behalf of an exploited group such as immigrant seamstresses, how much energy should one devote to litigation and how much to street marches, political organizing, and other forms of nonlegal work?

A vital strand of critical race theory examines praxis, the connection between theory and practical work aimed at transforming concrete social institutions. Anthony Alfieri contributes a spirited defense of community-based lawyering against the charge that it is unprincipled and prone to deviate from the ideal of legality.

Gerald López shows how low-income women struggle to solve the problems of their lives by means of resourcefulness and real intelligence—often without any help from lawyers. Julie Su describes a successful campaign on behalf of Thai and Latina immigrant sweatshop workers that included innovative legal theories, client organizing, and even guerrilla theater. Robert Williams suggests that some law professors (and maybe lawyers, too) lead bloodless, even bloodsucking, lives and need to join an organization called Vampires Anonymous.

74. Fidelity to Community

A Defense of Community Lawyering

ANTHONY V. ALFIERI

> Many of the lawyers . . . really looked skeptical[ly] at community action.
> **—Gary Bellow, Harvard Law School professor, 1999**

In July 2011, Miami-Dade County Mayor Carlos Gimenez, faced with a $400 million budget gap, proposed to close thirteen libraries across Greater Miami, including the Virrick Park Library in Coconut Grove Village West (the West Grove), an impoverished Afro-Caribbean American community served by the University of Miami School of Law's Historic Black Church Program. Now in its fourth year, the program provides multidisciplinary resources in education, law, and social services to underserved, predominantly low-income residents of the West Grove through partnerships with a consortium of historically black churches and other local nonprofit entities, service providers, and schools for the purposes of grassroots community organization and legal rights mobilization. Miami-Dade County officials asserted that the libraries slated for closing "were picked on two criteria: use and geography." Nevertheless, because the closings disproportionately injured low-income communities of color, the selection process raised serious questions and widespread suspicions of class bias and racial animus.

Like many county library systems across the nation struggling to educate already large and growing low-income populations, Miami-Dade County libraries are a resource for books and literacy programs and provide much-needed Internet service. Although small, the Virrick Park Library offers "a thriving educational experience for a substantial number of both youngsters and adults." As a result, both West Grove community advocates and elected officials protested the mayor's announcement, declaring that "the cost of the library is minimal compared to the value it provides the community."

Within days, West Grove church ministers and community leaders began to circulate e-mails opposing the closure and calling for political action to block it. To help, the law school program began to assess a range of legal-political tactics, including possible recommendations of limited direct-service representation, countywide impact litigation, and legislative law reform. Direct-service representation required the recruitment of pro bono counsel (e.g., legal-services organizations and for-profit law firms), the

A version of this chapter previously appeared as Anthony V. Alfieri, *Fidelity to Community: A Defense of Community Lawyering, a Review of Bradley Wendel's "Lawyers and Fidelity to Law,"* 90 Tex. L. Rev. 635 (2012). Originally published in the *Texas Law Review*.

solicitation of injured plaintiff parties (e.g., West Grove families and children), the formulation of plausible causes of action (e.g., civil rights disparate-impact claims and state constitutional right-to-education claims), and the fashioning of appropriate relief (e.g., declaratory and injunctive remedies, the latter requiring an impracticable evidentiary showing of irreparable injury and the probability of success on the merits). More daunting, test-case litigation demanded the cooperation of multiple cocounsels and complex calculations of party standing and class certification. Law reform, by comparison, entailed private and public lobbying of key decision makers in the mayor's office and at the county commission.

In addition, the program explored possible nonlegal alternatives, such as private fund-raising to replace the projected library budget shortfall and the physical relocation of the library to a neighborhood church or school. It also contemplated a media campaign (e.g., editorials and letters), public protest (e.g., a march, rally, or sit-in), and political pressure (e.g., reporting selected public officials to regulatory agencies to investigate ongoing unethical or unlawful conduct in unrelated matters), all to persuade local municipal and county officials to help mobilize public opposition to the proposed closing.

Taken together, this array of legal-political strategies and tactics will sound familiar to community lawyers. A wide-ranging community lawyering literature spans civil rights and poverty-law studies, clinical education and skills-training courses, and the empirical work of interdisciplinary scholars. Indeed, histories of the American civil rights and poor-people's movements highlight the role of community lawyers in legal advocacy and political organizing. Likewise, developments in law school curricular design and campus-community outreach point to the integration of community-lawyering models into legal education more generally. Similarly, the writings of law-and-society scholars underscore the significance of community or "cause" lawyering here and abroad.

An important book by W. Bradley Wendel[1] advances a theory of legal ethics positing fidelity to law as the central obligation of lawyers at work in liberal-democratic societies. Wendel's moral and political arguments for a fidelity-to-law conception propound political legitimacy as a normative benchmark for lawyer decision making. His arguments ground the duties of lawyers in "democratic law making and the rule of law," thus situating the ethical and indeed normative value of lawyering in the "domain of politics" rather than in ordinary morality or social justice. By defending a theory of legal ethics that places fidelity to law instead of client or community interests at the core of lawyers' obligations, Wendel seeks to rehabilitate the idea of legitimacy as a normative ideal for lawyers and channel lawyers into a formal, procedural system of advocacy and counseling largely independent of substantive-justice objectives. Wendel's transformation of the evaluative framework of legal ethics from the concerns of ordinary morality and substantive justice to the considerations of political legitimacy and process-oriented legality exposes community lawyers to new terms of normative criticism and erodes the justification of their crucial work in American law and society.

Fidelity to Law

> [T]he biggest problem . . . was that the lawyers would resist actually working directly with community organizers and community action people.
>
> **—Gary Bellow, Harvard Law School professor, 1999**

Wendel's fidelity-to-law conception of ethical lawyering rests on the claim of political legitimacy—a property or quality of "political arrangements" acquired through the deserved "respect and allegiance of citizens," an allegiance that survives citizen quarrels and unjust laws. On this definition, political legitimacy constitutes a normative precept animating the relationship and mediating the tension "between state power and citizens." By linking the duties of lawyers to considerations of "democratic law-making and the rule of law," the author relocates the ethical value of lawyering from the fields of ordinary morality and substantive justice to "the domain of politics." Thus configured, the value of lawyering derives from fidelity to the law, not the pursuit of client, nonclient, or broader community interests.

Law earns cultural and social "respect because of its capacity to underwrite a distinction between raw power and lawful power," or more bluntly, to sever or separate force from legality. That capacity, Wendel explains, "enables a particular kind of reason-giving" or considered judgment to be employed "independent[ly] of power or preferences." Through public deliberation and the exercise of reasoned judgment, represented and unrepresented citizens alike may lay claim to legal entitlements in an orderly, regularized fashion within society. Unlike preferences and interests or desires, legal entitlements are "conferred by the society as a whole" both fairly, in the manner of process, and collectively, in the nature of political community. For Wendel, "the legitimacy of laws enacted through fair procedures" gives rise to the political legitimacy of entitlements that citizens "accept" for moral rather than economic or political reasons. In this way, legitimacy requires no appeal to higher law claims such as ordinary morality, individual and collective justice, or the public interest.[2]

Wendel assumes that the law, under "a reasonably well-functioning democratic political order," symbolizes "a collective achievement by people who share an interest in living alongside one another in conditions of relative peace and stability." On this democratic view, law furnishes "procedures that enable citizens to resolve disagreements that otherwise would remain intractable, making it impossible to work together on common projects." In calling on lawyers to respect the law, Wendel urges the resolution of societal conflicts and controversies "through public, reasonably accessible procedures that enable citizens to reach a provisional settlement"—put simply, "to enable cooperative action in response to some collective need." He thus strives to channel lawyers within a positive-law system crafted "to supersede disagreements over what substantive justice requires."[3]

Consider in this light the case of community lawyers here in Miami and elsewhere. Typically engaged in a wide range of civil rights and antipoverty work, community-based lawyers frequently challenge state-sanctioned patterns and practices of class bias or racial animus embodied in discrimination and disparate treatment—repeated patterns and practices increasingly insulated doctrinally from federal and state court attack. Wendel's framework pushes normative criticism of such lawyer-engineered challenges away from considerations of morality and justice—precisely those considerations essential to the condemnation of racial discrimination and economic inequality. Instead, his framework tilts normative criticism of such lawyer challenges toward considerations of rights-based entitlement, political legitimacy, and procedural legality and hence toward the acceptance of discrimination and disparate treatment as good-faith attempts by democratic lawmakers to balance competing social interests in the allocation of scarce

resources here in Miami with respect to neighborhood libraries. This normative reassessment transforms the criticism of community lawyers who advise clients, particularly clients and communities of color, on the permissibility of strategic resistance to state-sanctioned patterns or practices of racial discrimination and racially disparate treatment from the accusation that their conduct reflects complicity in the moral wrong of contempt for nonclient, majority-political entitlements to the charge that their conduct actually tarnishes them as "abusers of the law."

The charge of lawyer abuse of the law arises from the morally deduced obligation "to respect the institutions, procedures, and professional roles that constitute the legal system."[4] To demonstrate that the law and the legal system are worthy of popular respect, Wendel draws on the "political normative considerations relating to the ethics of citizenship in a liberal democracy."[5]

In contrast to the instrumental conception, Wendel argues that "lawyers should act to protect the legal entitlements of clients" and not simply pursue their private interests or public preferences. For Wendel the law empowers lawyers to act for clients through the attorney-client relationship and "sets limitations on the lawful use of those powers." By showing that "the legal system deserves the allegiance of citizens," he contends, "lawyers will be seen to play a justified role in society" and therefore will accrue, and perhaps regain, ethical value as a profession.

Fidelity to Law as a Normative Criticism of Community Lawyering

For many community lawyers the commands of ordinary morality pilot their work, often in street-level collaboration with neighborhood residents and groups. Despite this divergence and the personal and professional sway of ordinary morality, for Wendel, "roles do real normative work by excluding consideration of reasons that someone outside the role would have to take into account." This role-specific, outsider-norm exclusion narrows Wendel's evaluative frame of reference to certain institutional roles and practices that, when applied to community lawyers, act to constrain their work across multiple, varied contexts. Those roles and practices, he concedes, demand moral justification at a higher, systematic level of generality beyond routine case-by-case application in localized settings. To that end, he ties the lawyer's role to a set of values embodied by the character of citizenship in a pluralistic society where the day-to-day "lives of individuals are comprehensively regulated by political institutions." This tie, however, fails to bind individuals disenfranchised by mainstream political institutions and denied the full rights and privileges of citizenship, as illustrated by the history of the West Grove.

Respect for the values of citizenship in a pluralistic society molds Wendel's understanding of lawyers when clients or circumstances summon them to act in their professional capacity as advocates, advisors, and counselors. On this understanding, lawyers play out "a small but significant part" in maintaining, and indeed preserving, the mainstay institutions of a pluralistic society—namely, courts, legislatures, and administrative or regulatory agencies. By attending to these institutions and keeping them in "good working order," Wendel contends, the lawyering role garners "significant moral weight." That weight, along with its underlying norms of fairness and legality, draws on "a free-standing morality of public life."

Unlike Wendel's civic-minded, political lawyers, community lawyers encounter a profoundly diminished "morality of public life" in their work. Public life in impoverished communities like the West Grove reveals decades of economic abandonment and political neglect. Devastated by concentrated poverty, public life for low-income households in Miami and elsewhere lacks the basic institutional features of a working society, such as accessible and functional employment markets, public schools, social services, and mass transportation. In these increasingly desperate and despairing circumstances, community lawyers struggle under Wendel's formalist injunction to construct their role primarily out of the citizenship norms of respect for law and legality.

Wendel's view requires that lawyers not only recognize but also affirm the law as legitimate. To Wendel this recognition acknowledges that the law should be and in fact stands "worthy of being taken seriously." It also acknowledges that the law should be "interpreted in good faith with due regard to its meaning, and not simply seen as an obstacle standing in the way of the client's goals." That dual recognition propels Wendel's claim "that lawyers must advise clients on the basis of genuine legal entitlements and assert or rely upon only those entitlements in litigation or transactional representation that are sufficiently well grounded."[6]

The claim of genuine legal entitlements changes the basis for ethical criticism of community lawyering from the standpoint of ordinary morality or injustice to infidelity to law. Infidelity of this kind links legal ethics and lawyers' professional obligations to "respect for the law and the legal system," which in turn treats law as a social achievement by its very nature "worthy of the loyalty of citizens and lawyers."[7] No doubt most community lawyers endorse this treatment and applaud the social achievement of the law in establishing legal entitlements and safeguarding legal protections, including "the capacity of official institutions to recognize rights in favor of disempowered citizens against the powerful."[8] Their interpretative horizon, however, goes beyond the settled ground of legal entitlements, genuine or not. Of necessity, daily combat against inner-city poverty and racial inequality requires the creative enlargement of conventional lawyer roles and functions in addition to the expansion of constitutional, statutory, and common law entitlements. Considerations of morality and justice fuel the augmentation of legal role, function, and entitlement.

Community lawyers work under conditions of socioeconomic dysfunction and legal-political conflict similarly marked by empirical uncertainty and normative controversy. Shaped by hierarchy, those conditions impede the cooperation and negotiation of politics, in part because of disagreement over the allocation of scarce resources—in this instance, county library funds—and in part because of inequalities of class and race. Wendel's fairness procedures neither address nor dismantle the conditions of hierarchy that undermine the legitimacy of law and the legal system for marginalized groups. Laws and legal systems that fail to respond adequately to the economic and social needs of citizens, and hence preserve and reproduce socioeconomic hierarchy, claim authority without legitimacy.

To be sure, Wendel concedes that lawyers should be "free to challenge unjust, wasteful, or stupid laws" under the standard procedures enacted to secure legal change, whether in the form of "civil-rights lawsuits, impact litigation, class actions, constitutional tort claims, lobbying," or "other vehicles."[9] Crucial to this concession is a distinction "between using legal procedures to challenge unjust laws and subverting them." For

Wendel, the obligation of fidelity to law ethically constrains lawyers to act narrowly to defend only the legal entitlements of clients. Narrowing the space available for the exercise of ordinary moral discretion in advocacy or counseling, he admits, deprives lawyers of the freedom to serve clients as "friends or wise counselors." Within that confined professional space, lawyers function as self-described quasi-political actors to assert and to protect their clients' legal entitlements and corresponding "political and legal values" against the well-known "coercive force of the state."

Wendel's commitment to the political value of legality and his recognition of the importance of institutionally prescribed roles create dissonance for community lawyers when the law and the legal system require morally disagreeable, albeit politically justified, actions such as compliance with the mayor's unjust directive to close the Virrick Park Library. Applied to the West Grove, his political-morality imperative practically precludes representation of neighborhood residents in opposition to the Virrick Park Library closing because their constitutional and statutory interests in education, literacy, and equal protection lack the force of legal entitlements. Read fairly, the current context of federal and state law, however indeterminate, fails to give rise to an appropriate range of reasonable interpretations sufficient to support any facial or as-applied challenge in this instance, despite the latitude granted by the adversary system. The purported craft of participating in the making and evaluating of legal arguments derived from the internal point of view of lawyering—here, for example, displayed in inventing implausible forms of declaratory and injunctive relief—produces neither reflective equilibrium nor ethical coherence for community advocates struggling to reconcile the claimed legality of the Virrick Park Library closing and the professional responsibilities of moral agency and justice promotion.

Community Lawyering and the Ethic of Disobedience and Resistance

> So I was involved in the protest activity.
>
> **—Gary Bellow, Harvard Law School professor, 1999**

For civil rights and poverty lawyers working in impoverished communities like the West Grove, Wendel's concept of ethical lawyering and its accompanying fidelity-to-law obligation reveals not legality and legitimacy but racialized power, repressive order, and authoritarian impulse. Instead of hewing to a rigid and wooden vision of lawyer political morality, community lawyers should consider the "morality and practicalities" of a client's or community's situation. In the already blighted situation of the West Grove, now in jeopardy of losing a vital neighborhood resource essential for public literacy, practical morality requires a democratic ethic of disobedience and resistance.

In the context of low-income communities of color, democratic lawyering offers race- and identity-conscious strategies of advocacy and counseling fashioned from dissenting voices traditionally outside law, legality, and legitimacy. Methods of race- and identity-conscious representation, developed by the civil rights movement and enlarged by critical theories of race, stand to reshape a vision of ethical lawyering. From the civil rights movement, we might integrate outsider, dignity-restoring narratives and relations of empowerment to rectify the public and private humiliations of law and the legal

system in Miami-Dade County. The narratives and relations of empowerment, however complex and difficult, undergirding grassroots organization and mobilization enable lawyers to break free from traditional conceptions of the adversary role and craft function. Fundamental to that break is the incorporation of difference-based community voices and stories into the lawyering process. From critical theories of race, we also might interweave the values of community participation and civic dialogue, especially between majority and minority communities. Only from dialogue will come a moral recognition of common cross-racial interests in economic justice and social solidarity, here embodied in the Virrick Park Library. In segregated communities like the West Grove, where the law and the legal system long ago failed, lawyer candor, collaboration, and race-conscious conversation best steer the normative assessment of legal-political strategies (e.g., direct-service representation, countywide impact litigation, and legislative law reform) and the practical consideration of alternative nonlegal tactics (e.g., private fund-raising initiatives, church and school partnerships, media campaigns, public protests, and political pressure points).

Casting lawyers as quasi-public officials and binding them tightly to narrow institutional roles and craft functions marshaled in defense of client legal entitlements will not curb threats to the law rising out of minority community–based claims of ordinary morality and social justice. It will only guarantee that lawyers will once again go outside law to reclaim the spirit of disobedience and resistance found in communities like the West Grove.

NOTES

1. W. Bradley Wendel, Lawyers and Fidelity to Law (2010).
2. *Id*. at 2.
3. *Id*. at 4.
4. *Id*. at 5.
5. *Id*.
6. *Id*. at 8.
7. *Id*. at 9.
8. W. Bradley Wendel, *Legal Ethics Is About the Law, Not Morality or Justice: A Reply to Critics*, 90 Texas L. Rev. 727, 737 n.43 (2012).
9. Wendel, Lawyers, *supra* note 1, at 11.

75. The Work We Know So Little About

GERALD P. LÓPEZ

I met someone not long ago whom too many of us regrettably have come to regard as unremarkable, someone who might well find herself, along any number of fronts, working with a lawyer in a fight for social change. I'll call her Maria Elena. She lives with her two children in San Francisco's Mission District, where she works as a housekeeper. She works as a mother too. And as a tutor of sorts. And as a seamstress. And as a cook. And as a support for those other women—those other Irish American women, African American women, Chinese American women, and most especially those other Latinas—with whom she finds herself in contact. She works in much the same way as many other low-income women of color I've known over the years—women who surrounded me while I was growing up in East Los Angeles, women who helped out in certain fights I participated in while practicing in San Diego, women who largely sustain various formal and informal grassroots efforts that a number of my law students now work with in those communities of working poor that line the east side of California's Highway 101 on the peninsula, from San Francisco through San Jose. How Maria Elena and her children make it from day to day tells us all a great deal about where we live, whom we live with, and even about how peoples' actual experiences measure up to the American dream—a contrast that nowadays tends to get obscured and even denied around an election year. Indeed, our own lives are tied inescapably to the Maria Elenas in our communities. These women are important parts of our economy, indispensable parts of certain of our work lives, and even intimate parts of some of our households. In a very palpable way, Maria Elena's struggles implicate us. More perhaps than we acknowledge and more perhaps than feels comfortable, she and we help construct one another's identities. We're entangled.

Historically, you'd think that how the Maria Elenas of our communities make it from day to day should have played an obvious and central role in training those whose vocation is to serve as lawyers in the fight for social change. After all, the lives in which these lawyers intervene often differ considerably from their own—in terms of class, gender,

A version of this chapter previously appeared as Gerald P. López, *The Work We Know So Little About*, 42 Stan. L. Rev. 1 (1989). Originally published in the *Stanford Law Review*.

race, ethnicity, and sexual orientation. Without laboring to understand these lives and their own entanglements with them, how else can lawyers begin to appreciate how their professional knowledge and skills may be perceived and deployed by those with whom they strive to ally themselves? How else can they begin to speculate about how their intervention may affect their clients' everyday relationships with employers, landlords, spouses, and the state? And how else can they begin to study whether proposed strategies have a chance of penetrating the social and economic situations they'd like to help change?

But as my niece might say, "Get a clue!" Whatever else law schools may be, they have not characteristically been where future lawyers go to learn about how the poor and working poor live. Or about how the elderly cope. Or how the disabled struggle. Or about how gays and lesbians build their lives in worlds that deny them the basic integrity of identity. Or about how single women of color raise their children in the midst of underfinanced schools, inadequate social support, and limited job opportunities. Indeed, in many ways both current and past lawyers fighting for social change and all with whom they collaborate (both clients and other social activists) have had to largely overcome rather than take advantage of law school experience. What's ultimately extraordinary, I think, is that these relationships work at all and that we can even sometimes fully realize an allied fight for social change.

If you think this overstates all that together confronts the Maria Elenas of our communities and those lawyers with whom they work, take a brief glimpse through my eyes at Maria Elena's life and what it seems to say about any future relationship she might have with even the best lawyers. Thirty-one years old, she first set foot in this country a little over eight years ago. She came from Mexico with her husband, their two-year-old son, their three-month-old daughter, and no immigration documents. Not unlike thousands upon thousands of others, the family worked its way from San Diego, through Los Angeles, to Gilroy—picking flowers, mowing lawns, and harvesting fruit—surviving on the many day-laborer jobs that pervade the secondary labor market in this state and living in situations the rest of us would recoil from. Nearly two years later, they finally landed here in the Mission District, expecting to reunite with some cousins and gain some stability. Instead, they found only confusing tales from various sources about how their *primos* had been deported after an Immigration and Naturalization Service (INS) factory raid in the East Bay.

More by force of habit than anything else, Maria Elena found herself trying to make do—hustling a place to live and her first job as a housekeeper. But the frustrations and indignities of undocumented life already had begun to take their toll on her husband. He couldn't find stable work; he couldn't support his family; he couldn't adjust to the sort of shadowy existence they seemed compelled to endure. Somewhere along the line, Maria Elena can't quite remember when, he just sort of withdrew from it all. From her, from the children, from trying. He wasn't violent or drunken. He just shrank into himself and didn't do much at all for months. And then one day when Maria Elena and the kids returned from grocery shopping, he was gone.

That was some four years ago and many lonely, confused, hurt, angry, scared, and even guilty tears ago. It was also some 1,300-plus housekeeping days ago. For Maria Elena has come to realize the hard way that housekeeping for her and for so many other women of color no longer serves as the first and worst of jobs in a work career in the

United States—as, for example, it once did in the late nineteenth century and still to some degree does for women from Western Europe. It's not that Maria Elena hasn't tried to find a job that pays better, that offers benefits and job security. She'd be interested, for example, in pursuing a recently publicized opening for a low-level industrial job, except that other Latinas have told her about the employer's so-called fetal protection policy—one that either endangers the health of future children or forces women to get sterilized. And she periodically searches for openings as a custodian and as an electronics assembler—jobs that most of us think of as being on the bottom rung of the job ladder but that in most regards would be a step up for her and other housekeepers. She's found these jobs very hard to come by, however, except for the occasional openings on night shifts, which her obligations to her kids just won't permit her to take.

Though she may be stuck in her job as a housekeeper, there's something unresolved and edgy about Maria Elena's daily existence. Things are always moving for her and her kids. Getting off to school and work. Coordinating the kids' return with a neighbor's afternoon schedule. Timing her own return with enough space to care for their needs and anxieties, particularly about school. Dealing with their illnesses while still honoring her housekeeping obligations. Often she drags her kids places others would not, and sometimes she leaves them alone when those of us who can afford the luxury of help would never consider it. She never has enough money to buy everything they see around them, but she tries to make sure they get what they need. When times get bad, they cut back. All in all, she seems to be a master of planned improvisation—about food, shelter, and medical care. You can feel her will and drive, and you can easily imagine her children's best efforts to help out. You can also sense, however, the interconnectedness of a range of difficult conditions any one of which might drive most of us to feeling that things had gotten out of control.

As if life weren't eventful enough, last year proved particularly epochal for Maria Elena and the kids. She decided to try to legalize their status in the United States through the provisions of the Immigration Reform and Control Act—the so-called amnesty program. It wasn't so much that the decision demanded that she resolve complex feelings about national allegiance; instead, it seemed to require that she make their lives vulnerable to law, lawyers, and government bureaucracy. For diffuse reasons, Maria Elena has come to regard law and lawyers as more dangerous than helpful. And time and again she has experienced governmental bureaucracies as inscrutable, senseless, and unchangeable. Even many of the lawyers and social service providers who advertised their willingness to help with legalization seemed, as far as she could tell, gouging, disorganized, or both.

So in her effort to retain some control over the situation, Maria Elena cautiously took advantage of a self-help program designed and delivered by a service organization that neighbors and local church groups had recommended as trustworthy and able. She found the program direct, accessible, and patient. In her words, "they kind of knew what we had to hear—you know, what we were going through, what we needed to do. From step one on." In this sense, she was lucky. Because while some 70 percent of applicants both in the Bay Area and nationally undertook to complete their legalization applications on their own, most did not have the advantage of any effective outreach efforts, much less programs that spoke directly to their needs.

Still, Maria Elena experienced the message she heard about the law's demands as profoundly threatening and disorienting. After all, being told she now had to prove that

she and her children had been in this country continuously for the last five years ran against everything she had trained herself to do while here. Like virtually every other undocumented worker, she had become expert at not leaving a paper trail. And she had found many people willing to accommodate her efforts to achieve a certain invisibility. Every one of her previous employers, for example, paid her in cash for her work—though perhaps not so much to protect her and her children as to protect themselves, since they rarely paid minimum wage and never paid into social security for her housekeeping. Now, through some perverse irony, she was being told that she'd better hope that she hadn't been too good at covering her tracks.

Some rewarding moments have marked Maria Elena's effort to qualify for legalization. She seems, for example, now to take considerable pride in her own ingenuity in managing to uncover the shardlike pieces of evidence of her family's continuing presence here. But the experience has not been without its considerable anxieties, and not just because Maria Elena profoundly mistrusts the INS (now Immigration and Customs Enforcement). One former employer (a family of married doctors whose house and children Maria Elena cared for over a fifteen-month period) mistakenly feared that documenting Maria Elena's employment would expose them to criminal liability for employing an undocumented worker and then not paying minimum wage or contributing to social security. While the couple somewhat grudgingly wrote a short note on their personal stationery to help Maria Elena meet the application deadline, they refused a subsequent INS request—a quite standard one—for a notarized statement. So Maria Elena found herself again trying to talk the couple into helping—doing her best to explain the law, avoid inadvertently antagonizing them, and help them work through the embarrassment they seemed to fear in making a notarized admission.

The simple fact is that instability will remain the law of life for Maria Elena and her kids, at least for some time. Even if she convinces this couple to cooperate, she's a long way from knowing she's going to get her green card—the key to ensuring her continued future employment and her family's existence here in the United States. Initially, she must await INS approval of her current application for a temporary permit—with all that implies about the notorious vagaries of INS discretion. Then, if all goes well, she must still negotiate her way through phase two of the legalization procedure—the so-called ESL/civics requirement, which demands demonstrated knowledge of English, U.S. history, and U.S. government. Yet until quite recently no one knew for sure what phase two actually would require of her and other applicants. Certainly, INS hadn't helped dispel the confusion, since it kept changing (sometimes radically changing) its incomplete proposed regulations—even after some people were supposed to begin applying on November 7, 1988. And for the longest time, lawyers, community service organizations, and educators couldn't possibly walk people through the maze with any confidence, since they couldn't predict—and probably shouldn't have been predicting—what the INS would finally decide to sanction.

So like so many other people in her position, Maria Elena does her best to sort her way through the confusion. She's tried to reconcile the cautious advice of certain church and service organizations with the glitzy radio ads promoting private programs that guarantee green cards—all the time remembering to keep her ear to the ground for the ever-evolving rumors that make their way around the Mission District. She heard somewhere that certain courses at community colleges and high schools have been or will be

certified by the INS as meeting the ESL/civics requirements. But she's found a number of schools increasingly cautious about promising anything, others suspiciously willing to promise too much, and most courses with waiting lists backed up seemingly forever. Meanwhile, to bring matters full circle, she's begun to sense that the employers she now works for would very much like her to get all this taken care of—so that they can know whether they can depend on her or will have to hire another housekeeper.

For all her problems, Maria Elena just can't see herself seeking a lawyer's help, even at places with so positive a reputation as, say, the Immigrant Legal Resource Center, the Employment Law Center, or California Rural Legal Assistance. "Being on the short end and being on the bottom is an everyday event in my life," she says, half-smiling. "What can a lawyer do about that?" That doesn't make it all right, she admits. But she says she's learned to live with it—to deal with it in her own ways. In any event, lawyers and law all seem to conjure up for her big, complicated fights—fights that, as she sees it, would pit her against a social superior, her word against that of a more respected someone else, her lack of written records against the seemingly infinite amount of paper employers seem able to come up with when they must. Because she retains her sense of order by focusing on keeping her family's head above water, lawyers and law most often seem irrelevant to and even inconsistent with her day-to-day struggles.

Were Maria Elena alone in these sentiments, lawyers might have little cause for concern. But you may be surprised to learn that Maria Elena is scarcely unique in her views about lawyers and law—though, to be sure, some of her problems may well be peculiarly the product of her immigration status. In fact, we are beginning to discover that many other low-income women of color—Asian Americans, Native Americans, Latinas, blacks—apparently feel much the same way as Maria Elena, even if they were born here and their families have been in this country for generations. Much else may well divide these women—after all, political and social subordination is not a homogenous or monolithic experience. Still, their actions seem to confirm Maria Elena's impulses and their words seem to echo Maria Elena's.

The little thus far uncovered about whether and how people translate perceived injuries into legal claims seems to confirm what apparently the Maria Elenas in our communities have been trying to tell us for quite some time, each in her own way. *Low-income women of color seldom go to lawyers, and they institute lawsuits a good deal less frequently than anybody else.* More particularly, they convert their experiences of oppression into claims of discrimination far less often than they (and everybody else) press any other legal claim. Indeed, most learn never even to call oppressive treatment an injury; if they do, many simply lump it rather than personally pressing it against the other party, much less pressing a formal claim through a lawyer. For all the popular (and I might add exaggerated) descriptions bemoaning how litigious we've all become, low-income women of color seek legal remedies far too infrequently, especially when discriminated against at work. Partly as a result, they still seem to endure regularly the injustice and the indignities that those in high office insist just don't exist much in this enlightened era—at least not in their circles, where everyone seems to be doing just fine.

Most of us presume that this state of affairs bespeaks the unfortunate failure of these women constructively to use lawyers and law—an inability to serve their own needs. You know the litany as well as I do—it almost rolls off the tongue: Lack of information and knowledge about their rights. Limited resources for using legal channels. Limited

understanding of the legal culture. And if you're sitting there thinking that this litany still retains real explanatory bite, you're right. The anticipation of rejections by unresponsive agencies, the cost and unavailability of lawyers, the technical obstacles to pursuing causes of action all serve in advance as background assumptions deterring low-income women of color from pressing formal claims. But if you listen carefully to people like Maria Elena, you begin to realize that they're saying something else is also going on—something that they and the lawyers with whom they work often find even more difficult to overcome.

Apparently, to use law (particularly antidiscrimination law) and lawyers, many low-income women of color must overcome fear, guilt, and a heightened sense of destruction. In their eyes, such a decision often amounts to nothing less intimidating than taking on conventional power with relatively little likelihood of success. It also means assuming an adversarial posture toward the very people and institutions that, in some perverse ways, you've come to regard as connected to you, at least insofar as they employ you when others will not (put aside at what wage, under what conditions, and with what benefits). And it seems inevitably to entail making your life entirely vulnerable to the law—with its powers to unravel the little you've got going for yourself and your family. In effect, turning to law and lawyers seems to signify a formal insurrection of sorts—an insurrection that, at least for these low-income women of color, foreshadows discomfiting experiences and negative consequences.

Instead of using law and lawyers, most low-income women of color often deal with oppressive circumstances through their own stock of informal strategies. Sometimes they tend to minimize or reinterpret obvious discrimination. Maria Elena, for example, tells me she often chalks up bad treatment to personal likes or dislikes or denies that it could really be about her. At the same time, these women also employ certain more proactive devices in an effort to alter the situations in which they work. For example, the loose network of housekeepers of which Maria Elena is a part (including formal work cooperatives and informal support groups), seems to be trying to transform their relationship with employers from master-servant to customer–skilled service provider, all in the somewhat vague but hardly irrational hope that current wages, conditions, and benefits will improve along the way.

Yet for the most part, these low-income women of color have fewer illusions about these strategies than you might first presume. They know that you can't explain away all discriminatory treatment and that you can't alter every oppressive situation through informal devices. And they even seem to sense that while they may perceive their own less formal approach to their problems as self-sustaining, it often turns out to be self-defeating. After all, they know better than the rest of us that too many of them still get paid too little, for too many hours of work, in terrible conditions, with absolutely no health benefits or care for their children, and with little current hope of much job mobility over the course of their lifetimes.

Still, you shouldn't facilely condemn the sense of skepticism many low-income women of color feel about the intervention of lawyers and law, particularly if you appreciate (as no doubt you do) that lawyers and law can hardly ensure them the help they need. These women simply find themselves drawn to informal strategies more within their control and less threatening than to subjection of the little they have to the invasive experience and uncertain outcomes of the legal culture. Their collective past has

taught them that seeking a legal remedy for their problems will not likely improve their position and may well fracture their fragilely constructed lives. If low-income women of color and the very best lawyers at places like the Immigrant Legal Resource Center and the East Palo Alto [California] Community Law Project would seem to offer one another special possibilities, they simultaneously present reciprocally enigmatic challenges. Each potentially threatens the very aspirations that hooking up with the other is meant in part to fulfill.

Somehow in the midst of all this, the Maria Elenas of our communities and at least the very best lawyers with whom they work still manage more than occasionally to make contact, get things done, and even find credible self-affirmation in the collective effort. In some instances, no doubt, they join forces out of desperation. If you need help badly enough and if you want to help badly enough, you can often figure out ways to hook up and make the relationship work. That is nothing to scoff at. It may well suggest how most things get done in this world, and it certainly says something about the human spirit under pressure.

At its best, this joint effort at fighting political and social subordination can be a story of magnificent mutual adaptation. At those times, the Maria Elenas of our communities and the lawyers with whom they work face the enigma of their relationship head on. Both try to be sensitive to, without uncritically acquiescing in, their respective needs and concerns. Both depend on the other to make some sense of how their overlapping knowledge and skills might inform a plausible plan of action. Both try to connect their particular struggle to other particular struggles and to particular visions of the state and the political economy. And both inevitably challenge the other as together they put a part of themselves on the line. In short, when things go well they seem capable of favorably redefining over time the very terms that otherwise circumscribe their capacity to take advantage of one another's will to fight.

Still, you should realize that legal education's historical disregard of practice with the politically and socially subordinated survives in all of us, even as some of us continue to try to break with this past. All of us (practitioners, teachers, students, and other lay and professional activists) have learned, to one degree or another, to not even really notice inspired and imaginative work in fights against subordination, much less study how it happens, how it might be taught, and what it might mean for us all. It's not simply that I think we have screwed-up views about lawyering for social change. More critically, we don't treat it, because we don't even see it, as remarkably complex and enigmatic work—with multiple and even elusive dimensions, presenting massive conceptual and empirical challenges, and cultural and interpersonal dynamics more daunting and even more self-defining than we are accustomed to handling. Just as we have come to regard Maria Elena as too unremarkable to pay much attention to, so too have we come to understand working with her as like anything else in law, except (to be truthful) a lot more lightweight, formulaic, and intellectually vapid. What we don't see in the work we know so little about not surprisingly generally manifests itself at this country's law schools in who gets hired, to teach what, to whom. Whether or not legal education likes it, the study of women in all their heterogeneous complexity is no longer just a curiosity. Neither is the study of people of color. Nor the study of gays and lesbians. These people and these dynamics pervade our legal and social and political and economic world.

At the heart of the matter, we simply must come to realize that we all make those communities we call our own. That the problems of the Maria Elenas of this world are our problems, the future of Maria Elena's children is our future, and the failure to share what clout we do exercise is ultimately our own failure, and a tragic and even dangerous one at that. We have a rare chance over the next several years to bring to life the systematic study of the work we know so little about, work that in many ways tells us precisely what we need most to know about ourselves—those sorts of things we'd often rather not hear, much less change. If we're big enough as people and honest enough as an institution, then in the near future Maria Elena and those others with whom she lives and labors might even come to recognize themselves as mattering—as systematically mattering—to the training we provide and the practice of law we help inspire.

76. Making the Invisible Visible

The Garment Industry's Dirty Laundry

JULIE A. SU

I come from California, the state that gave birth to and then passed Proposition 187, which told anyone *suspected* of having entered the country without proper documents to go home, and a state that, by constitutional amendment, eliminated affirmative action in public employment and contracting, outlawing one of the few tools to fight discrimination and exclusion.

What many of you may *not* know is that California—specifically, Los Angeles—is also the garment industry capital of the United States.[1] This is the story of some garment workers who were enslaved in El Monte, California. From their homes in impoverished rural Thailand, these workers dared to dream the immigrant dream, a life of hard work with just pay, decency, self-sustenance for themselves and their families, and hope. What they found instead in America was an industry—the garment industry—that mercilessly reaps profits from workers and then closes its eyes, believing that if it refuses to see, it cannot be held responsible. What these workers also found were government agencies so inhumane and impersonal that they confuse their purpose to serve the people with a mandate merely to perpetuate themselves.

The Thai Workers

On August 2, 1995, modern slave labor in America emerged from invisibility with the discovery of seventy-one Thai garment workers, sixty-seven of them women, in El Monte, a suburb of Los Angeles. These workers were held in a two-story apartment complex with seven units where they were forced to work, live, eat, and sleep in the place they called home for as long as seven years. A ring of razor wire and iron inward-pointing spikes, the kind usually pointed outward to keep intruders out, surrounded the apartment complex, ensuring that the workers could not escape.

They were warned that if they tried to resist or escape, their homes in Thailand would be burned, their families murdered, and they would be beaten. As proof, the captors caught a worker trying to escape, beat him, and took a picture of his bruised and

A version of this chapter previously appeared as Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry*, 1 J. Gender, Race & Just. 405 (1998). Originally published in the *Journal of Gender, Race and Justice*.

battered body to show the others. They were also told that if they reported what was happening to anyone, they would be sent to the Immigration and Naturalization Service (INS).[2] The workers were not permitted to make unmonitored phone calls or write or receive uncensored letters. Armed guards imposed discipline. Because the workers were not permitted to leave, their captors brought in groceries and other daily necessities and sold them to the workers at four or five times the actual price. When the workers were released and we first took them to the grocery store, they were shocked by the low prices of toiletries, toothpaste, shampoo, fruits, and vegetables. They had, of course, no way to know that they had been price gouged at the same time that they were making less than a dollar an hour for their eighteen-hour workdays.

Hundreds of thousands of pieces of cloth, spools of thread, and endless, monotonous stitches marked life behind barbed wire. Labels of brand-name manufacturers and nationwide retailers came into El Monte in boxes and left on blouses, shorts, shirts, and dresses. Manufacturer and retailer specifications, diagrams, details, and deadlines haunted the workers and consumed their lives.

Though eighteen-hour days were the norm, the Thai workers sometimes labored more depending on how quickly the manufacturers and retailers wanted their orders. The workers had to drink large quantities of coffee or splash water on their faces to stay awake. When finally permitted to go upstairs to sleep, they slept on the floor, eight or ten to a bedroom made for two, while rats and roaches crawled over them. Denied adequate medical attention, including care for respiratory illnesses caused by poor air, they suffered eye problems including near blindness, repetitive motion disorders, and even cancerous tumors. One extracted eight of his own teeth after periodontal disease went untreated. At the time of this writing, Sweatshop Watch, a statewide coalition formed in 1995 and dedicated to eliminating sweatshops, was still dealing with many of the health effects of the long years of neglect and physical and psychological torture. Freedom from imprisonment has not meant freedom from its many tragic effects.

Once the El Monte complex was discovered, however, the workers were not freed. Instead, INS immediately threw them into a federal penitentiary where they found themselves again detained behind barbed wire and forced to wear prison uniforms. Due process consisted of reading an obscure legal document that the workers were compelled to sign, making them deportable. Each day, an INS bus shuttled the workers, shackled like dangerous criminals, back and forth from the detention center to the downtown INS facility, where they waited interminably in holding tanks that felt like saunas.

Sweatshop Watch, a small group of activists comprising mostly young Asian Americans, demanded their release.[3] We insisted that the continued detention of the Thai workers was wrong; it sent the message to abused and exploited workers that if they reported the abuse and exploitation, they would be punished—that the INS would imprison and then deport them. We pointed out that sweatshop operators use this fear as a tool for their cruel and unlawful practices, and that garment industry manufacturers and retailers profit by the millions by employing such workers and exploiting their vulnerability.

The INS was not convinced, so we resorted to aggression and street tactics. We set up a makeshift office in the basement waiting room of INS detention. We used their pay phones, banged on windows, and closed down the INS at one or two in the morning, refusing to accept paperwork and bureaucracy as an excuse for the continued detention of

the Thai workers. By the end of the nine long days and nights until the workers' release, both pay phones were broken, as we had slammed the receivers down in frustration each time we received an unsatisfactory and unjust response.

I am convinced that we succeeded in getting the workers released in just over a week in part because we did *not* know the rules, because we would not accept procedures that made no sense either in our hearts or to our minds. It was an important lesson that our formal education might, at times, actually make us *less* effective advocates for the causes we believe in and for the people we care about.

The Civil Lawsuit

Soon after the workers were freed from INS detention, they filed a civil lawsuit in federal district court in Los Angeles,[4] charging the operators of the El Monte compound with false imprisonment and civil RICO,[5] labor law, and civil rights violations. They also named as defendants the manufacturers and retailers who ordered the clothes and who control the entire garment manufacturing process, from cut cloth to sewn garment to sale on the racks. At the same time, the U.S. Department of Justice, through its Los Angeles office, brought a criminal case against the operators, charging them with involuntary servitude, criminal conspiracy, kidnapping by trick, and smuggling and harboring individuals in violation of U.S. immigration law.

The criminal case was the first of many conflicts I would see between the mandates of traditional legal avenues for achieving justice and the goals of nontraditional political and social activism. Because the workers were the key witnesses in the criminal case, the prosecutors at the U.S. Attorney's office warned them not to speak out about the abuses they had endured. Whereas this restriction might have made sense in the context of the criminal prosecution, it served to silence, indeed make invisible again, the Thai workers at a time when their voices needed to be heard.

In February 1996, the captors pleaded guilty and were sentenced to prison terms of two to seven years. Yet the workers' struggles were just beginning. Upon conclusion of the criminal case, the workers' civil lawsuit could now proceed. The civil lawsuit is significant simply because it won the workers entrée to the legal system. Workers too seldom find the legal system open to them. But it is also significant because it names the manufacturers and retailers whose clothes the garment workers sewed.[6] Rather than limiting its theories of liability to the immediate captors of the Thai workers, this lawsuit seeks to establish corporate accountability.

The theories against the manufacturers and retailers fall into four categories. First, they are joint employers of the workers and therefore subject to all federal and state labor laws governing employers. (The manufacturers and retailers respond by insisting that they independently contract with sewing shops that make their clothes, insulating them from employer status.) Second, the suit charges that the manufacturers and retailers acted negligently in hiring and supervising the workers. The El Monte operation was structured so that more than seventy Thai workers were held against their will and forced to work eighteen hours a day, while front shops in downtown Los Angeles employed seventy-some Latina and Latino garment workers in typical sweatshops—the kind that characterize the Los Angeles garment industry. The manufacturers and retailers sent their goods to the front shops for finishing: ironing, sewing buttons and

buttonholes, cutting off thread, packaging and hanging, and checking finished clothes. The manufacturers and retailers sent quality control representatives to the front shops to ensure that their clothes were being made to specification. The turnaround time the manufacturers demanded was much too fast for the downtown locations to have been furnishing all of the work. Such large quantities of high-quality garments could not have been filled by workers making the requisite minimum wage and overtime.

Third, the manufacturers and retailers violated state law requiring garment manufacturers to register with the California Labor Commissioner and avoid the use of industrial home-workers for garment production. Federal law also provides that any person or corporation that places products in the stream of commerce for sale for profit must ensure that its products are not produced in violation of minimum wage and overtime laws. Manufacturers' and retailers' failure to comply with these laws constitutes negligence per se. Fourth, the lawsuit charges that manufacturers and retailers violated California law in engaging and continuing to engage in unfair and unlawful business practices.

One of the most legally significant and politically important, and for me, personally gratifying, aspects of the workers' lawsuit is the inclusion of Latina garment workers as plaintiffs. The Latina workers are entitled to redress for the hundreds of thousands of dollars in minimum wage and overtime payments they were denied. While not held physically against their will, they lived in economic servitude. Despite working full-time, year-round, they were still unable to rise above poverty. The inclusion of the Latina workers is significant for another reason. The discovery of slave labor in the California garment industry had, I feared, set a new standard for how bad things had to be before people would be outraged. We would no longer be horrified by conditions that are standard throughout the garment industry: overcrowded conditions and dark warehouses, endless hours for subminimum wage, constant harassment, and degrading treatment. The reasoning would be, ironically, that "at least they weren't held and forced to work as slaves; at least we don't see barbed wire." The workers united in their civil suit sent a clear message to garment manufacturers and retailers: This case is not just about slave labor. You are not only responsible for involuntary servitude; this case is also about the hundreds of thousands of garment workers, primarily Latina, laboring in sweatshops throughout the United States.

The struggle the workers are engaged in challenges us and challenges various elements of our society. It forces us to view abuses such as these not as isolated incidents but as structural deficiencies. Unless and until corporations are held accountable for exploitation, abuse of workers will continue and sweatshops will remain a shameful reality—the dirty laundry of the multibillion dollar fashion industry. Another challenge is to workers themselves and to their advocates. The workers have had to learn that, even in this country, nothing is won without a fight, no power is shifted without struggle, and no one is more powerful to stand up for them than they themselves. Mere access to the legal system and to lawyers does not ensure that justice will be served. No one will give you a social and economic structure governed by principles of compassion and equality over corporate profit—particularly if you are poor, non-English-speaking, an immigrant, a woman of color, a garment worker—unless you fight for it yourself. It is also a challenge to the workers and their representatives to maintain and build the coalition between Asian and Latina workers. These are workers who share neither a language nor cultural

and national roots. When we have had joint meetings with all the workers, each meeting takes three times as long as usual because every explanation, question, answer, and issue needs to be translated into three languages. But its rewards are precious. A Thai worker says in Thai, "We are so grateful finally to be free so we can stand alongside you and to struggle with you, to make better lives for us all," and her words are translated from Thai into English, then from English into Spanish. At the moment when comprehension washes over the faces of the Latina workers, a light of understanding goes on in their eyes, and they begin to nod their heads slowly in agreement, you feel the depth of that connection.

Working across racial lines has also posed challenges for me as an Asian American woman. The Latina workers who first came to see me were skeptical and a bit suspicious of me. "*¿Si ayuda los Thailandeses, porque quiere ayudamos?*"[7] I answered the best I could in Spanish, "*Porque creo in justicia, y la lucha es muy grande. Si no luchamos juntos, no podemos ganar.*"[8] The industry's structure magnifies ethnic and racial conflict at the bottom—workers against factory operators. Workers, who are primarily Latino and Latina, see their daily subjugation enforced by factory operators who are primarily Asian; Asian owners transfer the pressure and exploitation they experience from manufacturers and retailers to the garment workers. Ironically, to enable them to communicate Asian owners learn Spanish but often little more than "*rápido, mas rápido.*" Poverty and helplessness experienced by immigrants, Asian and Latina, combine with language and racial differences to make the garment industry a source of racial tension. Meanwhile, manufacturers and retailers, like puppet masters high above the scene they create and control, wield their power with impunity.

The workers' struggles and their strength have challenged the government. The workers' case says to the INS that its way of doing business as usual is unacceptable. The INS cannot be a tool of exploitative employers to keep workers from bettering their lives. Garment workers' cases are about labor law violations, so they fall under the purview of the Department of Labor. But in the garment industry, where almost all the workers are poor women of color, we have a civil rights problem. Why are manufacturers and retailers not investigated for rampant civil rights abuses? Why is the State Department not concerned, where issues of foreign policy and manufacturer and retailer conduct in countries around the world so clearly affect the human rights of poor workers in other countries and immigrant workers in the United States?

The workers' lawsuit challenges our legal system. It says that our system has to be able to bridge the gap between reality and justice. Manufacturers and retailers cannot simply walk into court and argue they use independent contractors without the court considering the economic and practical reality of their practices. The lawsuit also challenges the legal system's primary focus on lawyers. For one thing, I avoid referring to the workers as "clients." To me, it depersonalizes the workers and places them in a dependent relationship. As "clients," their relationship to me is defined by my education and skills as their "lawyer"; instead, by referring to them as "workers," their experiences define our work together. I talk with them not just in terms of legal rights but in terms of basic human dignity. For many people, when language is framed as "law," I have seen an immediate shift in their willingness to engage in the dialogue; many people think the discussion is suddenly taking place in a language they do not and cannot understand. What workers do understand is a language of human dignity. They desire to be treated

as human beings, not as animals or machines. Human dignity must be the measure of what we recognize as legal rights.

Finally, the question of not only what particular words we use but *which* language we use is critical. The workers will often ask me to tell their story for them, both because I can tell it in English and because they believe my knowledge of the law instills in me instant efficacy as a spokesperson. However, they are wrong. Forced into English or into the narrow confines of legal terminology, the workers become speechless. But when I listen to them tell their stories in their own language, listen to them describe their suffering, their pain, their hope through the long, dark days, they become poetic and strong. We as lawyers and advocates must always encourage those who have lived the experiences to tell them, in whatever language they speak.

NOTES

1. The number of sweatshops has increased in the United States since 1989. The growth has been greatest in Los Angeles. Precise data, however, are unavailable because of the lack of systematic enforcement of labor, health, and safety laws in these workplaces. Working conditions continue to be deplorable. Violations include exposed electrical wiring, blocked aisles, unguarded machinery, and unsanitary bathrooms, in addition to rampant nonpayment of minimum wages and overtime. See U.S. General Accounting Office Pub. No. B-257458, Garment Industry: Efforts to Address the Prevalence and Conditions of Sweatshops 1–7 (1994). See also Stuart Silverstein, *Survey of Garment Industry Finds Rampant Labor Abuse*, L.A. Times, Apr. 15, 1994, at D1 (noting that random inspection of sixty-nine garment manufacturers and contractors found all but two breaking federal or state laws or both, and more than one-third had serious safety problems). A study by the U.S. Department of Labor released in May 1998 confirmed this rampant level of noncompliance.

2. This is a common weapon used by sweatshop operators to keep workers from organizing and reporting abuses. Manufacturers and retailers, while pleading ignorance, reap profit from the vulnerability of garment workers, a vulnerability exacerbated by the relationship between exploitative employers and INS officials.

3. At the time of this writing, Southern California members of Sweatshop Watch included the Asian Pacific American Labor Alliance, Asian Pacific American Legal Center, Coalition for Humane Immigrant Rights of Los Angeles, Korean Immigrant Workers Advocates, Thai Community Development Center, and Union of Needletrades, Industrial, and Textile Employees. Northern California members include the Asian Law Caucus, Asian Immigrant Women Advocates, and Equal Rights Advocates.

4. Bureerong v. Uvawas, 922 F. Supp. 1450 (C.D. Cal. 1996).

5. The Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §1961 (1994), makes it unlawful to associate for the purposes of engaging in a pattern of racketeering activity, such as a scheme to defraud workers of their freedom and keep them in captivity, pay them subminimum wages, and use threats to extort their labor from them.

6. The suit, *Bureerong v. Uvawas*, 922 F. Supp. 1450 (C.D. Cal. 1996), names as defendants eight apparel companies: Mervyn's, Montgomery Ward, Hub Distributing (which owns Miller's Outpost), B.U.M. International, Tomato, L.F. Sportswear, Bigin, and New Boys.

7. "If you are helping the Thai workers, why would you want to help us?"

8. "Because I believe in justice, and the struggle is a big one. If we do not fight together, we will not succeed."

77. Vampires Anonymous and Critical Race Practice

ROBERT A. WILLIAMS, JR.

I was raised in a traditional Indian home, which meant I was raised to think independently and to act for others. Too many of the law-professor-storyhater types I've met seem to have been raised just the opposite—that is, to think for others and act independently. But that's another story. For me, my upbringing meant that I had to endure probing questions, asked by my elders, at the family dinner table, like, "Boy, what have you done for your people today?"

Now, when you are asked that type of question by one of your Lumbee elders, there's a background context you are presumed to understand. Because acting for others is regarded as an individual responsibility in Lumbee culture, each individual is responsible for making sure that he or she acquires the necessary skills and abilities for assuming that responsibility. So when you, as a young boy, are asked the question "What have you done for your people today?," what you are really being asked is "Have you studied hard today?," "Have you learned something of use that will help your family, that will help other Lumbee people?," "We know you are just a youngster, but do you understand that you are expected to serve others through your hard work and achievements?"

For me, then, going into law teaching was a way of translating such childhood Lumbee lessons into practice. My inner child saw being a law professor who taught and researched in the field of Indian law as a nice, efficient way of being a good person in the eyes of my family, my Indian community, and others. And the pay, considering the hours and flexibility, was damn good.

I was quickly abused and damaged, however, upon becoming a law professor. What I didn't know upon entering law teaching was that the law professors who ran the law school where I got my first job didn't give a damn about me saving Indians through Indian law. They cared about one thing and one thing only: themselves. You see, as I soon came to learn, I had been hired to make them and their law school look good.

Ever see the movie *Interview with the Vampire*? If not, and if you're a minority law professor, go rent it. Tom Cruise and Brad Pitt are these really pasty-faced-looking vampire guys who go around turning a few carefully picked innocent victims into other

A version of this chapter previously appeared as Robert A. Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 Mich. L. Rev. 741 (1997). Originally published in the *Michigan Law Review*.

vampires for their own weird, twisted, personal reasons. It's just like when you were hired for your first law school teaching job. Remember your first set of interviews with faculty hiring committees and you were "the affirmative action candidate"? Wasn't it like meeting these different Vampire Clubs? Each one had its own Cruise-type figure, the chair in most cases, selected by the Vampire dean for the lead recruitment role because he's got energy and this weird type of good guy–stout fellow charisma that you haven't quite fully figured out. Each Law School Vampire Club also has its Brad Pitt–type character who tells you during his interview with you how perverse it all is, this law school hiring process. But nonetheless, he's a vampire too, and he tells you how he really hopes all the other vampires in the club like you because the law school really needs a minority vampire. And of course all the clubs you interview with have an abundance of old farts. You know they are all sizing you up, seeing if you are worthy of a chance to join their Vampire Club. They all want to suck the lifeblood out of you.

Once you're on a faculty as an untenured minority law professor, a vampire-trainee as it were, you see how the process really works, and it's just like in the movie. The vampires on the recruitment committee go through the small group of qualified minorities who've worked their way to the top of the résumé pile. These victims are like the ones in the movie who deep down in their psyche want to become vampires and go to the AALS (Association of American Law Schools) meat market and stuff like that. Their blood types and pedigrees are all carefully arranged on the page by their résumé consultants. They always make sure to list their memberships in law school minority association activities and put in bold type their participation on a law review, even a specialty, second-tier journal.

"I'd like to get ahold of this one," says one of the old farts on the committee.

"What a catch this one would be, if only we could sink our fangs into her before another club of vampires gets to her," says the Cruise character.

"It's a shame to have to offer this nice young Hispanic woman a job here. She'll get chewed to pieces by this place," moans Brad Pitt.

You know, on second thought, if you're a minority law professor, don't bother renting the movie. You've seen it before. It's your life since deciding to enter law teaching. It's the present reality of affirmative action hiring that goes on in American law schools all the time. It's *Interview with the Vampire Law Professors.* Watch them select their victims. Cringe as they scout them out in law firms and judicial clerkship chambers. Scream as they call references. Squirm in your seat as they go round the table and discuss which minority candidate is most capable of being socialized into the culture of the Vampire Club. Die a thousand deaths as they offer immortality and eternal bliss to that one, most exquisite, most highly qualified minority victim vampire—a tenure-track position in their Vampire Club. Cry as the carefully selected minority victim becomes a vampire-initiate and abandons all prior allegiance to the party of humanity, the minority community, and a selfless sense of service to the legal needs of others. Feel the heartbreak as the minority vampire-to-be writes three big law review articles for the top ten or so journals during the next seven years of untenured, undead, vampire life. Feel the sense of frustration of the now tenured minority vampire, who realizes the intense alienation of vampire law professor life, or rather unlife. A vampire's life's work appears only in journals that only other vampires read. And only a small group of other vampires write in the field and will care about these articles at all (to see if they are appropriately cited for their "important" contributions to this lifeless form of vampire truth and knowledge).

You know what's really sick about this movie? It's hard to feel sorry for the minority law professors who are recruited into these Vampire Clubs. It's tough seeing their lifeblood sucked out of them, but it's their choice. No one made them choose to spend seven years of their lives writing law review articles that only other vampires will read. No, what's really sick is the suffering of the innocent victims of the vampire law professors' hiring and tenure process. It deprives the party of humanity and the minority community of the best and the brightest, people with tremendous energy, talent, and potential who have a chance to make a real impact on the world and to make it a better place for people of all races, colors, and creeds. It takes these well-trained, eager, young minority people and turns them into vampires. As untenured minority vampires, they are cloistered in offices and libraries, before a word processing screen. They come out of their law schools only to make presentations at brown-bag faculty lunches and other Vampire Clubs. During what should be the best and most productive years of their professional lives, these untenured minority vampire law professors are turned into something much worse than simply a useless member to their community. They eventually become tenured old farts themselves.

That is, unless they become critical race theory scholars. That's what minority law professors like me who get tenure become. We know that we really can't let ourselves become old farts, so we convince ourselves that we're not total sellouts by writing law review articles that drive the old farts crazy. If you're an old fart, for example, I bet you're saying to yourself this very instant that you can't believe that this chapter you're reading right now got into this book or the *Michigan Law Review*, which after all, is a real, undisputable top-ten law review—actually a top-six or so. And here's this Indian guy who wasn't even a Supreme Court clerk telling these ridiculous made-up stories about vampires and such nonsense with no footnotes. Just a lot of smart-ass, marginal comments. It must be because he's a minority.

But I swear, I'm not making any of this up. You can find lots of minority law professors who will tell you it's the story of their lives. Let me try and put this in terms you'll understand. Here's a hypothetical for you to consider:

A potential minority faculty hire comes into your office on the day of his or her interview. The potential affirmative action hiree is all fired up. The hiree tells you, "Instead of writing boring, hundred-page law review articles for the next seven years of my life, I want to direct this practice-oriented seminar class I'm designing on Indian law. The students will team with me in drafting three different legal codes tailored to the needs of three different Indian tribal court systems. I've talked to at least ten chief judges from tribal courts here in the state, and they all tell me it's a great idea that will fill a huge need in Indian Country. I can structure this seminar so that it's a really worthwhile academic real-world experience for my students. They'll get intensive instruction on Indian law issues and the substantive area of law that the tribal court needs code work on; we'll work on the subtleties of drafting a legal code; they'll do interviews out on the res and observe the tribal court in action; and when it's all done, they'll produce a code that will improve the administration of justice in Indian Country."

"If I take this on," the minority candidate tells you, "there's no way I can manage to write hundred-page bullshit law review articles." You nod your head in agreement and then try not to act stupefied when the poor lost waif next says, "I'm thinking of asking the hiring committee if that's okay. How do you think they will react?"

Now remember the rule that controls this type of case: "It's the footnotes, stupid." Applying the rule, you know that the faculty will react like the minority candidate was wearing a thousand cloves of garlic around his or her neck during the interview; you know that your colleagues as a group would rather impale their bloodless hearts on a wooden crucifix sharpened at the business end before hiring such a candidate; you know that this minority candidate has not figured out that an untenured vampire's sole purpose in life is to service the needs of the tenured vampires who are getting too old to produce fresh blood, er, law review articles, in top-ten law reviews that make their Vampire Club the envy of all the other Vampire Clubs.

Having applied the rule, it is now easy to predict the result of the case. This unqualified affirmative action innocent will not be hired by *your* law school.

I don't know exactly what made me join Vampires Anonymous. It was really more of a gradual, awakening-from-the-dead type of deal. I didn't need Vampires Anonymous to figure out that the model of a law school professor was warped and twisted and ill-suited to the demands of a postmodern multicultural world where being a vampire law professor is just one of the more antiquated of the many warped and twisted forms of parasitic deviancy plaguing a sick, decaying, and self-absorbed society in general. No, what made me realize that I needed Vampires Anonymous was my inability to do anything about it. I had so totally bought into the model of the vampire law professor that all I could do well was write critical race theory articles. I wasn't an old fart, but slowly, over the years, I had become a full-fledged vampire anyway, one who had gotten comfortable with the idea of tenured vampire life, meaning that all you had to do was sit on your ass and deconstruct the world with your word processor.

"Look at me," I said to myself in the mirror one day, except of course, that since I was a vampire, there was no *me* to look at. Since I hadn't really done anything for anybody else, I was basically invisible. I was a résumé with a two-page list of fancy critical race theory law review articles, books, and "Other Publications" but not much else. "So that's why affirmative action is just about dead in this country," I said to myself. "Self," I said, "you're one of its most privileged beneficiaries, and all you've done for the past decade is consume yourself in marginal intellectual diversions and antic, ineffectual posturings at law school faculty meetings. You actually believe that somewhere Dr. King or Gandhi or someone like that once wrote that all God's children, red, yellow, black, and white, had the right to publish articles in the *Harvard Law Review* and make $100K a year with three months off during the summer, and that your responsibility in life was to raise the 'color' issue now and then at faculty meetings."

It was after I moved to Arizona that I became really serious about joining Vampires Anonymous. That was where I figured out that I couldn't be a vampire law professor and do critical race practice at the same time.

Being a law professor in a place like Arizona where Indians are calling you up all the time and asking for help was a new experience for me. At first, I was really into the idea of putting a whole new section on my academic résumé to highlight my service to Indian people. But then it started getting out of hand; all these requests for help started interfering with my writing, not to mention my serious reading time. I had to make excuses, like, "Gee, I'd like to help you out by taking your tribe's land claim to the International Court of Justice at The Hague, but I've got to finish this law review article applying Frantz Fanon to Indian law that maybe a dozen or so people who also write on Indian

law will read." I mean, I'd be getting calls all the time, sometimes even at home, from some Indian tribal leader somewhere out there in the middle of Arizona Indian Country who would tell me how her tribe was getting screwed by the Bureau of Indian Affairs (BIA), and all I could think about was that I needed to bone up on Martha Minow and Carol Gilligan for that symposium piece on Indian law and feminist legal theory that was a month overdue. I always hated telling them stuff like "Gosh, I'd like to save your reservation, but right now is a real bad time. Maybe next semester," but what else could I do? I was a vampire and needed more law review articles for my résumé. Didn't these people know that I was a critical race scholar? What more did they want from me? Blood or something? Like I had any of *that* to give to anybody.

What these Arizona Indians really wanted me to do was to get off my critical race theory ass and do some serious critical race practice. They didn't give a damn about the relationship between hegemony and false consciousness. They wanted help, and I was a resource. That's why they were so tough on me. See, to be a leader in an Indian community means going off the res to bring in resources to help the community. That meant that all these people asking me for help were assuming the responsibility of being Indian leaders, which meant they could get right in my face and tell me to act like an Indian and give something back, rather than take, take, take. They were really cultural about it too, because they were Indians, and they knew how to test me, knew how to get under my skin. I didn't mind it when some law professor I'd just met at a hiring interview or conference would tell me that I didn't look very Indian, whatever that meant. I mean, I used to be bothered by it, sure, but I had developed several successful strategies over the years to cope with the psychic wounds of not looking Indian enough to some people. I would walk around with a feather in my pocket and hold it up at the back of my head and say something like, "How about now? Does that work for you, Kimosabe?" Or if I really disliked someone, I'd say something like, "Yeah, and you don't look like an asshole either, but you sure act like one."

What made me understand my need for an organization like Vampires Anonymous was when some Arizona Indian I had just said no to would say, right to my face or over the phone, "You know, you don't act Indian." That hurt. It brought back memories of my Lumbee elders looking at me over the dinner table and asking me what I had done for my people today. It brought back images of what I had once thought I was going to do as an Indian law professor—think independently, act for others. It made me go get help, because I realized that as long as I was a vampire law professor, I'd never be able to translate my critical race theory into critical race practice and serve the needs of others.

Kicking the vampire habit of sitting in an office all your life and writing law review articles is not easy. For me, Vampires Anonymous meant that I had to stop writing law review articles for a while and serve the needs of others in my community. I started out small, with kids, telling inspirational stories to third and fourth graders on occasions like Martin Luther King Day and Columbus Day and things like that. I'd just leave my office, turn off my computer terminal, and go tell stories about Dr. King or about the Iroquois Confederacy and the Great Tree of Peace—positive things, stories of solidarity, struggle, and of rights won, denied, and defended. You know, the type of transcommunal stories that need to be shared with others, particularly children of all races, colors, and creeds, in a disconnected multicultural society like ours.

I got more adventuresome. I called up the director of the American Indian Studies (AIS) master's degree program at the University of Arizona to see if they might be able to use my help. I got to teach some really great American Indian Studies students in my Indian law course, which I cross listed with the AIS program. I got into this incredible groove, moving my critical race theory beyond the confines of the law reviews and law school classroom. I was doing critical race practice, and I wasn't even having to give up my parking space on campus.

Your life really starts changing when you join Vampires Anonymous. Surrendering the last of my writing days to serving others' needs, I got involved in community organizations. I offered my help to former law students who had called me up to talk about a good Indian law case they were working on by assigning work-study students to them, offering my own relevant expertise, and inviting them to recruit law student volunteers to their cause by letting them speak to my class.

Some of the steps I took were insane, really, for a law professor who regarded himself as a serious scholar of fancy theory articles. I wrote an article for a bar journal review, and produced other, informational pieces for Indian Country newsletters, encyclopedia-type publications, things that real and serious vampire law professor–types would never bother reading or regard as serious scholarship come peer-review time. So what—I was reaching more people, different types of people, with the message, and that's what doing critical race practice is all about in my mind. I became semi–computer literate and started using the Internet to support other members of Vampires Anonymous. I became a coeditor of an Indian law casebook and incorporated critical race, critical legal studies, feminist, and indigenist materials in a new edition. I wrote a teacher's manual and accompanying syllabi that explained how the book could be used in a graduate or undergraduate ethnic studies course on Indian law and policy. I taught myself how to write grants and raise funds for projects that needed to be done by the organizations I was involved in or for tribal judge training conferences and community workshops.

It was at some point in the middle of all this critical race practice I was doing that I took the biggest step of my life. I developed a critical race practice clinic focused on Indian law at the University of Arizona and begin offering a clinical seminar on what I called tribal law. It was first offered as a two-credit course to second- and third-year law students and placed them under my supervision doing clinical placements in tribal courts and directed research requested by Arizona Indian tribes and other Indian tribes and indigenous peoples' organizations outside the state. Currently, the Tribal Law Clinic is offered as a year-round, seven-credit-hour clinical experience to law students and Indian studies graduate students in a variety of settings and roles. The clinic has sent law students to Nicaragua to assist in a legal needs assessment for the Indian communities of the Atlantic Coast, sent them to Geneva to assist indigenous nongovernmental human rights organizations at the UN Human Rights Commission, and set them to work as judicial clerks on the Navajo, Hopi, Apache, O'dham, and Yaqui Reservations. In fact, since its creation in 1990, the clinic has evolved into a program (which means I scrounged up a budget from various sources) that has assisted Indian tribes throughout Arizona and the southwest, as well as indigenous peoples in Central America, Mexico, Canada, and Australia. The basic mission is to provide pro bono legal research and advocacy assistance, law and graduate student internship and clinical placements, and community-based workshops and other forms of training to strengthen tribal

self-governance, institution-building efforts, and respect for indigenous peoples' human rights. In other words, we help Indians in as many ways as we can.

All the clinical work of the program involves students in projects consciously organized around the important themes of critical race theory. For example, projects are selected and carried out by looking from the bottom up; that is, students are taught and trained to *listen seriously* to the concerns, priorities, and experiences expressed by the indigenous communities we work with. We make a point of sending them into these communities, even if that means getting them down to Nicaragua or up to the Navajo Reservation. All our projects are approached as efforts aimed at decolonizing U.S. law and international law relating to indigenous peoples' rights. Students are encouraged to try to understand how the legacy of European colonialism and racism is perpetuated in contemporary legal doctrine, expose that legacy at work in the project they are working on, and develop strategies that delegitimate it, literally clearing the ground for the testing and development of new legal theories.

All the clinic's projects unashamedly endorse the discourse of rights, particularly the emerging discourse of indigenous human rights, as an organizing and empowering strategy for indigenous peoples. Finally, we globalize wherever possible to make linkages with indigenous communities around the world. Transcommunality—whether it's just using the program's Internet home page to provide updates on clinic projects or take requests for research or information-gathering assistance from an indigenous organization in Australia or Canada—is a big part of what we do.

Our students learn many lessons in the Tribal Law Clinic, but first and foremost, they come to understand that critical race practice is mostly about learning to listen to other people's stories and then finding ways to make those stories matter in the legal system. And no one can say that that's not really something!

That's my story about critical race practice and what Vampires Anonymous has done for me. We all create our own private mythologies, I guess. I'm now recovering as a triracial isolate Lumbee legal storyteller, putting my critical race theory to good use with the best resources that I believe postmodern multicultural legal education has to offer. You know what they are: the reliable group of bright, energetic, multicultural law students who still come to legal education with these wild and crazy ideas about law serving justice and all that; clinical courses that can motivate and teach these students by awarding academic credit for reaching out to serve the legal needs of others; and the human, information, and technical resources available within the modern law school.

This type of critical race practice clinical course isn't really that hard to do at all, if you are really motivated. You know the drill. Your elders taught it to you. Get off your butt and go out and make a difference in the world. Or think independently, act for others. Whatever, you were taught your responsibilities; you know what it is you have to do. Like I said, that's my story. I think it's great, but I would, of course. After all, I'm still a law professor, just not a vampire one. That's why I know that some of my law professor colleagues won't like me telling this story very much—you know, the storyhaters, old farts, and turtle men. They're still vampires after all, so other people and their stories don't matter very much to them. If only they would join Vampires Anonymous. They would come to learn that understanding other people and their stories really does matter in our efforts to achieve justice in our postmodern multicultural world.

From the Editors

Issues and Comments

In law school have you ever felt as though you were surrounded by vampires? Do you fear becoming one? (Have you already?)

What's wrong with abstract scholarship? If many of our problems are political in nature and not merely cases of individual shortcoming, must we not sometimes press for a complex, nuanced understanding? Is this process necessarily bloodless or life sapping? If you are representing clients in clinical settings, how important is it that the story be told their way or in their own words? What would you do if you knew that this would cause them to lose their cases?

Do you impose your preunderstanding of others' worlds onto their life stories by the simple act of recounting them? How can lawyers recognize when they are doing interpretive violence to a client's narrative? Or wasting their time and their clients' money because the courts are deaf to one's cause and street activism is needed to soften the situation and get everyone's attention?

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PART XVII

CRITICAL WHITE STUDIES

AN EMERGING STRAIN within critical race theory focuses not so much on the way minority coloration functions as a social organizing principle as on the way whiteness does.

In Part XVII, Ian Haney López examines how the Supreme Court constructed and interpreted whiteness under statutes that made skin color relevant. Next, Thomas Ross analyzes the way legal discourse often equates whiteness with innocence and blackness with the opposite. Next, Stephanie Wildman and Adrienne Davis examine how privilege—especially the white kind—is the opposite side of the coin of discrimination but operates in much the same way.

A second selection by Ian Haney López charges leaders of Latino communities with being, in effect, white, or if not that, of pining for the privileges of whiteness. Finally, "Rodrigo's Portent" examines events in a state whose racial composition is fast reaching the tipping point.

78. White by Law

IAN F. HANEY LÓPEZ

> Then, what is white?
> —*Ex parte Shahid*[1]

In its first words on the subject of citizenship, Congress in 1790 limited naturalization to "white persons."[2] Though the requirements for naturalization changed frequently thereafter, this racial prerequisite to citizenship endured for over a century and a half, remaining in force until 1952.[3] From the earliest years of this country until just a short time ago, being a white person was a condition for acquiring citizenship.

Whether one was white, however, was often no easy question. Thus, as immigration reached record highs at the turn of the last century, countless people found themselves arguing their racial identity in order to naturalize. From 1907, when the federal government began collecting data on naturalization, until 1920, over a million people gained citizenship under the racially restrictive naturalization laws.[4] Many more sought to naturalize and were denied. Records regarding more than the simple decision in most of these cases do not exist, as naturalization often took place with a minimum of formal court proceedings and so produced few if any written decisions. However, a number of cases construing the white-person prerequisite reached the highest state and federal judicial circles, including in the early 1920s two cases argued before the U.S. Supreme Court, and these cases resulted in illuminating published decisions. These cases document the efforts of would-be citizens from around the world to establish that as a legal matter they were white. Applicants from Hawaii, China, Japan, Burma, and the Philippines, as well as all mixed-race applicants, failed in their arguments. On the other hand, courts ruled that the applicants from Mexico and Armenia were white and on alternate occasions deemed petitioners from Syria, India, and Arabia to be either white or not white. As a taxonomy of whiteness, these cases are instructive because of the imprecision and contradiction they reveal in the establishment of racial divisions between whites and nonwhites.

It is on the level of taxonomical *practice*, however, that they are most intriguing. The petitioners for naturalization forced the courts into a case-by-case struggle to define who was a white person. More importantly, the courts were required in these prerequisite cases to articulate rationales for the divisions they were promulgating. It was not enough

A version of this chapter previously appeared in Ian F. Haney López, White by Law: The Legal Construction of Race.

simply to declare in favor of or against a particular applicant; the courts, as exponents of the applicable law, faced the necessity of explaining the basis on which they drew the boundaries of whiteness. They had to establish in law whether, for example, a petitioner's race was to be measured by skin color, facial features, national origin, language, culture, ancestry, the speculations of scientists, popular opinion, or some combination and which of these or other factors would govern in those inevitable cases where the indices of race contradicted each other. In short, the courts were responsible for deciding not only who was white but why someone was white. Thus, the courts had to wrestle in their written decisions with the nature of race in general and of white racial identity in particular. Their categorical practices provide the empirical basis for this chapter.

How did the courts define who was white? What reasons did they offer, and what do those rationalizations tell us about the nature of whiteness? Do these cases also afford insights into white race consciousness as it exists today? What, finally, *is* white? This chapter examines these and related questions, offering an exploration of contemporary white identity. It arrives at the conclusion that whiteness exists at the vortex of race in U.S. law and society and that whiteness as it is currently constituted should be dismantled.

The Racial Prerequisite Cases

Although not widely remembered, the prerequisite cases were at the center of racial debates in the United States for the fifty years following the Civil War, when immigration and nativism ran at record highs. Figuring prominently in the furor on the appropriate status of the newcomers, naturalization laws were heatedly discussed by the most respected public figures of the day and in the swirl of popular politics. Debates about racial prerequisites to citizenship arose at the end of the Civil War as part of the effort to expunge *Dred Scott*, the Supreme Court decision that had held that blacks were not citizens. Because of racial animosity in Congress toward Asians and Native Americans, the racial bar on citizenship was maintained, though in 1870 the right to naturalize was extended to African Americans. Continuing into the early 1900s, anti-Asian agitation kept the prerequisite laws at the forefront of national and even international attention. Anti-immigrant groups such as the Asiatic Exclusion League formulated arguments to address the white-person prerequisite, arguing in 1910 that Asian Indians were not white but were rather an "effeminate, caste-ridden, and degraded" race who did not qualify for citizenship.[5] For their part, immigrants also mobilized to participate as individuals and through civic groups in the debates on naturalization, writing for popular periodicals and lobbying government.[6]

The principal locus of the debate, however, was in the courts. Beginning with the first prerequisite case in 1878 and until racial restrictions were removed in 1952, forty-four racial prerequisite cases were reported, including two heard by the U.S. Supreme Court. Raising fundamental questions about who could join the polity as a citizen in terms of who was and who was not white, these cases attracted some of the most renowned jurists of the times, such as John Wigmore, as well as some of the greatest experts on race, including Franz Boas. Wigmore, now more famous for his legal-treatise writing, published a law review article in 1894 advocating the admission of Japanese immigrants to citizenship on the grounds that the Japanese people were anthropologically and culturally white.[7] Boas, today commonly regarded as the founder of modern

anthropology, participated in at least one of the prerequisite cases as an expert witness on behalf of an Armenian applicant, arguing he was white.[8] Despite these accomplished participants, however, the courts themselves struggled not only with the narrow question of whom to naturalize but more fundamentally with the categorical question of how to determine racial identity.

Though the courts offered many different rationales to justify the various racial divisions they advanced, two predominated: common knowledge and scientific evidence. Both of these rationales are apparent in the first prerequisite case, *In re Ah Yup*.[9] "Common knowledge" refers to those rationales that appealed to popular, widely held conceptions of races and racial divisions. For example, the *Ah Yup* court based its negative decision regarding a Chinese applicant in part on the popular understanding of the term "white person": "The words 'white person' . . . in this country, at least, have undoubtedly acquired a well settled meaning in common popular speech, and they are constantly used in the sense so acquired in the literature of the country, as well as in common parlance."[10] Under a common-knowledge approach, courts justified the assignment of petitioners to one race or another by reference to what was commonly believed about race. This type of rationale is distinct from reasoning that relied on knowledge of a reputedly objective, technical, and specialized sort. Such rationales, which justified racial divisions by reference to the naturalistic studies of humankind, can be labeled appeals to scientific evidence. A longer excerpt from *Ah Yup* exemplifies this second sort of rationale:

> In speaking of the various classifications of races, Webster in his dictionary says, "The common classification is that of Blumbach, who makes five. 1. The Caucasian, or white race, to which belong the greater part of European nations and those of Western Asia; 2. The Mongolian, or yellow race, occupying Tartary, China, Japan, etc.; 3. The Ethiopian or Negro (black) race, occupying all of Africa, except the north; 4. The American, or red race, containing the Indians of North and South America; and, 5. The Malay, or Brown race, occupying the islands of the Indian Archipelago," etc. This division was adopted from Buffon, with some changes in names, and is founded on the combined characteristics of complexion, hair and skull. . . . [N]o one includes the white, or Caucasian, with the Mongolian or yellow race.[11]

These rationales, one appealing to common knowledge and the other to scientific evidence, were the two core approaches used by courts to explain the assignment of an individual to one race or another.

As *Ah Yup* illustrates, at least initially the courts deciding racial prerequisite cases relied simultaneously on both rationales to justify their decisions. However, after 1909, a schism appeared among the courts over whether common knowledge or scientific evidence was the appropriate standard. After that year, the lower courts divided almost evenly on the proper test for whiteness: Five courts relied exclusively on common knowledge, while six decisions turned only on scientific evidence. No court drew on both rationales. In 1922 and 1923, the Supreme Court intervened in the prerequisite cases to resolve this impasse between science and popular knowledge, securing common sense as the appropriate legal meter of race. Though the courts did not see their decisions in this light, the early congruence and subsequent contradiction of common knowledge

and scientific evidence set the terms of a debate about whether race is social or natural. In these terms, the Supreme Court's elevation of common knowledge as the legal meter of race convincingly illustrates the social basis for racial categorization.

The early prerequisite courts assumed that common knowledge and scientific evidence both measured the same thing, the natural physical differences that marked humankind into disparate races. Any difference between the two would be found in levels of exactitude, in terms of how accurately these existing differences were measured, and not in substantive disagreements about the nature of racial difference itself. This position seemed tenable so long as science and popular beliefs jibed in the construction of racial categories. However, by 1909, changes in immigrant demographics and evolution in anthropological thinking combined to create contradictions between science and common knowledge. These contradictions surfaced most acutely in cases concerning immigrants from western and southern Asia, notably Syrians and Asian Indians, arrivals from countries inhabited by dark-skinned peoples nevertheless uniformly classified as Caucasians by the leading anthropologists of the times. The inability of science to confirm through empirical evidence the popular racial beliefs that held Syrians and Asian Indians to be nonwhites should have drawn into question for the courts the notion that race was a natural phenomenon. So deeply held was this belief, however, that instead the courts disparaged science.

Over the course of two decisions, the Supreme Court resolved the conflict between common knowledge and scientific evidence in favor of the former, although not without some initial confusion. In *United States v. Ozawa*, the Court relied on both rationales to exclude a Japanese petitioner, holding that he was not of the type "*popularly* known as the Caucasian race," thereby invoking both common knowledge ("popularly known") and science ("the Caucasian race").[12] Here, as in the early prerequisite cases, both science and popular knowledge worked hand in hand to exclude the applicant from citizenship. Within a few months of its decision in *Ozawa*, however, the Court heard a case brought by an Asian Indian, Bhagat Singh Thind, who relied on the Court's recent equation of Caucasian and white to argue for his own naturalization. In Thind's case, science and common knowledge diverged. In a stunning reversal of its holding in *Ozawa*, the Court in *United States v. Thind* repudiated its earlier equation, rejecting any role for science in racial assignments.[13] The Court decried the "scientific manipulation" it believed had eroded racial differences by including as Caucasian "far more [people] than the unscientific mind suspects," even some persons the Court described as ranging "in color . . . from brown to black."[14] "We venture to think," the Court said, "that the average well informed white American would learn with some degree of astonishment that the race to which he belongs is made up of such heterogenous elements."[15] The Court held instead that "the words 'free white persons' are words of common speech, to be interpreted in accordance with the understanding of the common man."[16] In the Court's opinion, science had failed as an arbiter of human difference; common knowledge succeeded it as the touchstone of racial division.

In elevating common knowledge, the Court no doubt remained convinced that racial divisions followed real, natural, physical differences. This explains the Court's frustration with science, which to the Court's mind was curiously and suspiciously unable to identify and quantify those racial differences so readily apparent to it. This frustration is understandable, given the promise of early anthropology to definitively establish

racial differences and, more, a racial hierarchy that placed whites at the top. Yet this was a promise science could not keep. Despite their strained efforts, students of race could not measure the boundaries of whiteness because such boundaries are socially fashioned and cannot be measured, or found, in nature. The Court resented the failure of science to fulfill an impossible vow; we might better resent that science ever undertook such a promise. The early congruence between scientific evidence and common knowledge reflected, not the accuracy of popular understandings of race, but the embeddedness of scientific inquiry. Neither common knowledge nor science measured human variation. Both only reported social beliefs about races.

The reliance on scientific evidence to justify racial assignments implied that races exist on a physical plane, that they reflect biological fact that is humanly knowable but not dependent on human knowledge or human relations. The Court's ultimate reliance on common knowledge says otherwise. The use of common knowledge to justify racial assignments demonstrates that racial taxonomies dissolve upon inspection into mere social demarcations. Common knowledge as a racial test shows that race is something that must be measured in terms of what people believe, that it is a socially mediated idea. The social construction of whiteness (and race generally) is manifest in the Court's repudiation of science and its installation of popular knowledge as the appropriate racial meter.

It is worthwhile here to return to the question that opened this chapter, a question originally posed by a district court deciding a prerequisite case. The court asked, "Then, what is white?"[17] The above discussion suggests some answers to this question. Whiteness is a social construct, a legal artifact, a function of what people believe, a mutable category tied to particular historical moments. Other answers are also possible. "White" is an idea, an evolving social group, an unstable identity subject to expansion and contraction, a trope for welcome immigrant groups, a mechanism for excluding those of unfamiliar origin, an artifice of social prejudice. Indeed, whiteness can be one, all, or any combination of these, depending on the local setting in which it is used. On the other hand, in light of the prerequisite cases, some answers are no longer acceptable. "White" is not a biologically defined group, a static taxonomy, a neutral designation of difference, an objective description of immutable traits, a scientifically defensible division of humankind, an accident of nature unmolded by the hands of people. No, it is none of these. In the end, the prerequisite cases leave us with this: "White" is common knowledge.

White Race Consciousness

The racial prerequisite cases demonstrate that whiteness is socially constructed. They thus serve as a convenient point of departure for a discussion of white identity as it exists today, particularly regarding the content of whiteness.

As a category, "white" was constructed by the prerequisite courts in a two-step process that ultimately defined not just the boundaries of that group but its identity as well. First, note that the courts constructed the bounds of whiteness by deciding on a case-by-case basis who was *not* white. Though the prerequisite courts were charged with defining the term "white person," they did so not through an appeal to a freestanding notion of whiteness but instead negatively, by identifying who was nonwhite. Thus, from *Ah Yup* to *Thind*, the courts did not establish the parameters of whiteness so much as the nonwhiteness of Chinese, South Asians, and so on. This comports with an understanding of

races, not as absolute categories, but as comparative taxonomies of relative difference. Races exist not as abstract categories but only as amalgamations of people standing in complex relationships with each other. In this relational system, the prerequisite cases show that whites are those not constructed as nonwhite. That is, whites exist as a category of people subject to a double negative: They are those who are not nonwhite.

The second step in the construction of whiteness more directly contributes to the content of the white character. In the second step, the prerequisite courts distinguished whites not only by declaring certain peoples nonwhite but also by denigrating those so described. For example, the Court in *Thind* wrote not only that common knowledge held South Asians to be nonwhite but that the racial identity of South Asians "is of such character and extent that the great body of our people recognize and reject it."[18] The prerequisite courts in effect labeled those who were excluded from citizenship (those who were nonwhite) as inferior; by implication, those who were admitted (white persons) were superior. In this way, the prerequisite cases show that whites exist not just as the antonym of nonwhites but as the *superior* antonym. This point is confirmed by the close connection between the negative characteristics of blacks and the opposite, positive attributes of whites. Blacks have been constructed as lazy, ignorant, lascivious, and criminal, whites as industrious, knowledgeable, virtuous, and law abiding.[19] For each negative characteristic ascribed to people of color, an equal but opposite and positive characteristic is imputed to whites. To this list, the prerequisite cases add whites as citizens and others as aliens.[20] These cases show that whites fashion an identity for themselves that is the positive mirror image of the negative identity imposed on people of color.

This relational construction of the content of white identity points toward a programmatic practice of dismantling whiteness as it is currently constituted. Certainly, in a setting in which white identity exists as the superior antonym to the identity of nonwhites, elaborating a positive white racial identity is a dangerous proposition. It ignores the reality that whiteness is already defined almost exclusively in terms of positive attributes. Further, it disregards the extent to which positive white attributes seem to require the negative traits that supposedly define minorities. Recognizing that white identity is a self-fashioned, hierarchical fantasy, whites should attempt to dismantle whiteness as it currently exists. Whites should renounce their privileged racial character, though not simply out of guilt or any sense of self-deprecation. Rather, they should dismantle the edifice of whiteness because this mythological construct stands at the vortex of racial inequality in America. The persistence of whiteness in its current incarnation perpetuates and necessitates patterns of superiority and inferiority. In both structure and content, whiteness stands squarely between this society's present injustices and any future of racial equality. Whites must consciously repudiate whiteness as it is currently constituted in the systems of meaning that are races.

Careful examination of the prerequisite cases as a study in the construction of whiteness leads to the argument for a self-deconstructive white race consciousness. This examination suggests as well, however, a facet of whiteness that will certainly forestall its easy disassembly: the value of white identity to whites. The racial prerequisite cases are, in one possible reading, an extended essay on the great value whites place on their racial identity and on their willingness to protect that value, even at the cost of basic justice. In their applications for citizenship, petitioners from around the world challenged the

courts to define the phrase "white person" in a consistent, rational manner, a challenge that the courts could not meet except through resort to the common knowledge of those already considered white. Even though incapable of meeting this challenge, virtually no court owned up to the falsity of race, each court preferring instead to formulate fictions. To be sure, the courts were caught within the contemporary understandings of race, rendering a complete break with the prevalent ideology of racial difference unlikely, though not out of the question. Nevertheless, this does not fully explain the extraordinary lengths to which the courts went, the absurd and self-contradictory positions they assumed, or the seeming anger that colored the courts' opinions in proclaiming that certain applicants were not white. These disturbing facets of judicial inquietude, clearly evident in *Ozawa* and *Thind*, arguably belie not simple uncertainty in judicial interpretation but the deep personal significance to the judges of what they had been called upon to interpret, the terms of their own existence. Wedded to their own sense of self, they demonstrated themselves to be loyal defenders of whiteness, even to the extent of defining this identity in manners that arbitrarily excluded fully qualified persons from citizenship. Confronted by powerful challenges to the meaning of whiteness, judges, in particular those on the Supreme Court, fully embraced this identity, in utter disregard of the costs of their actions to immigrants across the country. This perhaps is the most important lesson to be taken from the prerequisite cases. When confronted by the falsity of white identity, whites tend not to abandon whiteness but to embrace and protect it. The value of whiteness to whites probably ensures the continuation of a white self-regard predicated on racial superiority.

NOTES

1. *Ex parte* Shahid, 205 F. 812, 813 (E.D. S.C. 1913).

2. Act of March 26, 1790, Ch. 3, 1 Stat. 103. Naturalization involves conferring the nationality of a state on a person after birth, by whatever means. See Immigration and Nationality Act §101(a)(23), 8 U.S.C. §1101(a)(23) (1952).

3. Immigration and Nationality Act §311, 8 U.S.C. §1422 (1952).

4. Louis DeSipio & Harry Pachon, *Making Americans: Administrative Discretion and Americanization*, 12 Chicano-Latino L. Rev. 52, 54 (1992) (giving the figure as 1,240,700 persons).

5. *Proceedings of the Asiatic Exclusion League* 8 (1910), quoted in Ronald Takaki, Strangers from a Different Shore: A History of Asian Americans 298 (1989).

6. Yuji Ichioka, The Issei: The World of the First-Generation Japanese Immigrants, 1885–1924, at 176–226 (1988).

7. John Wigmore, *American Naturalization and the Japanese*, 28 Amer. L. Rev. 818 (1894).

8. United States v. Cartozian, 6. F.2d 919 (D. Ore. 1925). The contribution of Boas to anthropology is discussed in Audrey Smedley, Race in North America: Origin and Evolution of a Worldview 274–82 (1993).

9. *In re* Ah Yup, 1 F. 223, 224 (D. Cal. 1878).

10. *Id.* at 223.

11. *Id.* at 223–24.

12. 260 U.S. 178, 198 (1922).

13. 261 U.S. 204, 211 (1923).

14. *Id.*

15. *Id.*

16. *Id.* at 214–15.

17. *Ex parte* Shahid, 205 Fed. 812, 813 (E.D.S.C. 1913).

18. United States v. Thind, 261 U.S. 204, 215 (1922).

19. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1373 (1988).

20. Drawing on a wider range of cases, Neil Gotanda also notes the close linkage of nonblack minorities with foreignness. Neil Gotanda, *"Other Non-Whites" in American Legal History: A Review of* Justice at War, 85 Colum. L. Rev. 1186, 1190–92 (1985).

79. Innocence and Affirmative Action

THOMAS ROSS

When we create arguments, we reveal ourselves by the words and ideas we choose to employ. Verbal structures that are used widely and persistently are especially worth examination. Arguments made with repeated, almost formulaic, sets of words suggest a second argument flowing beneath the apparent argument. Beneath the apparently abstract language and the syllogistic form of these arguments, we may discover the deeper currents that explain, at least in part, why we seem so attached to these verbal structures.

Argument about affirmative action is particularly wrenching and divisive, especially among people who agree, formally speaking, on the immorality of racism. In a world where the dominant public ideology is one of nonracism, where the charge of racism is about as explosive a charge as one can make, disagreement about affirmative action often divides us in an angry and tragic manner.

I examine a recurring element of the rhetoric of affirmative action. This element, the rhetoric of innocence, relies on invocation of the innocent white victim of affirmative action. The rhetoric of innocence is a rich source of the deeper currents of our affirmative action debate. By revealing those deeper currents, we may gain a clearer sense of why the issue of affirmative action so divides good people, white and of color. Getting clearer about ourselves often is painful and disturbing. And the reason is simple—the rhetoric of innocence is connected to racism. It is connected in several ways, but most disturbingly, the rhetoric embodies and reveals the unconscious racism in each of us. This unconscious racism embedded in our rhetoric accounts, at least in part, for the tragic impasse we reach in our conversations about affirmative action. My hope is that by dragging out these deeper and darker parts of our rhetoric we may have a better chance of continuing our conversation. If we each can acknowledge the racism that we cannot entirely slough off, we may be able to move past that painful impasse and talk of what we ought to do.

A version of this chapter previously appeared as Thomas Ross, *Innocence and Affirmative Action*, 43 Vand. L. Rev. 297 (1990). Originally published in the *Vanderbilt Law Review*.

The Rhetoric of Innocence

A persistent and apparently important part of the affirmative action dialogue, both judicial and academic, is what can be termed the rhetoric of innocence. The rhetoric of innocence is used most powerfully by those who seek to deny or severely limit affirmative action, the "white rhetoricians."[1] This rhetoric has two related forms.

First, the white rhetorician may argue the plight of the innocent white victims of the affirmative action plan. The white applicant to medical school, the white contractor seeking city construction contracts, and so on, are each innocent in a particular sense of the word. Their innocence is a presumed feature, not the product of any actual and particular inquiry. It is presumed that the white victim is not guilty of a racist act that has denied the minority applicant the job or other position she seeks; in that particular sense of the word, the white person is innocent. The white rhetorician usually avoids altogether questions that suggest a different and more complex conception of innocence. In particular, the rhetoric of innocence avoids the argument that white people generally have benefited from the oppression of people of color, that white people have been advantaged by this oppression in a myriad of obvious and less obvious ways. Thus, the rhetoric of innocence obscures this question: What white person is innocent if innocence is defined as the absence of advantage at the expense of others?

The second and related part of the rhetoric of innocence is the questioning of the actual-victim status of the black beneficiary of the affirmative action plan. Because an affirmative action plan does not require particular and individualized proof of discrimination, the rhetorician is able to question or deny the victim status of the minority beneficiary of the plan. Victim status thereby is recognized only for those who have been subjected to particular and proven racial discrimination with regard to the job or other interest at stake. As with the first part of the rhetoric, the argument avoided is the one that derives from societal discrimination: If discrimination against people of color is pervasive, what black person is not an actual victim?

These two parts work as a unitary rhetoric. Within this rhetoric, affirmative action plans have two important effects. They hurt innocent white people, and they advantage undeserving black people. The unjust suffering of the white person becomes the source of the black person's windfall. These conjoined effects give the rhetoric power. Affirmative action does not merely do bad things to good (innocent) people or merely do good things for bad (undeserving) people; affirmative action does both at once and in coordination. Given the obvious power of the rhetoric of innocence, its use and persistence in the opinions of those justices who seek to deny or severely to limit affirmative action are not surprising.

The Supreme Court's affirmative action jurisprudence essentially began with *Regents of the University of California v. Bakke*.[2] From *Bakke* through the most recently decided cases, the Court has splintered again and again, the justices authoring opinions that constitute a bitter and divisive dialogue.[3] Within that dialogue the rhetoric of innocence is a persistent and powerful presence. In *Bakke* a majority of the Court struck down a medical school admissions program that set aside a specific number of places for minorities only.[4] The majority concluded that, although the admissions process might take account of race, the quota system employed by the state medical school either violated Title VI or denied the white applicants their constitutional right to equal protection under the Fourteenth Amendment.[5]

Justice Lewis Powell introduced the rhetoric of innocence to the Court's affirmative action discourse while announcing the judgment for the Court in *Bakke*. He used the rhetoric several times in the course of the opinion. Powell wrote of the patent unfairness of "innocent persons . . . asked to endure . . . [deprivation as] the price of membership in the dominant majority."[6] He wrote of "forcing innocent persons . . . to bear the burdens of redressing grievances not of their making."[7] In a passage that embodies both the assumption of white innocence and the questioning of black victimization, Powell distinguished the school desegregation cases and other precedents in which racially drawn remedies were endorsed:

> The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. . . . In the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past.
>
> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. . . . Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.[8]

Thus Powell, who sought to circumscribe tightly the ambit of affirmative action, relied on the rhetoric of innocence.

In contrast to Powell's opinion, the dissenting opinions by Justices William Brennan and Thurgood Marshall each challenged the premises of the rhetoric. Justice Brennan rejected the idea of requiring proof of individual and specific discrimination as a prerequisite to affirmative action.[9] Marshall attacked directly the rhetoric of white innocence and the questioning of black victimization: "It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact."[10]

The rhetoric of innocence continued in the cases following *Bakke*. In *Fullilove v. Klutznik*[11] a majority of the Court upheld a federal statute mandating a 10 percent set-aside for minority contractors in federally supported public works projects. Justice Warren Burger made use of the rhetoric of innocence, even while writing to uphold the set-aside: "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination . . . 'a sharing of the burden' by innocent parties is not impermissible."[12] He proceeded to emphasize the "relatively light" burden imposed on the white contractors and the flexible nature of the set-aside provisions. Thus, although Justice Burger wrote an opinion that upholds a particular affirmative action program, he used the rhetoric of innocence to emphasize the limitations of his endorsement. Burger thereby implied that a heavier burden on the innocent white parties might have made the plan unconstitutional.

Justice Potter Stewart, dissenting, expressed the rhetoric in both its innocence and actual victimization parts:

> [The federal statute's characteristics] are not the characteristics of a racially conscious remedial decree that is closely tailored to the evil to be corrected. In today's society, it constitutes far too gross an oversimplification to assume that every single Negro, Spanish-speaking citizen, Oriental, Indian, Eskimo, and Aleut potentially interested in construction contracting currently suffers from the effects of past or present racial discrimination. Since the MBE [Minority Business Enterprise] set-aside must be viewed as resting upon such an assumption, it necessarily paints with too broad a brush. Except to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race.[13]

Powell again invoked the rhetoric in his majority opinion in *Wygant v. Jackson Board of Education*.[14] In *Wygant* the majority struck down the provisions of a collective bargaining agreement that gave blacks greater protection from layoffs than that accorded white teachers with more seniority. The agreement was a product of prior litigation seeking to provide meaningful integration of the school faculties in the county. Without the special protection for the newly hired black teachers, the layoffs essentially would have undone the previous integration efforts. The majority nonetheless concluded that the agreement violated the constitutional rights of the laid-off white teachers:

> Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. . . . No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over-expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.[15]

Thus, mere societal discrimination is an insufficient predicate for the disadvantaging of innocent white teachers. This "societal discrimination" point is an important variant of the rhetoric of innocence. The black teachers are not real victims; they are subject merely to societal discrimination, a phenomenon that seems weak and abstract, practiced by no one in particular against no one in particular.[16]

Justice Byron White wrote separately in *Wygant*. For him the case was simple. White reasoned that the firing of white teachers to make room for blacks to integrate the faculty would be patently unconstitutional, and laying off whites to keep blacks on the job is the same thing; therefore, the layoff provision is unconstitutional. In White's pithy one-paragraph opinion he used the actual victimization part of the rhetoric, referring to "blacks, none of whom has been shown to be a victim of any racial discrimination."[17]

City of Richmond v. J. A. Croson Co.[18] continues the uninterrupted use of the rhetoric of innocence in affirmative action dialogue within the Court. Justice Sandra Day O'Connor's opinion for the Court struck down Richmond's ordinance setting aside

30 percent of the dollar amount of city construction contract work for minority contractors. Her opinion relied on the essential premises and conclusion of the rhetoric without using the usual phrases. Justice O'Connor wrote of the "generalized assertion" and "amorphous claim" of racism in the Richmond construction industry, thereby denying the actual victimization of the black beneficiaries.[19] Other justices followed suit.

As we have seen, from *Bakke* through *Richmond* the Court has splintered on the issue of affirmative action. Through the splintering and uncertainty, the rhetoric of innocence persists as an important tool in the hands of those who seek to limit the use of affirmative action. I now explore the deeper nature and special power of this important rhetorical tool.

Innocence and Racism

It is hard to know whether, and how, rhetoric works. We do know, however, that both judges and academicians often use the rhetoric of innocence. Those who use the rhetoric presumably find it persuasive or at least useful. What then could be the sources and nature of its apparent power?

Innocence

The power of the rhetoric of innocence comes in part from that of the conception of innocence in our culture. The idea of innocent victims, particularly when coupled with the specter of those who victimize them, is a pervasive and potent story in our culture. Innocence is connected to the powerful cultural forces and ideas of religion, good and evil, and sex. "Innocence" is defined typically as "freedom from guilt or sin" or, in the sexual sense, as "chastity."

The centrality of the conception of innocence to the Christian religion is obvious. Christ is the paradigmatic innocent victim. Mary is the perfect embodiment of innocence as chaste. Although the concept of original sin complicates the notion of innocence in Christian theology, the striving toward innocence and the veneration of those who come closest to achieving it and thereby suffer are important ideas in modern Christian practice.[20] "Blessed are those who are persecuted for righteousness' sake, for theirs is the kingdom of heaven."[21] The idea of innocence also is connected to the myths and symbols of evil. For example, Paul Ricoeur in *The Symbolism of Evil* demonstrates the cultural significance of the "dread of the impure" and the terror of "defilement."[22] The contrasting state for impure, or the state to which the rites of purification might return us, is innocence, freedom from guilt or sin. Ricoeur's thesis spans the modern and classical cultures. He makes clear the persistence and power of the symbolism of evil and its always present contrast, the state of innocence.

What is central within the modern culture surely will be reflected in its literature. And in literature the innocent victim is everywhere. In *Innocent Victims: Poetic Injustice in Shakespearean Tragedy*, R. S. White argued "that Shakespeare was constantly and uniquely concerned with the fate of the innocent victim."[23] White observed, "In every tragedy by Shakespeare, alongside the tragic protagonist who is proclaimed by himself and others as a suffering centre, stands, sometimes silently, the figure of pathos who is a lamb of goodness: Lavinia, Ophelia, Desdemona, Cordelia, the children."[24] Shakespeare

was not alone in the use of women and children drawn as innocent victims. In the work of Dickens, Hugo, Melville, and others, the suffering innocent is a central character.

The innocent victim is part of sexual practice and mythology. The recurring myth of the "demon lover" and its innocent victim is one example.[25] Moreover, we are preoccupied with innocence in the female partner as part of the mythological background of rape and prostitution and in our prerequisites in the chosen marriage partner.[26] The idea of the innocent victim always conjures the one who takes away her innocence and who thereby himself becomes both the defiler and the defiled. In literature and in life the innocent victim is used as a means of conjuring the notion of defilement. In fact, it is impossible to make sense of the significance of either the innocent victim or the defiler without imagining the other. Each conception is given real significance by its implicit contrast with the other. Thus, the invocation of innocence is also the invocation of sin, guilt, and defilement.

The rhetoric of innocence in affirmative action discourse thus invokes one of the most powerful symbols of our culture, that of innocence and its always present opposite, the defiled taker. When the white person is called the innocent victim of affirmative action, the rhetorician is invoking not just the idea of innocence but also that of the not innocent, the defiled taker. The idea of the defiled taker is given a particular name in one of two ways. First, merely invoking the innocent white victim triggers at some level its rhetorically natural opposite, the defiled black taker. This implicit personification is made explicit by the second part of the rhetoric, the questioning of the actual-victim status of the black person who benefits from the affirmative action plan. The contrast is between the innocent white victim and the undeserving black taker. The cultural significance of the ideas of innocence and defilement thus gives the rhetoric of innocence a special sort of power.

Unconscious Racism

The rhetoric of innocence draws its power not only from the cultural significance of its basic terms but also from its connection with unconscious racism. Professor Charles Lawrence explored the concept of unconscious racism and its implications for equal protection:[27]

> Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.[28]

We are each, in this sense of the word, racists.

Lawrence's thesis is disturbing, especially to the white liberal who can think of a no more offensive label than that of racist. Moreover, the white intellectual, whether

politically liberal or conservative, typically expresses only disgust for the words and behavior of the white supremacists and neo-Nazis he connects with the label racist. The dominant public ideology has become nonracist. Use of racial epithets, expressions of white genetic superiority, and avowal of formal segregation are not part of the mainstream of public discourse. These ways of speaking, which were part of the public discourse several decades ago, are deemed by most today as irrational utterances emanating from the few remaining pockets of racism.

Notwithstanding that the public ideology has become nonracist, the culture continues to teach racism. The manifestations of racial stereotypes pervade our media and language. Racism is reflected in the complex set of individual and collective choices that make our schools, our neighborhoods, our workplaces, and our lives racially segregated.[29] Racism today paradoxically is both "irrational and normal,"[30] at once inconsistent with the dominant public ideology and embraced by each of us, albeit for most of us at the unconscious level. This paradox of irrationality and normalcy is part of the reason for the unconscious nature of the racism. When our culture teaches us to be racist and our ideology teaches us that racism is evil, we respond by excluding the forbidden lesson from our consciousness.

The repression of our racism is a crucial piece of the rhetoric of innocence. First, we sensibly can claim the mantle of innocence only by denying the charge of racism. We as white persons and nonracists are innocent; we have done no harm and do not deserve to suffer for the sins of those other white people who were racists. If we accept unconscious racism, this self-conception is unraveled. Second, the black beneficiaries of affirmative action can be denied actual-victim status only as long as racists are thought of as either historical figures or aberrational and isolated characters in contemporary culture. By thinking of racists in this way we deny the presence and power of racism today, relegating the ugly term primarily to the past. Thus, by repressing our unconscious racism we make coherent our self-conception of innocence and make sensible the question of the actual victimization of blacks.

The existence of unconscious racism undermines the rhetoric of innocence. The innocent white victim is no longer quite so innocent. Furthermore, the idea of unconscious racism makes problematic the victim part of the characterization. The victim is one who suffers an undeserved loss. If the white person who is disadvantaged by an affirmative action plan is also a racist, albeit at an unconscious level, the question of desert becomes more complicated.

The implications of unconscious racism for the societal distribution of burdens and benefits also undermine the innocent status of the white. Because blacks are burdened in myriad ways because of the persistence of unconscious racism, the white man and woman thereby are benefited. On a racially integrated law faculty, for example, a black law professor must overcome widespread assumptions of inferiority held by students and colleagues, while white colleagues enjoy the benefit of the positive presumption and of the contrast with their black colleague.[31]

The historical manifestations of racism have worked to the advantage of whites in every era. Just as slavery provided the resources to make possible the genteel life of the plantation owner and his white family in early nineteenth-century Virginia, more than a century later the state system of public school segregation diverted the state's resources to me and not to my black peers in Virginia. The lesson of unconscious racism, however,

is that the obvious advantages of state-sponsored racism, the effects of which still are being reaped by whites today, are not the only basis for skewing the societal balance sheet. Even after the abolition of state racism, the cultural teachings persist. The presence and power of unconscious racism are apparent in job interviews, in social encounters, in courtrooms and conference rooms, and on the streets. In our culture whites are necessarily advantaged, because blacks are presumed at the unconscious level by most as lazy, dumb, and criminally prone. Because the white person is advantaged by assumptions that consequently hurt blacks, the rhetorical appeal of the unfairness to the innocent white victim in the affirmative action contest is undermined.

Moreover, the actual-victim status of the black person who benefits from affirmative action is much harder to question once unconscious racism is acknowledged. Because racial discrimination is part of the cultural structure, each person of color is subject to it, everywhere and at all times.[32] The recognition of unconscious racism makes odd the question whether this person is an actual victim. The white rhetorician often seeks to acknowledge and, at the same time, blunt the power of unconscious racism by declaring that "societal discrimination" is an insufficient predicate for affirmative action.[33] "Societal discrimination" never is defined with any precision in the white rhetoric, but it suggests an ephemeral, abstract kind of discrimination, committed by no one in particular and committed against no one in particular, a kind of amorphous inconvenience for persons of color. By this term the white rhetorician at once can acknowledge the idea of unconscious racism while giving it a different name and therefore a different and trivial connotation.

The rhetoric of innocence coupled with the idea of societal discrimination thus obscures unconscious racism and keeps rhetorically alive the innocence of the white person and the question of actual victimization of the black person. Unconscious racism meets that rhetoric on its own terms. Once one accepts some version of the idea of unconscious racism, the rhetoric of innocence is weakened analytically, if not defeated.

The rhetoric of innocence and unconscious racism connect in yet another way. Through the lens of unconscious racism the rhetoric itself can be seen to embody racism. Professor Lawrence described the two types of beliefs about the out-group held by racists:

> [S]tudies have found that racists hold two types of stereotyped beliefs: They believe the out-group is dirty, lazy, oversexed, and without control of their instincts (a typical accusation against blacks), or they believe the out-group is pushy, ambitious, conniving, and in control of business, money, and industry (a typical accusation against Jews).[34]

The stereotype of lazy and oversexed is abundant in our culture's characterization of the black person.[35]

The two parts of the rhetoric of innocence connect to and trigger at some level the stereotypical racist beliefs about blacks. The assertion of the innocent white victim draws power from the implicit contrast with the "defiled taker." The defiled taker is the black person who undeservedly reaps the advantages of affirmative action. The use of the idea of innocence and its opposite, defilement, coalesces with the unconscious racist belief that the black person is not innocent in a sexual sense, that the black person is sexually

defiled by promiscuity.[36] The "over-sexed" black person of the racist stereotype becomes the perfect implicit, and unconsciously embraced, contrast to the innocent white person.

A similar analysis applies to the second part of the rhetoric of innocence. The question whether the black person is an actual victim implies that the black person does not deserve what the black person gets. This question draws power from the stereotypical racist belief that the black person is lazy. The lazy black seeks and takes the unearned advantages of affirmative action.

My point is not that the white rhetorician is consciously drawing on the stereotypical racist beliefs. Nor is the white audience consciously embracing those beliefs when they experience the rhetoric of innocence in affirmative action discourse. Both the rhetoricians and their audience are likely to reject the stereotypes at the conscious level. Moreover, they would be offended at the very suggestion that they might hold such beliefs. The great lesson of Professor Lawrence's work is that the beliefs are still there, even in the white liberal. The beliefs are there because the teacher is our culture; any person who is part of the culture has been taught the lesson of racism. While most of us have struggled to unlearn the lesson and have succeeded at the conscious level, none of us can slough off altogether the lesson at the unconscious level.

If we see the rhetoric of innocence as just another part of the debate, we get nowhere. If instead we push past the apparently simple forms of the rhetoric and struggle to understand the deeper currents, perhaps we can acknowledge and then move beyond the question of our own unconscious racism and start talking, in a hopeful and productive way, of what we might do about it.

Examination of the rhetoric of innocence may teach us that innocence is a powerful and very dangerous idea that simply does not belong in the affirmative action debate. Real and good people certainly will suffer as a result of the use of affirmative action. Yet we will be much further along in our efforts to deal with that painful fact if we put aside the loaded conception of innocence. The question for us is not whether we will make innocent people suffer; it is how we get to a world where good people, white and of color, no longer suffer because of the accidental circumstances of their race. We cannot get from here to there if we refuse to examine the words we use and deny the unconscious racism that surrounds those words.

NOTES

1. I do not use the term "white rhetorician" to designate the race of the rhetorician. It is the white perspective, or the "whiteness" of the rhetoric, that makes the label appropriate, whatever the race of the rhetorician. The power of rhetorical perspective of course is not limited to the discourse of affirmative action. See, e.g., Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 Harv. L. Rev. 10 (1987). In her thoughtful exploration of the "dilemmas of difference," Professor Minow reminds us, "Court judgments endow some perspectives, rather than others, with power." *Id.* at 94.

2. 438 U.S. 265 (1978).

3. See L. Tribe, American Constitutional Law 1530–44 (1988).

4. The admissions scheme in *Bakke* was a special program completely separate from the regular one. If an applicant indicated on the regular application form a desire to be considered as a member of a minority group, the application was forwarded to a special admissions committee. This committee then reviewed these candidates and rated them according to interview summaries, grade point averages, and test scores. Unlike the regular candidates, the special candidates did not have to meet the

minimum grade point average of 2.5. The special candidates also were not compared to the general applicants; rather, they were compared only among themselves. The special committee then recommended candidates for admission until the number prescribed by the faculty was admitted. In 1974 this number was sixteen out of a class of one hundred. *Bakke*, 438 U.S. at 272–75.

5. *Id.* at 421 (opinion of Stevens, J.); *id.* at 319–20 (opinion of Powell, J.).

6. *Id.* at 294 n.34 (opinion of Powell, J.).

7. *Id.* at 298.

8. *Id.* at 307–09 (citations and footnote omitted).

9. "Such relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination." *Id.* at 363 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

10. *Id.* at 400 (opinion of Marshall, J.).

11. 448 U.S. 448 (1980).

12. *Id.* at 484 (quoting Franks v. Bowman Transp. Co., 424 U.S. 747, 777 (1976)).

13. *Id.* at 530 n.12 (Stewart, J., dissenting). In a rather odd extension of the rhetoric, Stewart labeled affirmative action as a form of modern nobility, "the creation once again by government of privileges based on birth." *Id.* at 531. By this analogy the black beneficiaries of affirmative action are like the European noblemen of the Old World, enjoying great and utterly unearned advantage at the expense of the whites, who are like the feudal serfs.

14. 476 U.S. 267 (1986).

15. *Id.* at 276.

16. Powell again revealed his commitment to the conception of innocence when he repeatedly used the term "innocent" to describe the disadvantaged white in a brief passage contrasting *Wygant* with the Court's precedents:

> We have recognized, however, that in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by *innocent* parties is not impermissible. In *FulMove*, the challenged statute required at least 10 percent of federal public works funds to be used in contracts with minority-owned business enterprises. This requirement was found to be within the remedial powers of Congress in part because the actual 'burden' shouldered by nonminority firms is relatively light."

17. *Id.* at 295 (White, J., concurring).

18. 109 S. Ct. 706 (1989).

19. O'Connor stated, "[A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. . . . [A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota." *Id.* at 723–24.

20. "[U]nless persons are vulnerable to injury, pain, and suffering as possible consequences of choice, choice would have no meaning. . . . [T]he *necessity* that moral evil be possible seems implied in the possibility of good." R. Monk & J. Stamen, Exploring Christianity: An Introduction 144 (1984). Professor Charles H. Long explored the power of religious symbolism, particularly as it relates to questions of race. See C. Long, Significations: Signs, Symbols, and Images in the Interpretation of Religion (1986).

21. *Matthew* 5:10 (New King James).

22. P. Ricoeur, The Symbolism of Evil 25 (1969).

23. R. White, Innocent Victims: Poetic Injustice in Shakespearean Tragedy 5 (1986).

24. *Id.* at 6.

25. See generally T. Reed, Demon-Lovers and Their Victims in British Fiction (1988).

26. See H. Lips & N. Colwill, The Psychology of Sex Differences 112–13 (1978) (observing that "[i]n our culture young and adolescent girls are not expected to engage in overt sexual activity,

although it is more permissible for boys to do so" and that "[s]ociologically, it has been explained in terms of parents' differential expectations of appropriate behavior for boys and girls").

During the early times of Christianity, a woman thought to have become pregnant by a man other than her husband was humiliated publicly by a priest. Her hair was untied and her dress torn, and she was made to drink a potion consisting of holy water, dust, and ink. "If she suffers no physical damage from that terrifying psychological ordeal, her innocence is presumed to have protected her." W. Phipps, Genesis and Gender: Biblical Myths of Sexuality and Their Cultural Impact 71 (1989).

27. C. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987), and Chapter 31, this volume; see also J. Kovel, White Racism: A Psychohistory (1970).

28. Lawrence, *supra* note 27, at 322 (footnotes omitted). "Simply put, while most Americans avow and genuinely believe in the principle of equality, most white Americans still consider black people as such to be obnoxious and socially inferior." G. Hazard, *Permissive Affirmative Action for the Benefit of Blacks*, 1987 U. Ill. L. Rev. 379, 385.

29. A process known as the tipping phenomenon occurs when white families abandon a neighborhood after the black percentage of the population exceeds a certain amount, usually between 30 and 50 percent black. Bruce Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 Stan. L. Rev. 245, 251 (1974); see also Reynolds Farley, *Residential Segregation and Its Implications for School Integration*, 39 Law & Contemp. Probs. 164 (1975). In 1970 a study of 109 cities was conducted to determine the degree of racial integration. In every one of those cities, at least 60 percent of either the white or the black population would have had to shift their places of residence to achieve complete residential integration. In all but three of those cities, the figure was at least 70 percent. *Id.* at 165. "Where neighborhoods are highly segregated, schools tend also to be highly segregated." *Id.* at 187. In some Northern districts where the courts and the Department of Health, Education, and Welfare had not integrated schools, school segregation was even higher than would be expected based on residential segregation levels. *Id.*

30. Lawrence, *supra* note 27, at 331.

31. See R. Kennedy, Chapter 70, this volume; see also D. Bell, *Strangers in Academic Paradise: Law Teachers of Color in Still White Law Schools*, 20 U.S.F. L. Rev. 385 (1986); A. Haines, *Minority Law Professors and the Myth of Sisyphus: Consciousness and Praxis Within the Special Teaching Challenge in American Law Schools*, 10 Nat'l Black L.J. 247 (1988).

32. "The battle against pernicious racial discrimination or its effects is nowhere near won." City of Richmond v. J. A. Croson Co., 109 S. Ct. 706, 757 (1989) (Marshall, J., dissenting).

33. See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986).

34. Lawrence, *supra* note 27, at 333 (footnotes omitted).

35. William Brink and Louis Harris asserted that "[t]he stereotyped beliefs about Negroes are firmly rooted in less-privileged, less-well-educated white society: the beliefs that Negroes smell different, have looser morals, are lazy, and laugh a lot." W. Brink & L. Harris, Black & White 137 (1976).

36. See Kovel, *supra* note 27, at 67, 79. The miscegenation laws finally ruled unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967), are a testament to the connection between racism and sex.

80. Language and Silence

Making Systems of Privilege Visible

STEPHANIE M. WILDMAN WITH ADRIENNE D. DAVIS

The *American Heritage Dictionary of the English Language* defines "privilege" as "a special advantage, immunity, permission, right, or benefit granted to or enjoyed by an individual, class, or caste." The word is derived from the Latin *privilegium*, a "law affecting an individual"; *privus*, meaning "single or individual"; and *lex* meaning "law." This definition touched a chord for me, because the root of the word recognizes the legal, systemic nature of the term "privilege" that has become lost in its modern meaning. And it is the systemic nature of the power systems of race, sex, and sexual orientation that we must begin to examine.

Consider the use of terms like "racism" and "sexism." Increasingly, people use -isms language as a way to describe discriminatory treatment. Yet this approach creates several serious problems. First, calling someone racist individualizes the behavior, ignoring the larger system within which the person is situated. To label an individual a racist conceals that racism can occur only where it is culturally, socially, and legally supported. It lays the blame on the individual rather than the forces that have shaped that individual and the society that the individual inhabits. For white people this means that they know they do not want to be labeled racist. They become concerned with how to avoid that label, rather than worrying about systemic racism and how to change it.

Second, the -isms language focuses on the larger category such as race, gender, or sexual preference. The language of -isms suggests that within these larger categories two seemingly neutral halves exist, equal parts in a mirror. Thus black and white, male and female, and heterosexual and gay/lesbian appear as equivalent subparts. In fact, although the category does not take note of it, blacks and whites, men and women, heterosexuals and gays/lesbians are not equivalently situated in society. Thus the way we think and talk about the categories and subcategories that underlie the -isms obscures the pattern of domination and subordination within each classification.

Similarly, the suffix *-isms* itself gives the illusion that all patterns of domination and subordination are the same and interchangeable. The language suggests that someone subordinated under one form of oppression would be similarly situated to another

A version of this chapter previously appeared in Stephanie Wildman et al., Privilege Revealed: How Invisible Privilege Undermines America.

person subordinated under another system or form. Thus, someone subordinated under one form may feel no need to view himself or herself as a possible oppressor, or beneficiary of oppression, within a different form. For example, white women, having an -ism that defines their condition—sexism—may not look at the way they are privileged by racism. They have defined themselves as one of the oppressed.

Finally, the focus on individual behavior, seemingly neutral subparts of categories, and the apparent interchangeability underlying the vocabulary of -isms masks the existence of systems of power. It is difficult to see and talk about how oppression operates when the vocabulary itself makes those power systems invisible. The vocabulary allows us to talk about discrimination and oppression but hides the mechanism that makes that oppression possible and efficient. It also hides the existence of specific, identifiable beneficiaries of oppression (who are not always the actual perpetrators of discrimination). The use of -isms language masks the privilege that is created by these systems of power.

The very vocabulary that we use to talk about discrimination obscures these power systems and the privilege that is their natural companion. To remedy discrimination effectively we must make the power systems and privileges that they create visible and part of discourse. So this is our problem with talking about race, sex, and sexual orientation: Each needs to be described as a power system that creates privileges in some and disadvantages in others. Most civil rights writing and advocacy have focused on disadvantage or discrimination, ignoring the element of privilege. To really talk about these issues, privilege must be made visible.

Law plays an important role in the perpetuation of privilege by ignoring the existence of privilege. And by ignoring it, law, with help from our language, ensures the perpetuation of privilege.

What is privilege? We all recognize its most blatant forms. Only men admitted to this club. African Americans not allowed into that school. Blatant exercises of privilege certainly exist but are not the heartbeat of what most people will say they believe belongs as part of our way of life. They are also only the tip of the iceberg in examining privilege.

When we look at privilege we see several things. First, the characteristics of the privileged group define the societal norm, often benefiting those in the privileged group. Second, privileged group members can rely on their privilege and avoid objecting to oppression. And third, privilege is rarely seen by the holder of the privilege.

Examining privilege reveals that the characteristics and attributes of those who are privileged group members are described as societal norms—as the way things are and as what is normal in society.[1] This normalization of privilege means that members of society are measured against characteristics held by those privileged. The privileged characteristic comes to define the norm. Those who stand outside are the aberrant or alternative.

I had a powerful example of being outside the norm recently when I was called to jury service. Jurors are expected to serve until 5:00 P.M. During this year, my family's life had been set up so that I picked up my children after school at 2:40 and saw that they got to various activities. If courtroom life were designed to privilege my needs, then there would be an afternoon recess to honor children. But in this culture children's lives, and the lives of their caretakers, are the alternative (or other), and we must conform to the norm.

Members of the privileged group gain many benefits by their affiliation with the dominant side of the power system. This power affiliation is not identified as such. It may be

transformed into and presented as individual merit. This is how legacy admissions at elite colleges and professional schools are perceived to be merit based. Achievements by members of the privileged group are viewed as meritorious and the result of individual effort rather than privilege. Another example is my privilege to pick up my children at 2:40.

Many feminist theorists have described the male tilt of normative standards in law, including the gendered nature of legal reasoning, the male bias inherent in the reasonable person standard, and the gender bias in classrooms. Looking more broadly at male privilege in society, definitions based on male models delineate many societal norms. As Catharine MacKinnon has observed:

> Men's physiology defines most sports, their health needs largely define insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulerships—defines history, their image defines god, and their genitals define sex.[2]

Male privilege thus defines many vital aspects of American culture from a male point of view. The maleness of that view becomes masked as that view is generalized as the societal norm, the measure for us all.

Another characteristic of privilege is that members of privileged groups experience the comfort of opting out of struggles against oppression if they choose. It may be the privilege of silence. At the same time that I was the outsider in jury service, I was also a privileged insider. During voir dire, each prospective juror was asked to introduce herself or himself. The plaintiff's and defendant's attorneys then asked supplementary questions. I watched the defense attorney, during voir dire, ask each Asian-looking male prospective juror if he spoke English. No one else was asked. The judge did nothing. The Asian American man sitting next to me smiled and recoiled as he was asked the question. I wondered how many times in his life he had been made to answer questions such as that one. I considered beginning my own questioning by saying, "I'm Stephanie Wildman, I'm a professor of law, and yes, I speak English." But I did not. I feared there would be repercussions if I did. But I exercised my white privilege by my silence. I exercised my privilege to opt out of engagement, even though this choice may not always be made consciously by someone with privilege.

Depending on the number of privileges someone has, she or he may experience the power of choosing the types of struggles in which to engage. Even this choice may be masked as an identification with oppression, thereby making the privilege that renders the choice invisible. For example, privilege based on race and class power systems may temper or alleviate gender bias or subordination based on gender. Despite the common characteristics of normativeness, ability to choose whether to object to the power system, and invisibility, which different privileges share, the form of privilege may vary on the basis of the type of power relationship that produces it. Within each power system, privilege manifests itself and operates in a manner shaped by the power relationship from which it results. White privilege derives from the system of white supremacy. Male privilege and heterosexual privilege result from the gender hierarchy.[3]

Examining white privilege, Peggy McIntosh has found it "an elusive and fugitive subject. The pressure to avoid it is great,"[4] she observes, as a white person who benefits from the privileges. She defines white privilege as

> an invisible package of unearned assets which [she] can count on cashing in each day, but about which [she] was "meant" to remain oblivious. White privilege is like an invisible weightless knapsack of special provisions, assurance, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks.[5]

McIntosh identified forty-six conditions available to her as a white person that her African American coworkers, friends, and acquaintances could not count on.[6] Some of these include being told that people of her color made American heritage or civilization what it is, not needing to educate her children to be aware of systemic racism for their own daily protection, and never being asked to speak for all people of her racial group.[7]

Privilege also exists on the basis of sexual orientation. Society presumes heterosexuality, generally constituting gay and lesbian relations as invisible.[8] Professor Marc Fajer describes what he calls three societal preunderstandings about gay men and lesbians: the sex-as-lifestyle assumption, the cross-gender assumption, and the idea that gay issues are inappropriate for public discussion. According to Professor Fajer the sex-as-lifestyle assumption means that there is a "common non-gay belief that gay people experience sexual activity differently from nongays" in a way that is "all-encompassing, obsessive and completely divorced from love, long-term relationships, and family structure."[9] As to the cross-gender assumption, Professor Fajer explains that many nongay people believe that gay men and lesbians exhibit "behavior stereotypically associated with the other gender."[10] The idea that gay issues are inappropriate for public discussion has received prominent press coverage recently as the military's "Don't ask, don't tell." Thus, even if being gay is acceptable, "talking about being gay is not," according to Professor Fajer.[11]

Professor Fajer does not discuss these preunderstandings in terms of privilege. Nevertheless, he is describing aspects of the sexual-orientation power system that allow heterosexuals to function in a world where similar assumptions are not made about their sexuality. Additionally, their sexuality may be discussed and even advertised in public.

In spite of the pervasiveness of privilege, antidiscrimination practice and theory have generally not examined it and its role in perpetuating discrimination. Antidiscrimination advocates focus on only half of the power system dyad, the subordinated characteristic, rather than seeing the essential companionship between domination that accompanies subordination and privilege that accompanies discrimination.

Professor Adrienne Davis writes:

> Anti-discrimination activists are attacking the visible half of the domination/subordination dyad, trying bravely to chop it up into little pieces. These anti-discrimination activists fail to realize that the subordination will grow back from the ignored half of the dyad of privilege. Like a mythic double-headed hydra, which will inevitably grow a second head if both heads are not slain, discrimination cannot be ended by focusing only on subordination.[12]

Yet the descriptive vocabulary and conceptualization of discrimination hinder our ability to see the hydra head of privilege. This invisibility is serious because what is not seen cannot be discussed or changed. Thus, to end subordination, one must first recognize privilege. Seeing privilege means articulating a new vocabulary and structure for antisubordination theory. Only by visualizing this privilege and incorporating it into discourse can people of good faith combat discrimination.

For me the struggle to visualize privilege most often has taken the form of the struggle to see my own white privilege. Even as I write about this struggle, I fear that my racism will make things worse, causing me to do more harm than good. Some readers may be shocked to see a white person contritely acknowledge that she is racist. Understand I do not say this with pride. I simply believe that no matter how hard I work at not being racist, I still am. Because part of racism is systemic, I benefit from the privilege that I am struggling to see.

Whites do not look at the world through a filter of racial awareness, even though whites are, of course, a race. The power to ignore race, when white is the race, is a privilege, a societal advantage. Yet whites spend a lot of time trying to convince ourselves and each other that we are not racist. I think a big step would be for whites to admit that we are racist and then to consider what to do about it.[13] I also work on not being sexist. This work is different from my work on my racism, because I am a woman and I experience gender subordination. But it is important to realize that, even when we are not privileged by a particular power system, we are products of the culture that instills its attitudes in us. I have to make sure that I am calling on women students and listening to them as carefully as I listen to men.

While we work at seeing privilege, it is also important to remember that each of us is much more complex than simply our race and gender. Professor Kimberlé Crenshaw and others introduced the idea of intersection into feminist jurisprudence. Her work examines the intersection of race, as African American, with gender, as female. Thus, Crenshaw's intersectionality analysis focused on intersections of subordination.

Intersectionality can help reveal privilege, especially when we remember that the intersection is multidimensional, including intersections of both subordination and privilege. Imagine intersections in three dimensions, where multiple lines intersect. From the center one can see in many different directions. Every individual exists at the center of these multiple intersections, where many strands meet, similar to a Koosh ball.[14]

The Koosh ball is a popular children's toy. Although it is called a ball and that category leads one to imagine a firm, round object used for catching and throwing, the Koosh is not firm and not usually round. Picture hundreds of rubber bands, tied in a center. Mentally cut the end of each band. The wriggling, unfirm mass in your hand is a Koosh ball, still usable for throwing and catching but changing shape as it sails through the air or as the wind blows through its rubbery limbs when it is at rest. It is a dynamic ball.

The Koosh is the perfect postmodern ball. Its image "highlights that each person is embedded in a matrix of . . . [categories] that interact in different contexts" taking different shapes.[15] In some contexts we are privileged and in some subordinated, and these contexts interact.

Societal efforts at categorization are dynamic in the same way as the Koosh is, changing yet keeping a central mass. When society categorizes someone on the basis of race,

as either white or of color, it picks up a strand of the Koosh, a piece of rubber band, and says, "See this strand, this is defining and central. It matters." And it might be a highly important strand, but looking at one strand does not really help anyone see the shape of the whole ball or the whole person. And race may be a whole cluster of strands including color, culture, identification, and experience. Even naming the experience "race" veils its many facets.

Categorical thinking obscures our vision of the whole, in which multiple strands interrelate with each other, as well as our vision of its individual strands. No individual really fits into any one category; rather, everyone resides at the intersection of many categories. Yet categorical thinking makes it hard or impossible to conceptualize the complexity of an individual. The cultural push has long been to choose a category.[16] Yet forcing a choice results in a hollow vision that cannot do justice. Justice requires seeing the whole person in her or his social context.

Complex, difficult situations that are in reality discrimination cannot be adequately described using ordinary language, because that language masks privilege. Language masks privilege by making the bases of subordination themselves appear linguistically neutral, so that the cultural hierarchy implicit in words such as race, gender, and sexual orientation is banished from the language. Once the hierarchy is made visible, the problems remain no less complex, but discussing them in a more revealing and useful fashion becomes possible.

NOTES

Note: I (S.M.W.) acknowledge my intellectual debt to two colleagues, Adrienne Davis and Trina Grillo, both professors at my school. The three of us worked together for almost two years, writing several working papers examining privilege and subordination. The "with" designation for authorship reflects Davis's contribution in paragraphs concerning -isms language and categories, which we wrote together for the working papers.

1. Richard Delgado & Jean Stefancic, *Pornography and Harm to Women: "No Empirical Evidence"?*, 53 Ohio St. L.J. 1037 (1992) (describing this "way things are." Because the norm or reality is perceived as including these benefits, the privileges are not visible).

2. Catharine A. MacKinnon, Toward a Feminist Theory of the State 224 (1989).

3. Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 197 (1988); Marc Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. Miami L. Rev. 511, 617 (1992). Both articles describe heterosexism as a form of gender oppression.

4. Peggy McIntosh, *Unpacking the Invisible Knapsack: White Privilege*, Creation Spirituality, Jan.–Feb. 1992, at 33. Marnie Mahoney has also described aspects of white privilege. Martha Mahoney, *Whiteness and Women, In Practice and Theory: A Reply to Catharine MacKinnon*, 5 Yale J.L. & Feminism 217 (1993).

5. McIntosh, *supra* note 4, at 33.

6. *Id.* at 34.

7. *Id.*

8. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in Blood, Bread, and Poetry: Selected Prose 1979–1985 (1986).

9. Fajer, *supra* note 3, at 514.

10. *Id.* at 515.

11. *Id.*

12. Adrienne D. Davis, Toward a Post-Essentialist Methodology; or, A Call to Countercategorical Practices (1994) (unpublished manuscript).

13. See also Jerome McCristal Culp, Jr., *Water Buffalos and Diversity: Naming Names and Reclaiming the Racial Discourse*, 26 Conn. L. Rev. 209 (1993) (urging people to name racism as racism).

14. The image of the Koosh ball to describe the individual at the center of many intersections evolved during a working session between Adrienne Davis, Trina Grillo, and me.

15. Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 Duke L.J. 296, 307.

16. Thus in 1916 Harold Laski wrote, "Whether we will or no, we are bundles of hyphens. When the central linkages conflict, a choice must be made." Harold Laski, *The Personality of Associations*, 29 Harv. L. Rev. 404, 425 (1916).

81. White Latinos

IAN F. HANEY LÓPEZ

Who are the leaders in Latino communities? This question does not admit simple answers, because who counts as a leader or even a Latino? Both are contentious issues. Having said that, I contend that often Latino leaders are white. I employ this hyperbole to emphasize my point that most of those who see themselves as leaders of Latino communities accept or assert whiteness as a key component of their identity. This assertion of whiteness, I posit, facilitates the mistreatment of Latinos and buttresses social inequality. In this chapter I use the experience of Mexican Americans and the Chicano movement to illustrate this dynamic and also comment on the aspiration to be white in the context of contemporary racial politics.

White Latino Leaders

The majority of those who consider themselves leaders in Latino communities are white. I do not contend by this that race is fixed or easily ascertained. Nor do I mean that the Latino community is led by Anglos—that is, by persons from the group historically understood as white in this country. Rather, Latino leaders are often white in terms of how they see themselves and how they are regarded by others within and outside their community. Race's socially constructed nature ensures that racial identity is formed on multiple, sometimes contradictory levels. Self-identification, group perception, and external classification all constitute axes of racial construction. In turn, these axes encompass myriad criteria for determining racial identity. In this connection, many Latino leaders believe they are—and are understood to be—white by virtue of class privilege, education, physical features, accent, acculturation, self-conception, and social consensus. True, these Latinos are rarely white in the sense that they receive the full range of racial privileges and presumptions Anglos reserve for themselves. But then, as with all racial categories, there are various shades of white, and many Latino leaders are arrayed along this continuum.

A version of this chapter previously appeared as Ian F. Haney López, *White Latinos*, 6 Harv. Latino L. Rev. 1 (2003). Originally published in the *Harvard Latino Law Review*.

Mexican Americans

The claim by Latinos to be white is not a new one, as the history of Mexican American identity attests. Before the Great Depression, the Mexican community in the United States consisted primarily of immigrants whose political and social imagination was attuned to Mexico and eventual return. During the Depression, however, Anglos scapegoated Mexicans and clamored for their expulsion. National, state, and local governments responded with deportation campaigns that expelled over half a million persons, including many U.S. citizens, amid tremendous hardship. The result was not the eradication of the Mexican community but rather the solidification of a Mexican American identity. Those most likely to remain in the United States through the dismal 1930s included persons with the most developed employment, property, family, social, and cultural ties to the United States. The Mexican community that remained developed a new identity as "Mexican Americans," asserting through that label a political and social philosophy centered on the claim to be quintessential members of the U.S. polity.

Mexican American leaders demanded equality for their community and launched political and legal campaigns to secure better treatment at the same time that they attempted to foster pride in their distinct origins. They also asserted that Mexicans were racially white. For instance, the most prominent Mexican American civil rights organizations, including the League of United Latin American Citizens and the GI Forum, attacked segregation not on the ground that this racial practice was morally wrong but because Mexicans were white. Employing what they termed the "other white" strategy, these groups insisted that Mexican Americans were members of the white race and that, consequently, no basis existed for subjecting Mexicans to racial segregation of the sort imposed on blacks.

The Mexican assertion of a white identity reflected the cultural premium American society placed on being white. Thus, Mexican claims of whiteness were more prevalent in those places where racial hierarchy was most deeply entrenched—Texas, for instance, more than California and rural towns more than cities. In addition, the ideology of white identity better suited the middle class—teachers, business owners, and skilled craftspeople. In both Mexico and the United States, fair features enabled upward mobility. As a result, middle-class Mexicans in the United States were not only more acculturated, educated, and wealthy than other community members but also more likely to bear European features. In contrast, laborers and more recent immigrants from Mexico were often darker and in other ways more distant from white ideals (for instance, by virtue of menial occupation, limited English ability, or poor education) and thus less able and less likely to avail themselves of a white identity.

Why does it matter that Mexican American leaders insisted that they were white? After all, they took pride in their origins, were politically active, and sought to improve their communities' social, economic, and political standing. We should acknowledge the politically progressive efforts of many Mexican Americans and eschew judgments that do not take into account changed historical circumstances. Nevertheless, we must also be clear that those who claimed a white identity also held that certain categories of persons lived beyond the realm of social concern or responsibility. Those beyond care included noncitizens and nonwhites, in particular blacks but also many Mexicans.

Asserting a white identity has the aim of locating oneself at or near the top of the U.S. racial hierarchy. Claiming such an identity thus does not disrupt but rather further

entrenches hierarchy. It adds legitimacy to the perception that whites fundamentally differ from nonwhites, that they are superior and deserve the best, and that these divisions reflect nature and not social norms. These concomitants of whiteness skewed Mexican American politics.

The Mexican American generation saw citizenship as a key attribute of whiteness and belonging and feared that the continued influx of Mexican immigrants—whom they perceived as poor, uneducated, and dark—undercut the ability of Mexican Americans to assimilate as white persons. As a result, Mexican American civil rights organizations insisted on citizenship as a prerequisite to membership and actively campaigned against "wetbacks." The emphasis on white identity also accompanied racial antipathy toward blacks, ranging from a widespread unwillingness to find common cause with them to the expression of white supremacist ideas regarding their supposed inferiority. The celebration of whiteness also caused many Mexican American leaders to accept the Horatio Alger ideology that pictured social and economic progress as a function of individual effort. This led them to condemn those members of the Mexican community who were forced by racism and structural injustice to the margins of U.S. society. Whiteness was a Faustian bargain.

The Brown Race

The Chicano movement challenged the notion of a white Mexican identity. Exasperated by a community politics that stressed assimilation on the basis of white identity and yet failed to produce meaningful equality with Anglos and inspired by the racial pride of the Black Power movement, many Mexicans came to embrace a politics of cultural distinctiveness and to view themselves as members of a brown race. To be sure, the leaders of the Chicano movement did not initially emerge from the same community segments that most forcefully asserted a white identity. Instead, members of the working class predominated among Chicano activists, who also included *vatos locos* and *pintos*—persons formed, respectively, by their participation in street culture or by their status as former prisoners. Nevertheless, during the Chicano movement, broad sectors of the Mexican community came to accept and assert the idea that they were proud members of a brown race. In the intervening years, this legacy waned, so that today members of the Mexican community in the United States are evenly split, with roughly half claiming they are white and the other half insisting otherwise. Still, the move to an explicitly brown racial identity among Mexicans has had important political ramifications.

The Chicano movement was guilty of many failings, including the tendency to define brown identity in terms of nineteenth-century ideas that tied race to ancestry, culture, and group destiny, as well as to patriarchal gender roles. Chicano militants tended to believe that race was fixed by blood and in turn that race—that is, nature—determined aspects of culture, group history, and gender relations. Nevertheless, in adopting a nonwhite identity, the Chicano movement worked against some of the more pernicious aspects of Mexican American racial politics. The movement saw the community as united by oppression and so rejected the notion that citizenship formed a pertinent divide. The rejection of citizenship as a dividing line continues, as few Latino leaders today support a politics of hostility toward recent immigrants. With slightly less enduring success, the Chicano movement supplanted the aspirations of the middle class with the concerns of

the poor in the center of Latino political consciousness. Today's leaders are more likely than their Mexican American antecedents to believe that structural inequalities distort the life chances of their constituents and to combat them. Chicano militants also marched shoulder to shoulder with African Americans, though this solidarity has long since evaporated. Now division and suspicion often characterize Latino and black relations. Despite its varying successes, the Chicano movement provides important lessons, for once again the lure of a white identity calls out to many Latinos, including community leaders.

The New Whites

Racial dynamics continue to change. Historically, Anglo society constructed Mexicans and other Latino groups as nonwhite. But now various Latino and Asian communities, for instance, the Cubans and the Japanese, increasingly hold nearly white status. Growing numbers of minority individuals—those with fair skin; wealth; political connections; or high athletic, artistic, or professional accomplishments—can virtually achieve a white identity. This is not to say that these groups and individuals are fully white, because that racial designation, like all others, operates on a sliding scale. Nevertheless, the boundaries of whiteness are expanding to incorporate communities and individuals who would have been construed as nonwhite just a few decades ago. In turn, this expansion fuels the growing sense among many that not only racism but race are now artifacts of the past. The fair treatment and high status accorded some minorities ostensibly proves that our society has transcended race and racism.

But those two forces continue to distort almost every social encounter and warp almost every facet of our social structure. While whites have preserved their superior status, in part by extending privileges to some, many in our society bear the brunt of the brutal politics of race. Our society still constructs whole populations as nonwhite, impoverished and incarcerated, disdained and despised, and feared and forsaken. Our prison populations testify to the persistently destructive power of race. The United States now incarcerates people—mainly minorities—at six to ten times the rate of other industrialized nations. Half of all inmates are black and probably one-quarter are Latino.

However harrowing these numbers, the effort to criminalize and incarcerate minorities is only a small part of a larger process of deindustrialization and wealth transfer to the rich that has defined the decades since the civil rights era. This deepening immiseration relies on racial politics. Race explains why we see criminal justice responses to crises in public health, education, and job creation as well as sustained attacks by legislators on a broad array of social services and government wealth redistribution efforts. Race—now couched in the language of criminals or of immigrants or of terrorists—is the scare tactic that unifies a white majority behind a cohort of political leaders who primarily serve an emerging plutocracy. Crack addicts, welfare queens, gang bangers, illegal aliens, enemy combatants, and terrorists are the racial images thrown down repeatedly to justify a politics of inequality that continually favors middle-and upper-class whites.

Individuals and communities continue to reap a premium by being white. The closer one comes to being white, the less susceptible one is to the gross mistreatment and disregard accorded minorities and the more access one has to the material rewards and

positive presumptions reserved for our nation's racial elite. One would be crazy to want to be anything other than white. As a result, two-thirds of all recent immigrants—the vast majority of them from Asia and Latin America—identify themselves as white. So does half the Latino population.

Claiming to be white achieves measurable advantages for some individuals and communities but at a steep price for others. The Latino community, to remain a community, must reject the lure of white identity and instead adopt a solidarity based on being nonwhite. I do not mean a solidarity rooted in claims of a putative biological connection, which was the chief mistake of the Chicano movement. Rather, I mean cohesion founded on the basis of a political identity. Nonwhites in the United States occupy a subordinate status. Asserting a white identity may provide one way to escape that inferior position, yet this solution solidifies the root structures of racial hierarchy and ensures the continued subordination of others. In contrast, claiming a nonwhite identity commits one to the political goal of ending racial oppression for all. We should assert a nonwhite identity as a means of fostering political opposition to racial status inequality. Latinos and their leaders should not pine for the privileges of whiteness but should embrace a political commitment to end racial hierarchy.

82. Rodrigo's Portent

California and the Coming Neocolonial Order

RICHARD DELGADO

In Which Rodrigo Drops In on Me in the Middle of a Mundane Task

"Lean your head back for a moment, Professor," my barber had just requested. I did so, anticipating the rush of soothing warm water that would mark the beginning of my monthly shampoo and haircut when a familiar voice caused me to jerk erect.

"Rodrigo!" I exclaimed at the sight of my lanky young friend standing next to my chair, a wide grin on his face. "What a sight for sore eyes. What are you doing here?"

"Giannina and I are on our way back from a conference in California. We had a little time on our hands and decided to drop in. Your secretary said I might find you here."

"I'm having my monthly haircut," I stammered, immediately realizing that I had merely stated the obvious. Gesturing toward the barber, who had been standing by patiently, bottle of shampoo in hand, I said, "Rodrigo, this is Joe, who's been cutting my hair for years. Joe, this is Rodrigo. He teaches law the next state over."

The two nodded politely, and Joe gestured that Rodrigo might take a seat nearby.

"I could use a trim myself," Rodrigo said, glancing at his image in the mirror. "I thought of getting one in the conference hotel. But when I walked in, the proprietor gave me a hard look, so I left. I don't think they wanted my business."

"We sure would here," Joe said with alacrity. "My son, Keshawn, can handle you. He just went next door for a minute."

"Perfect," Rodrigo replied. "I can get my hair cut and catch up with Gus at the same time. I have a thesis I'd love to run past you. You, too, Joe, if you're interested."

Joe, who had been gently lathering my hair with his strong fingers, nodded and then added, "Keshawn's going to the community college. Studying prelaw. I'm sure he'd love to listen in, too."

The bell on the door jangled. "There he is now," Joe said, gesturing toward a serious-looking black youth who had just come in. "Keshawn, this here's Rodrigo. He's a friend of the professor's. Wants a haircut, too."

A version of this chapter previously appeared as Richard Delgado, *Rodrigo's Portent: California and the Coming Neocolonial Order*, 87 Wash. U. L. Rev. 1293 (2010). Originally published in the *Washington University Law Review*.

Rodrigo nodded vigorously, Keshawn picked up a white pinstriped robe from a nearby shelf, and Joe began rinsing me off in preparation for transfer to his regular chair by the window. As he accompanied me to the new location, I noticed that we had the shop to ourselves.

Keshawn took Rodrigo to the now-vacant shampooing chair, while Joe and I made small talk about how his shop was doing in the current economic downturn.

Then, with my young friend settled in the chair next to mine, I said, "Rodrigo, this must be a first. Ever since you and I met years ago, we've gotten together at restaurants, AALS, that law-and-economics conference in the far north, and once at an airport while waiting for a connection. Now here we are at Joe's barber shop, where I'm looking forward to hearing about your California trip and new thesis."

"I went there for a conference on the state's prison crisis," Rodrigo began, stretching his neck out while Keshawn tucked a gauzy paper towel under his chin. "Giannina came along to get together with an old friend. The idea I want to run past you came to me afterward."

"I've been reading about the state's budgetary problems," I said. "All those prisons can't be helping."

"They've been building them at a great clip," Rodrigo replied. "And although they initially boosted the economies of the surrounding towns, they're now straining the treasury to the breaking point. According to one of the panelists, Californians pay nearly as much for prisons—over $10 billion dollars a year—as they do for higher education."

We go on to briefly discuss restorative justice, and then Rodrigo returns to his thesis.

In Which Rodrigo Begins to Show How California Is Becoming a Neocolonial State

"The state's population recently reached a tipping point and is now more than half minority. It's the first one to have a majority minority population. Several other states are likely to follow suit soon."

"California's school population tipped some time ago, if I recall."

"It did," Rodrigo said, "and now is two-thirds minority. Early on, California was a literal colony or territory, with a small population of Anglos wielding control over the original Indians and Mexicans. After the discovery of gold and the completion of the transcontinental railroad, Anglo settlement increased rapidly so that the number of whites soon surpassed that of all the rest. After that, the usual mechanisms of colonial authority were unnecessary. Anglos dominated by sheer force of numbers."

"But today, the ratio is switching back."

"Exactly. Because of immigration and a high birth rate, minorities have begun to outnumber whites. That's why you see all the unrest, including vigilante activity at the border and all those referenda. As though realizing that they are soon to be a minority, whites have been trying to hang on to power as long as possible."

"And that explains all those voters' initiatives we've been reading about," Keshawn chimed in. "Going all the way back to the one that changed the system of property taxes."

"Right," Rodrigo said. "That was Proposition 13. Part of a taxpayers' revolt, it came in the wake of a state fair-housing act that required home and apartment renters to make housing available to all. Other referenda quickly followed, including one making English

the official language, another forbidding bilingual education, and another rejecting affirmative action in governmental contracting and higher education."

"And there's the one that took aim at recent immigrants," Joe added, handing me a mirror. "Our state considered a version patterned after California's but voted it down."

"And a good thing, too," Rodrigo said. "California's would have denied the newcomers access to all nonemergency services, including public education. A federal court quickly declared it unconstitutional."

"Striking, especially when you consider it all at once," I said. "And the meaning you draw from all this, Rodrigo, is . . . ?"

"California is in the process of reverting to its former condition—becoming, in effect, a neocolonial state. Once you realize this, you see signs of it everywhere. My research assistants and I have started analyzing various areas of California life, including higher education, state government, and the entertainment industry. I have some figures right here." He slid a slim blue binder out from under his robe.

"Before you get into that, how does that length look to you, Professor?"

I stole a quick look at myself in the mirror and told Joe, "They say you can't make a silk purse out of a sow's ear. But you come close every time."

"Want me to cover some of that gray, Professor?"

"Maybe next time," I said. "If you don't mind, I'll just sit here until Keshawn and Rodrigo are finished. I'd like to hear more about that thesis of his."

"No problem," Joe said with a flourish of his scissors. "As California goes, so goes the nation."

In Which I Challenge Rodrigo to Defend His Thesis

"So they say," I said, resolving to push my young protégé a little. "Intriguing as your thesis is, Rodrigo, you need to do a number of things. First, you need to show that a colonial model explains California's current unrest better than ordinary racism does. As you know, the competition-aggression theory holds that racism increases when a dominant and a subordinate group compete for scarce commodities, such as jobs. Right now, the state's economy is in a severe downturn. Maybe ordinary competition explains events there."

"Okay," Rodrigo said. "That's the first point. What's the second?"

"Possibly the material in that binder helps with this one. You need to show that a neocolonial model explains a broad range of events in California, not just its prison crisis. Every state is having problems with excessive incarceration right now. Does the neocolonial model hold true in areas other than criminal justice?"

Rodrigo made a fist with two fingers extended. "You mentioned a third point."

"Oh, it's the state's history. Take the points up in any order you like," I said, patting my neat mop of hair. "With luck, it'll be like a good haircut, all coming together in the end."

In Which Rodrigo Applies Postcolonial Theory to California

When we all nodded, Rodrigo stole a quick glance inside his folder and looked up. "I've started examining a number of areas, including state government, the K–12 system,

higher education, corporate life, and Hollywood and the media. In each area, you see that the colonial model explains events in a way that other approaches don't."

I reached over and put my hand on his arm. "I do want to hear your statistics, Rodrigo. But before you begin, could you give us a quick review of postcolonial theory? It will help us put those facts of yours in perspective. I know you and I discussed this school of thought once before, but I don't remember every detail. And Joe and Keshawn may not be very familiar with it at all."

Postcolonial Theory: A Brief Overview

When the two barbers nodded gratefully, Rodrigo began. "In a nutshell, it's a body of writing that seeks to understand the colonial condition. The main authors, as the Professor mentioned, are from Asia, Africa, and Latin America. Some of them ponder the psychology of the oppressed and the role of educated natives who collaborate with the colonial overlords. Others address how the occupying power uses ideology, literature, and popular culture to paint natives as simple and in need of the superior culture and science of the settling forces. Still others write about resistance and how the colonial subject can maintain sanity in a society where others wield complete control."

"One or two of their suggestions are chilling, if I recall."

"Right," Keshawn interjected, "Frantz Fanon's in particular."

"Particularly that remark about blood," Rodrigo said. "Oh, and others discuss the role of language and how the native intellectual who chooses to write in French or English can easily lose touch with his people and culture."

"I seem to recall that a few American writers have written in this vein," I ventured.

"Right," Rodrigo replied. "Thoreau was one. He detested the Mexican-American War, believing it a case of sheer imperialism, and went to jail rather than pay taxes to support it. Martin Luther King, Jr., cited Gandhi and his theory of nonviolent resistance. The Black Panthers quoted a host of postcolonial writers. And in our time, Robert Blauner, Robert Allen, Armando Navarro, and Rodolfo Acuña have analyzed power relations in the United States in these terms."

When Rodrigo paused, Keshawn thanked him, scribbled a long note on a scrap of paper, and then said, "All right, how about California?"

California's Colonial Turn: Objective Manifestations

Rodrigo glanced inside his blue folder and then looked up. "I've been examining several sectors for evidence of postcolonial forces at work. EEOC [Equal Employment Opportunity Commission] figures enabled me to document a number of trends.

"To start off, the state's ethnic representation in each of the areas I looked at almost screams 'colonialism.'" He held up a handful of charts and tables. "As you see, that's true whether you look at the prison system, the entertainment industry, politics, major corporations, or education. Whites are almost always at the top, with the others in subordinate positions.

"With public education, for example, most of the superintendents are white, as are the members of the school boards. The same is true for principals, except for a handful of inner-city schools. In the teaching ranks, the racial makeup is more mixed, while

most of the teacher aides are people of color. And, of course, most of the students are minorities. It goes right down the line."

"In a way, that's what you would expect," I said, determined to play the devil's advocate as long as possible. "Schools are the purveyors of official knowledge. They pass culture down from one generation to the next. So, it's vital that minority children internalize the lessons that the Anglo establishment wants. You might not, then, be dealing with neocolonialism but a culture's perfectly understandable desire for ideological continuity from one generation to the next. But how about some of your other areas? With business, you have the profit motive, so barriers against minority advancement ought to be lower. Are the ranks of higher executives more balanced?"

"Not at all," Rodrigo said. "Even in sectors such as computers and places like Silicon Valley, where Asians have experienced success, few of the companies have Asian CEOs. The few that do are start-ups begun by an Asian."

"Very few blacks, too," added Joe. "I read that in a minority-business magazine I get."

"Close to zero," Rodrigo agreed. "And with politics, the situation is only a little better. For example, Cruz Bustamante was the only Latino in recent history to win a statewide election, and that was for a lieutenant governor slot. When he ran for governor, the opposing party aired commercials implying that he was part of a secret plan to return California and the Southwest to Mexico. He lost. When, a few years later, Antonio Villaraigosa ran for mayor of Los Angeles—and won, the first Latino to hold that office since 1872—his opponents resurrected ads showing a person cutting cocaine and a voiceover intoning, 'Los Angeles can't trust Antonio Villaraigosa.' The number of blacks who have won any office at all is small, and the voting rates for that group have declined over the years. The number of Latinos and Asians who have won election has increased but is still much lower than their portion of the population at large. Minority underrepresentation is particularly acute in the state senate."

"I think you mentioned Hollywood and the entertainment industry," I said. "What did you find there?"

"Much the same as with the schools. They, too, are in the business of articulating cultural values. The entire industry is a prime source of official narratives, scripts, and ideology."

"I bet I know what you found," Keshawn interjected. "Aside from Spike Lee and a few aging black stars, Hollywood is pretty much a white preserve."

"It is," Rodrigo replied. "Minority groups have been complaining for years. The National Hispanic Media Coalition filed a petition with the FCC just this spring, documenting widespread ethnic stereotypes and an absence of minority broadcasters, movie directors, and newspaper editors. A recent book points out that television programming over a recent thirty-year period depicted Latinos as criminals twice as often as whites and three times as often as blacks. California, of course, is the center of moviemaking and much of the television industry."

"Speaking of moviemaking, I was just reading about California's Walt Disney as champion of white, middle-class values," I said. But, recalling my resolution to press Rodrigo, I added, "A lot of the media are centered in New York and other cities, and I doubt that they are any freer of the stereotypes you mention. So I'm not sure you can lay all of the blame on California and its discontents. Besides, white folks have more money and

connections than our brothers and sisters of color and, by and large, better educations. Wouldn't you need to show that the disparities in broadcasters, writers, and editors have increased in recent years as the minority population has grown? Shouldn't you be looking at things from a historical perspective?"

"I've started doing that. As luck would have it, a recent book and article collect much of this material." Rodrigo held up a thick book with a blue and gold cover.

I squinted and asked, "Who is it by?"

"Two California academics, Walton Bean and James Rawls. Titled *California: An Interpretive History*, it just came out in a new edition by Rawls. It's a good read. It begins by reviewing the state's early history, including settlement, Conquest, and early farm fascism in the 1930s; Indian massacres and relocation; and unspeakable brutality toward blacks, Chinese, and Asians. It discusses the rise of the great corporations, the railroads, and agribusiness. The last few chapters, on the modern era, were particularly helpful."

"Do the authors describe the state in neocolonial terms?" I asked.

"No, although they are scathing about the state's treatment of Indians, women, and minorities. But if you read carefully, you begin to see the outlines of a colonial society coming into focus, especially in the closing chapters. So even though the authors don't apply the term to recent developments, they do in all but name."

"How about modern times?" I asked.

"Rawls, who wrote most of the material on the modern period, points out how whites have gained control of all the state's industries, including agribusiness. He also notes that the content of official ideology, such as in state textbooks, has often been Anglocentric."

"Just as one would expect in an emerging colony," I said. Then, after a pause, "I just read about a controversy that arose when President Obama appointed a new head of the National Endowment for the Humanities. The previous director had stirred up conservatives when he introduced a set of standards, formulated at UCLA, for teaching U.S. history. They would have emphasized the role of ordinary citizens, workers, women, and activists like Harriet Tubman at the expense of generals, presidents, and the founders. When the new director reintroduced the standards, the U.S. Senate indignantly rejected them."

"I read about that controversy," Rodrigo said, "and it struck me as further evidence that the United States is taking on the outlines of a colonial society. Resistance to bottom-up history is exactly what you would expect in a system wary of sharing power with a large population of color. It's hard to explain in terms of ordinary racism, or even classism. One of those previous directors was a Republican, while the next one was a Democrat."

"So the concern over official history cuts across party lines," I said. "But back to the California book. Do the authors have anything to say about their own discipline?"

"They do. They mention that in 1964, official textbooks were so full of demeaning images of Native Americans that the American Indian Historical Society called for their revision. Three years later, concern over the inadequacy of Indian education led to the formation of the California Indian Educational Association."

"Over the years," Keshawn added, "Indians have had to struggle against government-operated boarding schools that cut off the children's ponytails and taught them to hate their own culture and language."

"Rawls covers all of that. He also describes how Latinos have been challenging culturally insensitive schools, textbooks, and curricula that disrespect their culture and contributions. He covers their struggles against segregation and inferior, crowded schools. He also takes up those referenda and initiatives that we discussed earlier, deeming them evidence of a distinct antiminority shift. Other times, he calls them evidence of a taxpayer revolt. Either way, it comes down to the same thing, in my opinion."

"What about that struggle over official ideology?" I asked. "Do you see it anywhere else, apart from the educational arena and the media?"

"One area is beauty and official aesthetics."

"You're referring to early travel literature, I gather, that painted the West as a beautiful, fertile land that was too good for the indolent Mexicans and Indians."

"Right. Rawls, Horsman, Kevin Starr, and others make that point. It's connected to the idea of Manifest Destiny and is undergoing a revival today in right-wing literature complaining of how immigrants and Latinos are writing graffiti, littering lawns and sidewalks, and driving beat-up, exhaust-spewing cars. They are destroying the Golden State, the California Dream."

"Interesting point, Rodrigo. I hadn't connected beauty and neatness to colonialism. But early colonial societies certainly drew a line between themselves, with their pink cheeks and noble profiles, and the swarthy natives with furrowed brows."

Joe snorted. "Maybe they hadn't heard of Wesley Snipes, Denzel Washington, or Will Smith. Women are crazy about them. But don't worry, you two. We'll try our best to make you look good—on top, I mean."

"Oh," Rodrigo interjected. "I forgot. The colonials also devalued native languages, considering them vastly inferior to English, French, or Spanish. Today, the English-only movement is on the march, particularly in California. Partly on aesthetic grounds, but partly on the basis of trumped-up pseudoscience, they want to get rid of all that 'babble.'"

After a pause, I asked, "What about labor issues? I would think that the Bracero movement is a prime example of colonial exploitation."

"A number of authors mention how American society manipulated immigration quotas to admit labor at times when the U.S. economy needed low-wage workers. Then, after the emergency ended, we showed them the door."

"Like today," I added. "The job market is hurting, so we deport as many undocumented immigrants as we can."

"Even those who have been here for years and have children who are U.S. citizens. We treat them, in effect, as a surplus population whose purpose is to mow our lawns, pick our crops, make our beds, and cook our meals. Rawls shows that this was true of the Chinese and Japanese in earlier times, as well."

"What about resistance, another postcolonial theme?"

"Rawls discusses that. Let's see." Rodrigo flipped through some pages. "Right here. He says that the Japanese protested their treatment at the hands of California nativists. The Chinese, too. And Filipinos and Mexicans united under César Chávez and the farmworkers' movement—striking, picketing, and registering a number of gains."

"Which, as we know, didn't last long," I said a little morosely.

"True. But Rawls recounts more recent examples of resistance, such as when minority voters struck back after a Republican administration took an anti-immigrant position.

They also complained of toxins piled up in minority neighborhoods and a statewide housing gap between the rich and the poor, whites and minorities. They protested when the state dismantled bilingual education programs created for students whose native language was not English. Conservatives had criticized those programs as pandering to foreigners refusing to fit in. By 2005, the drop-out rate for blacks and Latinos was over 40 percent in the high schools and even at the California state universities. Their poor reception in the public schools obviously played a part."

"You could also consider graffiti a kind of cultural protest," Keshawn added. "Not to mention hip-hop music."

Colonialism and the Imposition of Belief

The two barbers beamed. But I didn't let him revel in self-congratulation for long. "You said you were going to address the contents of education and the media. If you want to persuade your readers that California is taking on the contours of a colonial society, you need to show how the state is indoctrinating its citizens. True colonial societies do that. They don't just run the show. They dominate and dictate belief."

"A recent law review article helps me there," Rodrigo replied.[1] "It shows how the state's elite campuses created an official structure of knowledge that legitimated existing power relations. The authors call it a caste-based system of knowledge."

"All universities are in the business of knowledge creation," I caviled. "I hope you can show more than that they joined forces with corporations from time to time to market inventions and expand knowledge."

"I can," Rodrigo replied. "For example, beginning in the late seventies, California scientists contributed to the discourse about race-IQ connections. A number were in the forefront of the movement to prove that minorities were less intellectually able than whites. As recently as the 1930s, the University of California was 99.9 percent white.

"Ten years after *Brown v. Board of Education* and nine after the civil disobedience of Rosa Parks, Berkeley's Boalt Hall School of Law had not graduated a single black. UCLA's medical school, established in 1951, did not graduate a black doctor for the first twenty years of its existence. The undergraduate admissions office based its process almost entirely on grades, recommendations, and family connections. It also kept a close eye on inner-city and Catholic schools, applying a correction factor based on the performance of their previous graduates. The result was that a student from an inner-city school with a perfect average would have his or her grades marked down automatically.

"When standardized tests arrived in the late sixties, the UC system—after years of resistance—quickly embraced them. This lowered minority numbers even further. The system then bowed to pressure and instituted a weak form of affirmative action, which improved minority numbers somewhat. But the era did not last long—a scant twenty-seven years. A regents directive, followed shortly by that referendum Keshawn mentioned, dealt it the coup de grâce. Enrollment of blacks and Latinos at all of the selective programs plummeted and has not recovered."

After a brief pause, I said, "As sobering as that history is, Rodrigo, it is not that different from that of other states that have struggled over minority admissions. To show

neocolonialism at work in California, you would need to demonstrate an ideological component. You said that certain California educators were in the leading ranks of race-IQ scientists. Do you have more along those lines?"

"I do," Rodrigo said, glancing at the reprint. "That's where my caste-based structure of knowledge comes in. Under UC president Clark Kerr, California adopted a blueprint called the Master Plan, which divided the state's universities into a three-part system. The University of California would admit the top one-eighth of high school graduates and the California State University campuses the top one-third. The community colleges would enroll all the rest."

"Sounds like Plato's plan for the citizens of Athens," Keshawn interjected. "We were reading about that in my political science class."

"The similarity is striking," Rodrigo said, adding, "With only a few changes, the plan remains in effect today, consigning each population and income group to its proper place."

"Kerr was a big planner, as I recall."

"He was. But California's intellectuals also contributed to the development of a paradigm of knowledge—in effect an intellectual master plan—that firmly marginalized women and minorities as articulators of official knowledge."

"It does start to sound like India under the Brits or Algeria under the French," Keshawn said.

Rodrigo continued excitedly, "We've already noted how some, such as Arthur Jensen and William Shockley, tried to prove that blacks were genetically inferior. Official historians exonerated white politicians, such as Earl Warren, for moral missteps that fell heavily on minorities. The state's agriculture schools sided with agribusiness over farmworker interests. Faculty from those schools opposed unionization and preached the virtues of chemical farming at the expense of the workers who toiled in the fields. Social workers and sociologists taught that minorities were problem groups, rather than potential contributors to California society."

After a pause, Rodrigo concluded, "Oh, and the state always happens to establish new campuses in attractive, middle-class communities, never in inner-city neighborhoods. This sends a powerful signal about who the universities see as their intended audience. In a few cases, the system conspired with towns to purge minorities to pave the way for a new campus."

Rodrigo paused, while Keshawn eyed his sideburns. "Want those any shorter, Professor?" he asked.

"Maybe a little," Rodrigo replied. "I'm hoping I won't need another trim until the term is over."

As Keshawn bent to the task, I said, "The state's educational system may well exhibit shades of neocolonialism, especially in its alliance with agricultural interests. I hadn't known about that. But all educational systems articulate official knowledge and so, in that sense, entrench a traditional, class-based system of knowledge. You mentioned the distribution of leadership in various jobs—teacher, principal, teacher aide, and the like—and I suspect you have more such data in that folder. But what about the qualitative side? Colonialism doesn't just consist of a set of skewed statistics. It feels and looks different. Do you have anything that addresses that?"

In Which Rodrigo Shows How Life in California Is Taking On the Character of a Neocolonial Regime

"Good question, Professor. I like the way you push me. I do have the beginnings of a qualitative analysis, although nothing systematic. This could easily be a life's work."

"Don't apologize. This helps us see where the country may be heading. I may not agree with you in every detail, but you're definitely onto something."

"Okay," he said. "Aside from the numbers, three or four developments smack, to me at least, of colonialism," Rodrigo began. "Qualitatively speaking, I mean. Two recent ones that I have hit upon are the dispute over drivers' licenses and Anglos who are starting to see minorities as cannibals."

"Cannibals?" I said, raising my eyebrows. "You mean in the literal, flesh-eating sense? And what do drivers' licenses have to do with neocolonialism?"

Rodrigo's face flushed slightly, but he continued resolutely. "Take drivers' licenses first. In the Middle Ages, only the nobility were permitted to ride horses. Gentlemen could ride, but commoners could not. It was a privilege of rank and a symbol of high social office."

"The same was true during slavery," Keshawn added. "State codes made it a crime for a slave to ride a horse, even for a commercial errand the master wanted done. The slave had to walk wherever he went."

"That's another parallel," Rodrigo agreed. "In present-day California, as you know, a recent governor refused to back immigrants, even though he is one himself, in their effort to gain the ability to obtain official drivers' licenses. Latinos, of course, needed licenses to drive from job to job, as well as for more mundane purposes such as shopping or taking the kids to school or the doctor. Liberals and business owners supported their right to drive, but conservatives opposed it, arguing that undocumented aliens did not deserve the privilege."

"So they're supposed to walk, I suppose, even though the next farm might be five miles away."

"Just like in feudal times," Rodrigo replied. "Tugging their forelocks all the while. Or maybe taking public transit. And then you have those references to Latinos eating up California and its wealth."

"Its sweet, white flesh," Keshawn said, letting out a loud snort. "As though all of us are just dying to sink our fangs . . ."

"Or other body parts," Joe seconded. "Hee hee."

"Indeed," Rodrigo said, blushing a little. (Despite his cosmopolitan roots, Rodrigo was surprisingly prudish, I recalled with a start.) "When white Europeans discovered black people in Africa and Indians in North America, they were fascinated by tales of cannibalism. That and leaving old people out in the wild to die, as some Indian tribes are said to have done."

"Shakespeare mentions cannibalism," I said. "And I think some of the early travel writers do, as well."

"They do. And what we see today shows the same fixation on Latinos as excessive consumers. They squander state resources. They eat strange food. They want to have babies in our hospitals."

"They want to get haircuts in nice white hotels," Keshawn commented, brandishing his scissors with a flourish. "Like you did."

"Hmm," said Rodrigo. "You might be right. That owner might easily have seen me as an interloper who didn't belong there. It would be as if a respectably attired, educated Indian gentleman walked into the British officers' club. The members would greet him with a wall of disapproving looks: What's he doing here? Eventually, someone would ask him to leave. Similarly, that California owner might have seen me as a kind of cannibal, eating the nice atmosphere of his fancy shop."

As we were absorbing his novel thesis, he added, "I've thought of another kind of cannibalism. Many nonwhites, especially Latino immigrants, have a lot of children. Enough to worry some of our Anglo friends."

"The idea is a little ludicrous," I mused. "But it possesses a certain insane logic. You could see overbreeding as a kind of cannibalism. Earthy and overfertile, the newcomers create too many of their own kind. Their growing population is starting to overwhelm the state's emergency rooms, schools, and welfare facilities. It's eating away at a white people's state, like a flock of fast-breeding insects."

"Conservative websites repeat the overconsumption charge as though it were an article of faith," Rodrigo added. "Although the reality, as we know, is quite different. The group is—on the whole—young, hardworking, and healthy. It consumes fewer social resources, on average, than do whites. And Latino men hold jobs at a higher rate than any other group, including Asians. Although they do, of course, consume social services, they also pay for them through their taxes."

"I read a study from Harvard that showed that the group commits, on average, less crime than any other," I said.[2] "Even though you couldn't tell that from talk radio."

"You must mean the Sampson study showing a drop in crime rates in the cities where immigrants settle," Rodrigo said.

"And another by two California economists," Keshawn added. "I just read about that somewhere."

"I'll track it down," Rodrigo said. "But demonizing this law-abiding, pious, hardworking group, most of whom just want to get a job and send money home to their families is, in one way of looking at it, a classic neocolonial trope. The natives are wayward children, in need of taming and tutelage. In the case of the Mexicans, some of them are beyond training. So we want to keep them out of the country altogether."

"Something was on the tip of my tongue right now," I said. "Oh, now I remember. It's another kind of cannibalism. Patricia Williams wrote about 'raiding the [c]hicken [c]oop of [k]nowledge,' in which she describes the indignation of certain upper-class families in communities like Beverly Hills. They become upset when they learn that a neighbor's maid—usually Latina—has been dropping her kid off at the neighborhood school and giving the employer's address for purposes of enrollment. The fancy school ends up with a brown face nobody counted on. The proceeds of all those bake sales and property taxes, by right, ought to be going to little Anglo kids living in the rich houses. The maid is raiding the chicken coop of knowledge, so the neighbors organize to have the child thrown out."

"Can't go around eating Anglo culture and education," Rodrigo said, a little wryly.

After a pause, while Keshawn stepped back to admire his handiwork and asked Rodrigo if he liked the way his hair looked—he did—I asked, "Rodrigo, what about Obama's

first-term victory? Some writers say that it proves that we have entered a post-civil-rights era when race doesn't matter any more. Doesn't his election cut against your thesis?"

Gestalt Switch: In Which Rodrigo Explains Why Neocolonialism Is Superior to Race in Explaining Recent Developments

"No," Rodrigo replied. "Racism is not declining, according to social scientists and studies like the IAT [Implicit Association Test]. And even if it were, the victory of this exceptional candidate was also a function of a weak opposition party and an American public disgusted at the way things were going."

"Not to mention that only 43 percent of white people voted for him," Keshawn added. "His victory was almost entirely due to the minority vote."

"Indeed," Rodrigo replied. "That's why I'm not sure that the election says anything about the declining significance of race. But Obama's election supports my neocolonial thesis. Other events do so as well."

"Hold on a second," I said. "Are you suggesting that Obama is some sort of colonial lackey?"

"No, not at all," Rodrigo replied coolly. "He's his own man. But those who voted for and surround him may be another matter. He may believe he is free to pursue his own lights but be so corralled by Timothy Geithner, Lawrence Summers, Robert Gates, and others that he is not fully in charge."

"But is instead an exemplary overseer of his own people, put in power to keep them in place," said Keshawn. "Just like in colonial times. As Dad said, the more things change, the more they stay the same."

"I don't buy it!" I exclaimed. "Granted, it's a little hard to explain why 43 percent of whites voted for him if racism were still a force. You may be right about that. But do you actually see him as a colonial figure?"

"No," Rodrigo replied. "But who knows what was going on in the minds of those millions of white voters who supported him? Is it possible that some of them thought that a well-educated black man, born to a white mother and raised by white grandparents, with a sincere manner and good diction, was exactly what was needed to keep the lid on? Note that California, the most diverse state, went for him in a landslide. Even a majority of white voters there favored him."

"I don't find it useful to try to analyze my white friends," I said, a little sharply. "Although I can see how some of them might have found him a comforting figure, I don't see how you can prove that they saw him as some sort of middleman, like those well-educated Indian figures who accepted jobs in the British colonial administration." Then, after a pause, "I guess it's possible that some of them were happy to vote for a candidate who could postpone social change in a period when minorities were beginning to approach whites' numbers. Come to think of it, legal commentator Jeff Rosen recently wrote that Obama could wean liberals from their reflexive willingness to attribute everything to racism.[3] He thought that was a good idea."

"I read that article," Rodrigo said. "Rosen also said that, as a black man, Obama could roll back judicial supervision providing safe black voting districts in the South. Rosen said that blacks would resent this bitterly but that it would end up benefiting the Democratic Party. Providing safe black districts reduces the chances of the Democrats

winning other mixed districts. So powerful whites in the Democratic Party favor the idea."

"And it's one only a president like Obama could pull off," I said, shaking my head a little. "It sounds outrageous when you first hear it, but who knows, it might contain an element of truth. But you said you had additional—I hope not quite so paradoxical—evidence."

"I do," he replied. "I'm sure you've heard about the struggles that have been raging at the University of California over admissions. The competition is especially keen at the most prestigious campuses, like Berkeley and UCLA, and in the graduate and professional schools, such as law and medicine."

The three of us nodded. Keshawn looked particularly interested, and I wondered if he was considering transferring to one of those schools when he finished his two years at the community college. I redoubled my resolve to talk with him about law school sometime.

Rodrigo continued, "Asians have been complaining that new admissions criteria disfavor them. Earlier, the university offered little resistance to the regents' directive and, later, the state referendum barring affirmative action. It took the *Rios* suit for the university to agree to perform a holistic review of every candidate."

"And your conclusion, Rodrigo, is . . . ?"

"Well, you know how social scientists believe that racism is a function of levels of education. The higher up the educational ladder you go, the less racist people tend to be, at least in the raw sense."

"And what do you make of that?"

"It means that the university ought to be the least resistant sector of society to minorities trying to get ahead. Instead, you find consistent, unrelenting resistance. Racism can't explain it. But my colonial thesis can. Universities are purveyors and articulators of official knowledge. They are also the gateway to jobs of power and influence. A colonial society wouldn't want a lot of minorities there. A few, yes. But large numbers, no."

Ding! All four of us looked up in surprise as a middle-aged black man, accompanied by a large, energetic poodle, entered the shop. "I'm here to make an appointment," he said, looking at Joe.

Our meeting broke up. Joe stepped to his cash register to schedule the appointment of someone who I gathered was a steady customer. Rodrigo stood, his robe trailing, walked over and petted the poodle, and then returned to his chair. Keshawn reviewed some slips of paper from his pocket and asked Rodrigo to clarify a reference. I stole a look inside Rodrigo's blue binder, which he had left open on his chair. It was full of charts and graphs.

When we reconvened, minutes later, I cautioned Rodrigo that he'd better think about wrapping up. Dinnertime was approaching, and our two friends might need to close up shop and head home.

"Where were we?" Rodrigo asked. "Oh, yes—the qualitative side of colonialism. Well, there's one last thing. Remember the Opium Wars?"

We nodded. "Great Britain introduced opium to the Chinese, causing millions of them to become addicted. When the Chinese government, to its credit, attempted to end the lucrative trade, Great Britain deployed the full might of the Royal Navy to vindicate the sacred principle of free trade. When the Chinese later violated the terms of the peace

treaty that Britain had dictated, Britain—along with her allies, France and the United States—went to war a second time, forcing China to cede a vital port, partition her empire, pay reparations, and agree to permit the export of indentured Chinese workers to the Americas."

"So imperial powers are not beyond using drug policy to get their way."

"Exactly," Rodrigo said. "Today, the United States is using the drug scare to close the border with Mexico, detain Mexicans suspected of trafficking, and strengthen the hand of the Mexican and Colombian security forces, thereby remilitarizing those countries and increasing their dependency on the United States."

"I hope you are not saying that drugs are harmless," I said. "If so, many of your readers might think that a little colonialism is a good thing."

"Not really," Rodrigo replied. "I'm only pointing out that the government isn't above using a drug scare to put pressure on Latin America. It could have just as easily decided to focus on Americans' own contribution to the drug problem. After all, for every seller, a willing buyer. No one is forcing clean-cut suburban youth to buy drugs from Mexico, Colombia, or Afghanistan. The Brits used military force when they saw a demand problem starting to arise. The Chinese emperor, who didn't like three hundred million languid, drug-addicted subjects lying around instead of working . . ."

"Violating Confucian ethics," Keshawn said.

"Right. He wanted to end the British drug trade, which was extremely profitable. The British used brute force and the might of the Royal Navy to keep trade open. That's not much different from what the United States is doing today, except that our intervention lies on the supply side."

"And similarly aims to cement control," Rodrigo replied, "but over Latin America and the U.S. domestic population. The establishment has decided that it doesn't want Latino drug lords raking in all that money."

"And driving Mercedes and sending their kids to Swiss boarding schools," I added.

"Right. Nor does the establishment want the young growing up addicted, unproductive, and antiauthoritarian in outlook. This has been especially true of California. As early as the mid-1950s, newspaper magnate William Randolph Hearst had it in for the Mexicans. He had lost some eight hundred thousand acres of his timberland during the Mexican Revolution. When Congress was considering passing the nation's first antimarijuana legislation, he lobbied strongly for it. White supremacists in California have campaigned relentlessly to add Mexico to the list of countries whose citizens are severely limited in immigrating here. Linking Mexicans with marijuana, they use the connection to prove the group's genetic inferiority. As one commentator put it, 'Marijuana was bad because Mexicans used it; Mexicans were bad because they used marijuana.' They also sold it to nice, middle-class American youth, addicting them to the Mexicans' slovenly ways.

"So we're acting like the Chinese emperor but using ideology, force, and military might on the opposite side," Rodrigo said, closing the book on his lap with a slap. "Both interventions had the same purposes—profits and control—the earmarks of a colonial system."

Not a moment too soon. A mother with a young child walked in, the child holding her hand tightly. "Do you do children?" she asked.

NOTES

1. Richard Delgado & Jean Stefancic, *California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. Rev. 1521 (2000).

2. Robert J. Sampson, *Rethinking Crime and Immigration*, 7 Contexts 28 (2008); see also Robert J. Sampson, *Open Doors Don't Invite Criminals*, N.Y. Times, Mar. 11, 2006, at A15.

3. See Jeff Rosen, *Race to the Top*, New Republic, May 6, 2009, at 20.

From the Editors

Issues and Comments

Is minority racial status possible only in a society that has designated the category of whiteness a preferred condition? That is, are whiteness and blackness (or brownness, etc.) mutually dependent notions, such that without the one the other would not exist? If so, should it be a first order of business for any society bent on achieving racial justice to come to grips with the meaning of its own dominant coloration, which in the American case is whiteness?

Do you agree that in our own society whiteness is equated with innocence, as Thomas Ross says, or is the baseline for determining privilege, as Adrienne Davis and Stephanie Wildman suggest? When it comes to deciding who can intermarry and who can naturalize, is even a drop of nonwhite blood tantamount to contamination, as Ian Haney López implies, on the basis of his assessment of Supreme Court jurisprudence? Do white fears over engulfment by nonwhites play a part in California's recent convulsions, as Richard Delgado writes, and if so, will society see more of the same in the future?

The reader intrigued by recent critical attention to the idea of whiteness may well wonder what is next, in particular whether masculinity, another category freighted by power and privilege, will not come in for similarly intensive examination. Novels like Alice Walker's *The Color Purple* and essays such as those in Ishmael Reed's *Airing Dirty Laundry* have called attention to misogyny and divisions between men and women of color. Recently a few race-crits have begun to address these issues as well. Derrick Bell's *And We Are Not Saved* contains a pungent—and controversial—Chronicle concerning black professional women's marriage chances. Through a fictional interlocutor, Bell raises the possibility that black men who date or marry white women, get themselves arrested, or otherwise make themselves unmarriageable are responsible for the predicament of black women faced with a lonely future (Derrick Bell, And We Are Not Saved 193–214 (1987)). A recent book by Ralph Banks in the Part XIV Suggested Readings addresses the same issue.

Will critical race masculinism be the next area of inquiry for civil rights scholarship and activism? Developments move quickly in critical thought, especially during times of ferment like the present. Although making predictions is always hazardous, it seems likely that a reexamination of the role of gender in communities of color, and of the construction of femininity and masculinity in general, is very much in order. Other areas

now moving to the forefront are environmental justice, international human rights, children and adoptees of color, multiracialism, and religion in social reform movements.

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