

ARTICLES

RACIAL CRITIQUES OF LEGAL ACADEMIA

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Perhaps the most insidious and least understood form of segregation is that of the word.

—Ralph Ellison¹

THIS Article 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 color² are wrongfully ignored

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¹ SHADOW AND ACT 24 (Vintage Books ed. 1972).

² Choosing terms to designate racial identity touches upon a set of intricate problems and tender sensitivities. Nothing better reflects this than the recent debate triggered by Reverend Jesse Jackson's endorsement of the term "African-American" as the preferred racial designation for "black" Americans. See Wilkerson, "African-American" Favored by Many of America's Blacks, N.Y. Times, Jan. 31, 1989, at 1, col. 1. In this Article, I use the term "white" to describe those persons who would probably be so designated pursuant to the implicit understandings of racial identity as commonly recognized in the United States. I use several terms to describe "people of color," including "minority," "black," and "colored." When I need to be more specific and distinguish more sharply membership within various groups that comprise peoples of color, I use such terms as "Hispanic," "Asian-American," "African-American," "Afro-American," "colored," or "Negro." Although "Negro" and "colored" have acquired a pejorative connotation in some quarters, I consider these terms to have equal dignity with other racial labels. This note on usage should make the readers aware that I shall employ an eclectic set of racial identifications that will derive meaning principally from the specific contexts in which they are used. For interesting alternative approaches to the issue of racial nomenclature, see Crenshaw, *Race, Reform, and Retrenchment*, 101 HARV. L. REV. 1331, 1332 n.2 (1988); and Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404 n.4 (1987).

or undervalued. A decade ago, Professor Derrick Bell expressed this concern, protesting what he viewed as the undue extent to which "white voices have dominated the minority admissions debate."³ 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."⁴ More recently, Professor Mari Matsuda decried what she perceives as "segregated scholarship."⁵ 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 (CLS) Movement, the major bulwark of leftism in legal academic culture, has also been criticized for being "imperialistic"⁶ and for "silencing" scholars of color.⁷

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 than 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."⁸ Delgado asserts that

³ Bell, *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 1, 4 n.2 (1979) [hereinafter Bell, *Bakke and Minority Admissions*]. 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 acknowledgement 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 D. 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).

⁴ Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 566 (1984).

⁵ Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1, 2-4 & n.12 (1988).

⁶ See Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 307 (1987).

⁷ See Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435, 441 (1987).

⁸ Bell, *A Question of Credentials*, Harv. L. Rec., Sept. 17, 1982, at 14, col. 1; see also Bell,

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.⁹ Matsuda claims that "those who have experienced discrimination speak with a special voice to which we should listen,"¹⁰ that "the victims of racial oppression have distinct normative insights,"¹¹ and that "[t]hose who are oppressed in the present world can speak most eloquently of a better one."¹²

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.

In Part I of this Article, I provide a historical context for the versions of the racial exclusion and racial distinctiveness theses that Bell, Delgado, and Matsuda articulate. I argue that their writings warrant close attention. They raise questions that are, or should be, central to any academic community. They share an intellectual kinship with several well-known and influential intellectual traditions. They express beliefs that are prevalent, deeply rooted, and consequential.

In Part II, I describe and assess the Bell/Delgado/Matsuda line of racial critiques — writings that exemplify the tone and substance of much of the literature published over the past decade that uses the prism of race to examine the organization of the professoriat and the evaluation of scholarship.¹³ The writings by Professors Derrick

Minority Admissions as a White Debate, *supra* note 3, 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").

⁹ See Delgado, *The Imperial Scholar*, *supra* note 4, at 566-73.

¹⁰ Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

¹¹ *Id.* at 326.

¹² *Id.* at 346.

¹³ This racial critique literature includes: Bracamonte, *Minority Critiques of the Critical Legal Studies Movement: Foreword*, 22 HARV. C.R.-C.L. L. REV. 297 (1987); Brooks, *Anti-Minority Mindset in the Law School Personnel Process*, 5 LAW & INEQUALITY 1 (1987); Dalton, cited above in note 7; Freeman, *Racism, Rights and the Quest for Equality of Opportunity*, 23 HARV. C.R.-C.L. L. REV. 295, 298-99, 351 (1988); 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); Lawrence, *Minority Hiring in AALS Law Schools*, 20 U.S.F. L. REV. 429 (1986); McGee, *Symbol and Substance in the Minority Professoriat's Future*, 3 HARV. BLACKLETTER J. 67 (1986); and Parker, *Ideas, Affirmative Action and the Ideal University*, 10 NOVA L.J. 761 (1986).

Bell,¹⁴ Richard Delgado,¹⁵ and Mari Matsuda¹⁶ 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. Prior to the racial critiques, some of the most provocative studies of the history and sociology of legal academia emerged from the legal realist and CLS movements.¹⁷ Like certain proponents of legal realism and current advocates of CLS, 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 in which race relations have impinged upon every aspect of our culture and a resolute insistence upon 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.¹⁸

¹⁴ See D. BELL, *The Unspoken Limit on Affirmative Action: The Chronicle of the DeVine Gift*, in *AND WE ARE NOT SAVED* 140-61 (1987) [hereinafter D. BELL, *Unspoken Limit*]; D. BELL, *RACE, RACISM AND AMERICAN LAW*, *supra* note 3; Bell, *Application of the "Tipping" Point Principle to Law Faculty Hiring Policies*, 10 NOVA L.J. 319 (1986) [hereinafter Bell, *Tipping Point*]; Bell, *Bakke and Minority Admissions*, *supra* note 3; Bell, *Strangers in Academic Paradise: Law Teachers of Color in Still White Law Schools*, 20 U.S.F. L. REV. 385 (1986); Bell, *A Question of Credentials*, *supra* note 8, at 6, col. 1.

¹⁵ See Delgado, *The Imperial Scholar*, *supra* note 4; Delgado, *The Author Replies*, 3 LAW & INEQUALITY 261 (1985) (responding to criticism of *The Imperial Scholar*); Delgado, *The Ethereal Scholar*, *supra* note 6.

¹⁶ See Matsuda, *Affirmative Action and Legal Knowledge*, *supra* note 5; Matsuda, *Looking to the Bottom*, *supra* note 10.

¹⁷ See, e.g., Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222 (1931); Keyserling, *Social Objectives in Legal Education*, 33 COLUM. L. REV. 437 (1933); D. KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY* (1983); Konefsky & Schlegel, *Mirror, Mirror on the Wall: Histories of American Law Schools*, 95 HARV. L. REV. 833 (1982); 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 have emerged around the same time as the racial critiques. See, e.g., Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987); Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47 (1988); Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163 (1988); Rhode, *The "Woman's Point of View,"* 38 J. LEGAL. EDUC. 39 (1988); Scales, *The Emergence of Feminist Jurisprudence*, 95 YALE L.J. 1373 (1986); Weiss & Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988); West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

¹⁸ The racial critique literature has by no means completely succeeded in establishing the race question as an important matter of concern for commentators on legal academic discourse. For instance, two recent ambitious articles that, given their subjects, should have considered

At the same time, the writings of Bell, Delgado, and Matsuda 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 claims of racial exclusion or their claims 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 farther, 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, in Part III, 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; (2) the argument that, on intellectual grounds, the minority status of academics of color should serve as a positive credential for purposes of evaluating their work; (3) explanations that assign responsibility for the current position of scholars of color overwhelmingly to the influence of prejudiced decisions by white academics.

In Part IV, I discuss political considerations that have impinged upon the writing of this Article, focusing particularly on fears that it will be used against the cause of racial justice.

I. 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.¹⁹

racial critique literature but failed to do so are Kissam, *The Evaluation of Legal Scholarship*, 63 WASH. L. REV. 221 (1988), and Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988). On the scope of the influence of racial critiques, see pp. 1809–10 below.

¹⁹ Wirth, *Preface* to K. MANNHEIM, *IDEOLOGY AND UTOPIA* at xiii (1954).

Like the sociology of knowledge,²⁰ and various Marxist²¹ and feminist²² 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.

²⁰ See K. MANNHEIM, *supra* note 20, at 2 ("The principal thesis of the sociology of knowledge is that there are modes of thought which cannot be adequately understood as long as their social origins are obscured."); see also THE SOCIOLOGY OF KNOWLEDGE: A READER (J. Curtis & J. Petras eds. 1970) (chronicling developments in the sociology of knowledge since the 1936 publication of Mannheim's *Ideology and Utopia*).

²¹ See, e.g., K. MARX, THE GERMAN IDEOLOGY: PART I, reprinted in part in THE MARX-ENGELS READER 172-73 (R. Tucker 2d ed. 1978) ("The ideas of the ruling class are in every epoch the ruling ideas: i.e., the class which is the ruling *material* force of society, is at the same time its ruling *intellectual* force." (emphasis in original)). The literature on Marxist conceptions of ideology is enormous. For a useful, brief introduction, see D. MCLELLAN, IDEOLOGY 10-20 (1986).

On Marxist analyses of various academic disciplines in the United States, see THE LEFT ACADEMY: MARXIST SCHOLARSHIP ON AMERICAN CAMPUSES (B. Ollman & E. Vernoff eds. 1982). The editors of *The Left Academy* argue that although "the continued presence of some Marxist professors has become an absolute requirement to legitimize the university," *id.* at 4-5,

[h]olding Marxist views is . . . a grave disadvantage in the competition for scarce jobs, promotions, and tenure in the academy Political bias against Marxist professors generally works in one of two ways: either their research is said to cover too much ground ("This isn't political science"); or they are condemned for not publishing enough in scholarly journals, most of which have been tightly controlled . . . by the orthodox establishment.

Id. at 6.

²² For feminist analogues to the exclusion thesis in literary criticism, see J. RUSS, HOW TO SUPPRESS WOMEN'S WRITING (1983); Baym, *Melodramas of Beset Manhood: How Theories of American Fiction Exclude Women Authors*, in THE NEW FEMINIST CRITICISM: ESSAYS ON WOMEN, LITERATURE AND THEORY 63 (E. Showalter ed. 1985), which states that "the theories controlling our reading of American literature have led to the exclusion of women authors from the canon"; Gilbert, *What Do Feminist Critics Want? A Postcard from the Volcano*, in THE NEW FEMINIST CRITICISM, cited above, at 37, which notes that male colleagues "don't come to our talks, don't read our essays and books, don't in fact concede that we exist as thinkers, teachers, and writers who are part of a significant intellectual movement"; Miller, *Man on Feminism: A Criticism of His Own*, in MEN IN FEMINISM 142 (A. Jardine & P. Smith eds. 1987), which notes that "[a]t stake in the field of feminist criticism is an analysis . . . that challenges not only the exclusion of women writers from the canon, but the criteria that underwrite and regulate the formation of the canon itself"; and Showalter, *The Feminist Critical Revolution*, in THE NEW FEMINIST CRITICISM, cited above, at 3, which states that "literary criticism and its philosophical branch, literary theory, have always been zealously guarded bastions of male intellectual endeavor."

For feminist analogues to the distinctiveness thesis, see M. BELENKY, B. CLINCHY, N. GOLDBERGER & J. TARULE, WOMEN'S WAYS OF KNOWING (1986); C. GILLIGAN, IN A DIFFERENT VOICE (1982); S. HARDING, THE SCIENCE QUESTION IN FEMINISM (1986); and P. SPACKS, THE FEMALE IMAGINATION (1975).

For a systematic overview of feminist analyses in a wide variety of academic pursuits, see FEMINIST SCHOLARSHIP: KINDLING IN THE GROVES OF ACADEME (E. DuBois, G. Kelly, E. Kennedy, C. Korsmeyer & L. Robinson eds. 1985).

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.²³ In the age of slavery, the image of Negro intellectual inferiority became entrenched in the minds of pro-slavery and anti-slavery whites alike²⁴ and helped to rationalize the denial of educational resources to blacks.²⁵

²³ 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); Howard & Hammond, *Rumors of Inferiority*, *NEW REPUBLIC*, Sept. 9, 1985, at 17.

²⁴ 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 ed. 1975).

²⁵ Gaining access to classrooms under any conditions was generally difficult for blacks during this period. For two centuries, many jurisdictions in the United States criminalized the education of slaves, all of whom were black. See E. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 561-66 (1976). During the age of slavery, "free" blacks also encountered fierce resistance to their efforts to obtain education. See I. BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* 76-78 (1974); L. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860*, at 113-52 (1961).

An event in Boston in 1772 vividly illustrated both this suspicion and the power of white authorities over the certification of Negro cultural achievement. At a gathering that included the Governor and Lieutenant Governor of Massachusetts, eighteen of Boston's most notable citizens gathered to determine whether the young black slave woman Phyllis Wheatley had in fact written certain poems she claimed to have authored. After an oral examination, they formally attested to the authenticity of her authorship, an act that was essential to publication of the poems because publishers feared, with justification, that few whites would believe that a Negro working alone could possibly have composed poetry. See Gates, *Editor's Introduction: Writing "Race" and the Difference It Makes*, in "RACE," *WRITING, AND DIFFERENCE* 7-9 (H. Gates, Jr., ed. 1986). Gates aptly remarks that this episode constituted "one of the oddest oral examinations on record." *Id.* at 8.

The derogation of Negro capacity to which Wheatley's publishers responded was a widespread attitude. "At least since 1600, Europeans had wondered aloud whether . . . the African 'species of men,' . . . could ever create formal literature, could ever master 'the arts and sciences.'" Gates, *Race, Writing and Difference*, 4 *MISS. C.L. REV.* 287, 289 (1984) (emphasis in original). A long line of famous white European intellectuals reached a negative conclusion. See C. WEST, *PROPHECY DELIVERANCE: AN AFRO-AMERICAN REVOLUTIONARY CHRISTIANITY* 61-63 (1982). According to Voltaire, Negroes "are not capable of any great application or association of ideas." *Id.* at 62 (quoting Voltaire). David Hume suspected that blacks are "naturally inferior to the whites." *Id.* (quoting Hume). "There never was," according to Hume, "a civilized nation of any other complexion than white, nor even any individual eminent either in action or speculation. No ingenious manufactures amongst them, no arts, no sciences . . ."

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.²⁶ W.S. Scarborough, an accomplished Negro scholar of Greek and Latin, found that there simply was no place for him in academia in late nineteenth-century America, "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."²⁷

Alongside invidious discrimination perpetrated by individuals or private organizations was discrimination authorized or compelled by government.²⁸ In considering racial critiques of legal academia, one must remember that the litigation struggle against de jure segregation was primarily a struggle against segregation in *education*, and that prior to *Brown v. Board of Education*,²⁹ the desegregation of state law schools was a major locus of controversy.³⁰ 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

Id. Responding to statements made by a negro, Immanuel Kant commented that the fellow "was quite black from head to foot, a clear proof that what he said was stupid." *Id.* at 63 (quoting Kant).

²⁶ See generally Winston, *Through the Back Door: Academic Racism and the Negro Scholar in Historical Perspective*, 100 DAEDALUS 678 (1971).

²⁷ Franklin, *The Dilemma of the American Negro Scholar*, in *SOON, ONE MORNING* 70 (H. Hill ed. 1963).

²⁸ 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 Leflar & Davis, *Segregation in the Public Schools — 1953*, 67 HARV. L. REV. 377, 378 n.3 (1954).

²⁹ 347 U.S. 483 (1954).

³⁰ 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).

that are rationalized in terms of meritocratic standards.³¹ Recognizing that American history is seeded with examples of intellectuals of color whose accomplishments were ignored or undervalued because of race³² 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' apologetic account of slavery³³ and William A. Dunning's pejorative portrayal of Reconstruction³⁴ — both of which were enormously influential and long considered to constitute sound scholarly learning³⁵ — 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.³⁶ These same cultural assumptions have affected legal scholarship as well.³⁷ There was a time, not so long ago, when articles and notes in law reviews *defended* segregation,³⁸ questioned the legality and desirability

³¹ 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., 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 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).

³² See, e.g., K. MANNING, *BLACK APOLLO OF SCIENCE* (1983) (delineating in moving detail the ways in which 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, "[a]n 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 Lillie, 11 *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.

³³ See U. PHILLIPS, *AMERICAN NEGRO SLAVERY* (1918).

³⁴ 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 decisionmaking in race-relations cases, see Kennedy, *Reconstruction and the Politics of Scholarship*, 98 *YALE L.J.* 521, 527-28 (1989).

³⁵ For an account of Phillips, see E. GENOVESE, cited above in note 25, at 259. For an account of Dunning, see Muller, *Look Back Without Anger: A Reappraisal of William A. Dunning*, 61 *J. AM. HIST.* 325 (1974).

³⁶ See G. FREDRICKSON, *supra* note 24, 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).

³⁷ See Kennedy, *The Tradition of Celebration*, 86 *COLUM. L. REV.* 1622, 1622-23 (1986).

³⁸ See, e.g., Field, *The Constitutionality of Segregation Ordinances*, 5 *VA. L. REV.* 81 (1917);

of the fifteenth amendment,³⁹ and even condoned (albeit with qualifications) the practice of lynching.⁴⁰ 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.

The second feature of American race relations essential to an understanding of the racial critiques is the ongoing effort by intellectuals of color to control the public image of minority groups and to exercise leadership on their own behalf. In 1827, the opening editorial of the first black-owned newspaper in the United States objected to control exercised by whites over the interpretation of blacks' demands and aspirations. "Too long have others spoken for us,"⁴¹ observed the editor of *Freedom's Journal*. A century later, Carter G. Woodson, the scholar most responsible for establishing Afro-American history as an independent scholarly specialty, vigorously insisted that Negroes should control the research and media through which Afro-American history was presented to the nation.⁴² "[I]f the story of the Negro is ever told," Woodson argued, "it must be done by scientifically trained Negroes [M]en of other races cannot function efficiently because they do not think black."⁴³

Note, *Constitutionality of Segregation Ordinances*, 16 MICH. L. REV. 109 (1917); Comment, *Unconstitutionality of Segregation Ordinances*, 27 YALE L.J. 393 (1918).

³⁹ See Machen, *Is the Fifteenth Amendment Void?*, 23 HARV. L. REV. 169 (1910).

⁴⁰ See Bonaparte, *Lynch Law and Its Remedy*, 8 YALE L.J. 335 (1899). In his article, United States 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).

⁴¹ R. DICK, *BLACK PROTEST: ISSUES AND TACTICS* 3 (1974) (quoting *Freedom's Journal*, Mar. 16, 1827, at 1). The author continued: "Too long has the public [sic] been deceived by misrepresentations in things which concern us deeply." *Id.* Consider also the words of Martin Delany:

The colored people are not yet known . . . for the reason, that politicians, religionists, colonizationists, and abolitionists, have each and all, at different times, presumed to 'think for, dictate to, and know better what suited colored people, than they knew for themselves; and consequently, there has been no other knowledge of them obtained, than that which has been obtained through these mediums.

M. DELANY, *THE CONDITION, ELEVATION, EMIGRATION AND DESTINY OF THE COLORED PEOPLE OF THE UNITED STATES* 10 (1852) (emphasis in original).

⁴² See A. MEIER & E. RUDWICK, *BLACK HISTORY AND THE HISTORICAL PROFESSION*, 1915-1980, at 57-60, 63-66, 288-89 (1986).

⁴³ *Id.* at 289 (quoting a letter from Charles H. Wesley to Carter G. Woodson (Aug. 8, 1927)). Black literary figures expressed similar sentiments. Writing in 1922, William Pickens maintained that "[i]t is not simply that the white story teller will not do full justice to the humanity of the black race; he cannot." *THE BLACK AESTHETIC* xvii (A. Gayle, Jr., ed. 1972) (emphasis in original). The Negro historian Charles Wesley agreed, maintaining that "no member of the other group can study our group as successfully as one of our group can The one who

In the 1970's, activists associated with the Black Power Movement expressed intuitions similar to those raised by Woodson. Their objections and demands concerning academia were far more loud, insistent, and sweeping, however, than any that had previously been raised. Among the demands were that evaluative criteria designed by and for blacks supplement or replace "white standards," that "black studies" be accorded recognition as a distinct area of scholarly endeavor, and that black studies be taught and governed exclusively or predominantly by black professors and students.⁴⁴ Two beliefs that frequently accompanied these demands were: (1) that as "insiders" to minority communities, scholars of color have unique insight into or information about racial issues; and (2) that white scholars as "outsiders"⁴⁵ have little or nothing to contribute intellectually to black studies or the study of race relations and indeed, pose a political danger insofar as their analyses, though flawed, are frequently used by politicians as the basis for public policy.⁴⁶

feels the pinch can tell the story of the joy or pain more convincingly and truthfully than another." A. MEIER & E. RUDWICK, *supra* note 42, at 289.

For similar reasons, some black scholars and political activists expressed misgivings, see D. SOUTHERN, GUNNAR MYRDAL AND BLACK-WHITE RELATIONS 9-10 (1987), about the choice by the Carnegie Corporation of a *white* social scientist to direct the massive study on race relations that became Gunnar Myrdal's extraordinarily influential *An American Dilemma* (1944).

⁴⁴ For commentary on these developments, see generally BLACK STUDIES IN THE UNIVERSITY (A. Robinson, C. Foster & D. Ogilvie eds. 1969); and NEW PERSPECTIVES ON BLACK STUDIES (J. Blassingame ed. 1971). On the demand for "black" standards, see Ladner, *Introduction to THE DEATH OF WHITE SOCIOLOGY* (J. Ladner ed. 1973), which states that "[b]lacks have always been measured against an alien set of norms. As a result they have been considered to be a deviation from the ambiguous white middle-class model. . . ." *Id.* at xxiii; see also Gayle, *Cultural Strangulation: Black Literature and the White Aesthetic*, in THE BLACK AESTHETIC, *supra* note 43, at 38 (arguing for recognition of a "Black Aesthetic" in literary judgment); Hare, *The Challenge of a Black Scholar*, in THE DEATH OF WHITE SOCIOLOGY, *supra*, at 73 (noting that "[t]he black scholar must break free from . . . enslavement to Western concepts of scholarship"); Staples, *What is Black Sociology? Toward a Sociology of Black Liberation*, in THE DEATH OF WHITE SOCIOLOGY, *supra*, at 168 (stating that "[b]lack sociology must be the science of liberation. The task of Black sociology is to provide the legitimization of Black institutions and behavior that have evolved to meet the needs of the Black masses."); Stewart, *Introduction to Black Aesthetics in Music*, in THE BLACK AESTHETIC, *supra* note 43, at 77-91 (arguing for recognition of "Black Aesthetic" in the evaluation of music); Walters, *Toward a Definition of Black Social Science*, in THE DEATH OF WHITE SOCIOLOGY, *supra*, at 190 (arguing for the creation of a "Black social science").

⁴⁵ For a penetrating critique of the "insiders"-"outsiders" paradigm, see Merton, *Insiders and Outsiders: A Chapter in the Sociology of Knowledge*, 78 AM. J. SOC. 9 (1972). The intellectual debt I owe to Merton's analysis can be seen in practically every aspect of this Article. See also Wilson, *The New Black Sociology: Reflections on the "Insiders and Outsiders" Controversy*, in BLACK SOCIOLOGISTS 327 (J. Blackwell & M. Janowitz eds. 1974) (arguing against the proposition that insider or outsider status should be deemed significant for purposes of evaluating scholarly work).

⁴⁶ See, e.g., Billingsley, *Black Families and White Social Science*, in THE DEATH OF WHITE SOCIOLOGY, *supra* note 44, at 431. According to Billingsley, white social scientists' exclusion of

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.⁴⁷ The boycott dramatized a variety of objections,

blacks from social science scholarship, *see id.* at 442, perpetuates "the 'white people know best' tendency," *id.*, and produces analyses that serve to rationalize social policies injurious to black communities, *see id.* at 445-46. What is needed, he declares, is a reorientation in social science research in which the "leadership must come from black scholars." *Id.* at 450.

Similar sentiments continue to be felt and voiced. Recently, for instance, a number of black scholars repudiated the unfinished work of the National Research Council Committee on the Status of Black Americans because of objections to the Committee's racial composition. The Committee is engaged in "[m]arshall[ing] descriptive data on the changing position of blacks in American society since 1940 . . . and explor[ing] the consequences, anticipated and unanticipated, of public and private initiatives to ameliorate the position of blacks in America." Jaynes & Williams, *Challenges and Opportunities*, SOCIETY, Jan.-Feb. 1987, at 3. The Committee's study director, Professor Gerald Jaynes, is a person of color, as are a substantial number of those who constitute the Committee and its senior staff, including John Hope Franklin, Bernard R. Gifford, James Lowell Gibbs, Charles V. Hamilton, Eleanor Holmes Norton, and William J. Wilson. *See id.* at 4-6. Professor Charles Willie still objects, however, on the grounds that the study director is not the sole or senior author of the Committee's final report, and that the Committee's chairman, Professor Robin Williams, is white:

I doubt that a man would be appointed chair of a committee on the status of women in America today. Such would not be tolerated by women. So why should the Committee on the Status of Black Americans be led by a white American? . . . The current committee leadership for the study of blacks in the 1980's is more than insensitive; it is an insult to blacks.

Willie, *Appearances and Sensitivities*, SOCIETY, Jan.-Feb. 1987, at 21; *see also* Butler, *Social Research and Scholarly Interpretation*, SOCIETY, Jan.-Feb. 1987, at 18 (stating that "[w]hat is under attack is the track record that has been established by such studies [about Afro-Americans by Euro-Americans] and the reality that one's group can have a significant impact on the interpretation of data").

Another recent protest involving allegations of unfairness in the allocation of intellectual authority and honorific recognition involves allegations of racism over omissions in universities' curricula of cultural achievements by people of color. *See* Atlas, *On the Campus: The Battle of the Books*, N.Y. Times, June 5, 1988, § 6 (Magazine), at 24. Still another recent protest involved an open letter signed by 48 black writers decrying the fact that Toni Morrison, a black novelist of international reputation, had not been awarded either a National Book Award or a Pulitzer Prize. "We . . . assert ourselves," the signatories of the letter proclaimed, "against such oversight and harmful whimsy." *Black Writers in Praise of Toni Morrison*, N.Y. Times, Jan. 24, 1988, § 7 (Book Review), at 36.

⁴⁷ 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. Board 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 prior to 1976. *See* R. KLUGER, *supra* note 30; M. MELTSNER, *CRUEL & UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973); M. TUSHNET, *supra* note 30; C. VOSE, *CAUCASIANS ONLY* (1959); 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 both as an advocate, participating in

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.⁴⁸ 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.⁴⁹ Furthermore, in the view of at least some of the boy-

scores of cases before the Supreme Court, including *Brown*, and as a scholar. See, e.g., J. GREENBERG, *RACE RELATIONS AND AMERICAN LAW* (1959); 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 Carroll, *Rights Unit's New Leader*, N.Y. Times, June 13, 1984, at A17, col. 1.

⁴⁸ 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) [hereinafter Open Letter] (on file at the Harvard Law School Library).

⁴⁹ Sympathetically relating the views of some of the protesters, Derrick Bell observes that while they applauded Greenberg's contributions to civil rights, they also contended "that he should long since have recognized the symbolic value of his position to the black community and turned over the leadership post to a black lawyer." Bell, *A Question of Credentials*, *supra* note 8, at 7, col. 1; see also King, *Minority-Hiring Fight at Harvard*, Boston Globe, Nov. 17, 1982, at 29, col. 3.

Some observers attempted to portray the protesters' argument as unprecedented. Greenberg himself stated that it had never been "seriously" suggested that he step aside from the directorship of the LDF in favor of a black attorney. That is inaccurate. Greenberg's succeeding Thurgood Marshall as the director of the LDF had long disturbed significant portions of the black bar and civil rights community. Louis Lomax reported that "[t]he argument invariably comes in these words: 'The Jews would die before they would let a Negro rise to the leadership of one of their organizations; so why should we let Jews, or any white man . . . head our organization?'" L. LOMAX, *THE NEGRO REVOLT* 180 (1962); see also Kennedy, *On Cussing Out White Liberals*, NATION, Sept. 4, 1982, at 169, 171.

The problem of interracial competition within the ranks of those seeking to obtain or enforce civil rights for blacks is an old one. For an insightful analysis of an early phase of this problem

cotters, the fact 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 there would exist a substantial pool of suitably qualified minority teachers.⁵⁰

The boycott was harshly criticized by a broad array of observers.⁵¹ 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"⁵² 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."⁵³ 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."⁵⁴

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.⁵⁵ Moreover, the privileging of whites in cultural en-

among black and white civil rights attorneys, see Meier & Rudwick, *Attorneys Black and White: A Case Study of Race Relations Within the NAACP*, 62 J. AM. HIST. 913 (1976). See also Marx & Useem, *Majority Involvement in Minority Movements: Civil Rights, Abolition, Untouchability*, in RACIAL CONFLICT: TENSION AND CHANGE IN AMERICAN SOCIETY 424 (G. Marx ed. 1971) (comparing the conflicts between minority insiders and liberal outsiders in the civil rights movement).

⁵⁰ See Open Letter, *supra* note 48.

⁵¹ See, e.g., *Blind Pride at Harvard*, N.Y. Times, Aug. 11, 1982, at A22, col. 1 (editorial by *The New York Times*); Kennedy, *On Cussing Out White Liberals*, *supra* note 49; 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, *see id.* at 73, and the *North Carolina Daily News*, *see id.* at 89.

⁵² Edley, *The Boycott at Harvard: Should Teaching Be Colorblind?*, Washington Post, Aug. 18, 1982, at A23, col. 3.

⁵³ Bell, *A Question of Credentials*, *supra* note 8, at 14, col. 1.

⁵⁴ *Id.*

⁵⁵ See Kennedy, *Speaking for Blacks*, HARPER'S, May 1980, at 93; see also Kilson, *Paradoxes of Blackness: Notes on the Crisis of Black Intellectuals*, DISSENT, Winter 1986, at 70 (noting

terprise 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."⁵⁶ The color line, however, has cast long shadows over that area of cultural accomplishment as well.⁵⁷ In the 1950's, 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 rewards⁵⁸ — a pattern still visible today, albeit in less dramatic form.⁵⁹

that "[t]he paradox of blackness in American society [is that in] white hands, blackness can be converted into sizable commercial . . . value"). At the same time, black academics specializing in racial affairs received a boost not only from the groundswell of interest in their specialty, but also from demands insisted upon by black power activists. See *supra* p. 1755. Still, it is striking the degree to which major institutions, including those controlled by whites of a decidedly liberal bent, evinced a strong preference for white commentators on racial issues. See Kennedy, *Speaking for Blacks*, *supra*, at 93.

⁵⁶ J. BALDWIN, NOTES OF A NATIVE SON 24 (1949).

⁵⁷ Langston Hughes captured the frustration many black artists have felt when he wrote:

You've taken my blues and gone —
 You sing 'em on Broadway
 And you sing 'em in Hollywood Bowl,
 And you mixed 'em up with symphonies
 And you fixed 'em
 So they don't sound like me.
 Yep, you done taken my blues and gone.

Hughes, *Note on Commercial Theater*, reprinted in 1 A. RAMPERSAD, THE LIFE OF LANGSTON HUGHES, 1902-1941, at 381 (1986).

⁵⁸ See J. ORMAN, THE POLITICS OF ROCK MUSIC 3 (1984).

In 1954, "covers," white versions of songs previously recorded by blacks, hit the charts. This unfortunate practice became profitable for many record companies who found covers sold better in a racist popular culture than original versions. Bill Haley and the Comets scored the economic gains for "Shake, Rattle and Roll," where the original artist, Ivory Joe Hunter, did not. Pat Boone covered Fats Domino's "Ain't That a Shame" and other black hits. . . . For the most part, the practice of covers came to an end when young white Americans started demanding the real thing.

Id.; see also McLeese, Book Review, N.Y. Times, Oct. 18, 1987, § 7, at 13 (reviewing *Chuck Berry: The Autobiography* (1987)) ("Although Berry lacked Presley's smoldering sensuality, he lacked something else that was even more crucial: white skin. In the America of the 1950's (and 60's and beyond), the country was quicker to embrace a white man who sounded black than a black man who sounded white."); G. HIRSHEY, NOWHERE TO RUN: THE STORY OF SOUL MUSIC xv-xvi (1984) (stating that despite some softening of the color line, black artists still often find themselves "effectively shut out" of receiving airplay on mainstream radio and in cable-TV rock video); D. MARSH, FORTUNATE SON 268-300 (1985) (commenting that rock critics have all too often ignored music by blacks while championing derivative music by whites).

For examples of the ways in which the rankling memory of this history finds expression in the work of black legal academics, see D. BELL, AND WE ARE NOT SAVED, cited above in note 14, at 128; and Dalton, cited above in note 7, at 444-45.

⁵⁹ Music critic Steve Perry notes, for instance, that while there exists in rock music increasingly more racial crossover in audiences and among musicians, "[t]he most prominent lines in rock are still racial." Perry, *Black and White and Heard All Over*, IN THESE TIMES, Oct. 8-

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, the task to which I now turn.

II. TESTING CLAIMS OF RACIAL EXCLUSION AND RACIAL DISTINCTIVENESS

A. Bell, Delgado, and Racial Exclusion

1. *Bell*. — Professor Derrick Bell's writings are certainly among the most provocative contributions to the racial critique literature. The piece that best conveys his view of the race problem in the legal academic establishment is an allegorical tale, *The Unspoken Limit on Affirmative Action: The Chronicle of the DeVine Gift*.⁶⁰ In this story, Bell imagines how an elite, predominantly white law school would react to the prospect of hiring a black candidate — the Seventh Candidate — who, if hired, would increase the minority presence on the faculty to twenty-five percent.⁶¹ Bell creates a white dean who states that the school will not appoint this Seventh Candidate because doing so would, in his eyes, change the racial character of the school

14, 1986, at 12. Commenting on the situation in Minneapolis, one of the most artistically fertile and racially integrated centers of rock music production, Perry writes:

[R]acial lines still get drawn with a vengeance on nearly every level It's exemplary '80s racism, which is to say that it speaks mostly through its silences. It's a question of what people don't say, and who they don't include. . . . In the Twin Cities, black artists aren't vilified. But they are frequently and quietly ignored.

Id. For a more positive appraisal of the racial dynamics of rock 'n' roll, see Perry, *Ain't No Mountain High Enough: The Politics of Cross-over*, in *FACING THE MUSIC* 51 (S. Frith ed. 1988). See also *infra* note 263 and accompanying text.

Other areas of American culture that have been and continue to be deformed by racist ideas and practices include film, painting, and sculpture. See *BLACK FILMS AND FILM MAKERS* (L. Patterson ed. 1975) (compiling articles detailing racist treatment of black film-makers and racist portrayals of blacks in movies); Horowitz, *Hollywood's Dirty Little Secret*, *PREMIERE*, Mar. 1989, at 56 (uncovering racism in the allocation of power in the motion picture industry); Failing, *Black Artists Today: A Case of Exclusion*, *ARTNEWS*, Mar. 1989, at 24 (arguing that despite the worthiness of work produced by black artists, it continues to be devalued by racist, stereotypical assumptions). According to one recent report, outstanding works of black artists are beginning to attain deserved recognition. See Brenson, *Black Artists: A Place in the Sun*, *N.Y. Times*, Mar. 12, 1989, § 2, at 1, col. 2. This same report notes, however, that "black artists continue to encounter tremendous resistance within the institutionalized art world. . . . [M]ost people who follow, show and buy contemporary art do not have a clue how rich and complex the art of black Americans is." *Id.*

⁶⁰ See D. BELL, *Unspoken Limit*, *supra* note 14, at 140-61.

⁶¹ See *id.* at 143.

to an intolerable degree.⁶² According to Bell, the Seventh Candidate's effect on the racial make-up of the faculty would "threaten[], at some deep level, the white faculty members' sense of ideological hegemony."⁶³ In order to highlight what he perceives as the racism that affects even those institutions formally committed to affirmative action, Bell hypothesizes that the Seventh Candidate has impeccable credentials and is superqualified by any reasonable standard.⁶⁴ Although Bell criticizes the conventional standards used to identify merit,⁶⁵ his main point is a warning that even when blacks satisfy these standards they can still expect to face discrimination, especially if what whites view as an inconvenient number become too successful.⁶⁶

Although fictional in its specifics, this allegory sets forth what Professor Bell views as a realistic portrait of white elite legal academic institutions. Elsewhere, writing in a nonfictional form, he bluntly avers that "[q]ualifications aside, law school faculty [at mainly white schools] consider their schools as 'white schools' and would resist hiring beyond a certain number of even the most qualified teachers of color."⁶⁷

Bell rightly insists upon considering whether, behind the rhetoric of reform, traditional fears and prejudices play a role in maintaining a system of legal education in which the number of black professors remains disturbingly small.⁶⁸ Racial interaction in a variety of contexts provides indirect support for his suspicion. He mentions the "tipping" phenomenon in housing whereby whites are willing to accept a certain small number of black neighbors but resist or flee when blacks begin to constitute a larger presence.⁶⁹ He also points to

⁶² See *id.*

⁶³ *Id.* at 158.

⁶⁴ Bell's Seventh Candidate is "exceptionally able" with "impeccable" academic credentials. One of Bell's characters relates that the Seventh Candidate was:

The top student at our competitor school, . . . had edited the law review and 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 where, after three years of work they rated 'splendid,' he was in line for early election to partnership.

Id. at 142-43.

⁶⁵ See *id.* at 147-48.

⁶⁶ See *id.* at 143.

⁶⁷ Bell, *Tipping Point*, *supra* note 14, at 325.

⁶⁸ The most recent and comprehensive figures are contained in an article that is based on a review of 149 law schools, constituting about 85% of the member institutions of the American Association of Law Schools (AALS). See Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988). According to Chused, "[i]n 1986-87, a typical law school faculty had thirty-one members . . . [O]f these . . . thirty were white and one was black, Hispanic, or other minority . . ." *Id.* at 538. These figures prompt Chused to conclude that "[r]acial tokenism is alive and well at American law schools." *Id.* at 539.

⁶⁹ See D. BELL, *Unspoken Limit*, *supra* note 14, at 151-52; see also *United States v. Starret*

allegations that elite educational institutions are imposing quota limits on Asian-Americans.⁷⁰ Given the residual influence of white supremacist thought and sensibility, one can imagine that at least some predominantly white faculties might cease to apply customary standards evenhandedly if the consequence of doing so was clearly leading to a sufficiently large increase in the number of black professors such that they "threatened" to become a powerful bloc.

To the extent, however, that Bell seeks to speak to *current* racial policies in legal academia — as distinct from potential developments in the future — his analysis is significantly limited, and will widely be viewed as such, because it avoids a central issue: the oft-stated proposition that the paucity of black professors in the leading law schools is largely explained by the paucity of black candidates who are qualified by traditional standards for such posts. Considerable evidence suggests that at present, distressingly few black candidates attain the qualifications typically required for admission to elite law school faculties — the type of qualifications that Bell confers upon the Seventh Candidate, including excellent grades, selection to law review, a law review note, and high-level clerkships.⁷¹ Indeed, some reports indicate that minority candidates with excellent conventional

& City Assocs., 840 F.2d 1096 (2d Cir.) (holding that a quota limiting the number of minorities allowed into a housing project violates the federal open housing statute), *cert. denied*, 109 S. Ct. 376 (1988); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1140 (2d Cir. 1973) (holding that a quota limiting the number of minorities allowed into a housing project to prevent "tipping" does not violate the federal Constitution); Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245 (1974); Note, *Tipping the Scales of Justice: A Race-Conscious Remedy for Neighborhood Transition*, 90 YALE L.J. 377 (1980).

⁷⁰ See D. BELL, *Unspoken Limit*, *supra* note 14, at 145 & n.2; see also Bunzel & Au, *Diversity or Discrimination? — Asian Americans in College*, PUB. INTEREST, Spring 1987, at 49; Gibney, *The Berkeley Squeeze*, NEW REPUBLIC, Apr. 11, 1988, at 15.

⁷¹ Relating the comments of law school deans and academics he interviewed for an article on the scarcity of black professors in legal academia, David Kaplan writes that "most . . . said there simply are not enough qualified applicants and, for the rare hot prospects that do exist, the competition from other schools and the private sector is intense. To expand the pool, the academics warn, would require an unacceptable diminution of standards." Kaplan, *Hard Times for Minority Profs*, NAT'L L.J., Dec. 10, 1984, at 28, col. 1.

I know of no study that systematically compares the credentials of white and minority candidates for law school posts. A study of this sort might run into opposition. Commenting on difficulties he encountered in researching affirmative action and college admissions, Robert Klitgaard notes:

[C]olleagues and friends wondered whether it would be unpleasant or risky or even wrong to study group differences, bias, and representation. Some thought that studying bias and the performance of minorities could heighten racial sensitivities, with negative consequences. Minorities might feel hurt if they thought that as a group their test scores and grades and academic performance were being studied. Admissions officers and university administrators might worry that the results of an investigation of bias would cast them in a bad light. And those who studied such matters might find their integrity questioned.

R. KLITGAARD, *CHOOSING ELITES* 157 (1985).

qualifications are in such short supply that those who have them become the focus of veritable bidding wars.⁷² Bell sidesteps the issue by recourse to poetic license: he *imagines* a black candidate who is qualified or even superqualified by conventional measures, but who is excluded nonetheless from a law school faculty by naked prejudice.

Whether there currently exists a hidden ceiling of invidious racism can only be fully determined by putting white academics to the test — that test being a willingness to hire and promote black candidates who display the traditional criteria of academic achievement even if proceeding in this manner produces faculties in which blacks occupy a significant or even predominant share of the available positions. The fragmentary evidence available suggests that there are, unfortunately, insufficient numbers of black candidates qualified by traditional criteria to put the white academic establishment to that test.⁷³

Bell challenges the usefulness of the criteria used to delimit the pool of "qualified" candidates. He questions the value of grades in making evaluations of persons who have been engaged in active careers for substantial periods after graduating from law school and criticizes what he perceives as an unwillingness to take into account adequately other indicia of achievement and promise that might more accurately identify the strengths of minority candidates.⁷⁴ Bell rightly recognizes that standards themselves are socially constructed and hence liable to embody the biases of sectors of society that possess the power to impose such standards — sectors of society, one might add, that typically and unsurprisingly prosper pursuant to these standards. The legitimacy of a given standard, however, cannot properly be determined wholly by reference to consequences measured by bare statistics — such as disparities between the numbers of students of color in law school and the number of professors of color. The statistics generated by a given standard may well provide a predicate for questioning it. Results indicating that a given standard disadvantages the members of one group relative to others may indicate that the standard itself needs reform. On the other hand, statistics may indicate that those who failed to satisfy the criteria in question are themselves in need of reform. Ascertaining which conclusion to reach in a particular context always requires more than statistics. It requires recourse to a complex set of normative and descriptive assumptions. A statistic, after all, is never self-explanatory; it always requires interpretation.

When there is widespread agreement with respect to relevant assumptions, the interpretive effort required to make sense of a given

⁷² See Kaplan, *supra* note 71, at 28, col. 1.

⁷³ See *id.*

⁷⁴ See Bell, *Tipping Point*, *supra* note 14, at 325.

statistical outcome is minimal; it is enough merely to announce the outcome. In that situation — situation one — the statistic comes close to speaking for itself. In situation two, when widespread agreement on underlying assumptions is missing, it is improper — or at least unpersuasive — merely to announce a statistical outcome, and to presume that that will be enough: *res ipsa loquitur*. When consensus on underlying assumptions is missing, one cannot presume that a statistical result will be interpreted unambiguously. One must recognize instead that the result will generate competing interpretations, each of which must be argued for and supported by specific substantiation. For example, differences in underlying descriptive and normative assumptions account for the different treatment that judges give to claims of racial discrimination in low-level jobs as opposed to those involving high-level jobs. Judges are far more willing to let the numbers do the talking in cases involving low-level employment as opposed to high-level employment.⁷⁵

An example of situation one would be an unbroken, year-long series of all-white juries in an urban area with a large black population; in that context, the numbers themselves give rise to what many would view as a *prima facie* case of racial discrimination.⁷⁶ An example of situation two would be an all-white engineering faculty. In that context, the numbers themselves would probably cause a far more complicated and uncertain reaction because many observers would likely intuit that the absence of blacks in such a situation may well be explainable in terms of a severe shortage of qualified candidates.⁷⁷ Bell seeks to portray the small number of professors of color in elite law schools as a situation one problem. But stubborn facts, as well as the perceptions of much of the legal academic professoriat, suggests that it would be more persuasive to approach the law school context as a situation two problem. At a minimum, this requires

⁷⁵ See generally Barthelet, *Jobs in High Places*, 95 HARV. L. REV. 945 (1982).

⁷⁶ See, e.g., *Castaneda v. Partida*, 430 U.S. 482 (1977) (holding that extreme disproportionality between the number of Mexican-Americans available for grand jury service and the general population of Mexican-Americans creates a *prima facie* case of discrimination); *Norris v. Alabama*, 294 U.S. 587 (1935); *Neal v. Delaware*, 103 U.S. 370 (1881) (holding that extreme disproportionality between the number of Negroes available for jury service and the number of Negroes called for jury service creates a *prima facie* case of unconstitutional racial exclusion). But see *Castaneda*, 430 U.S. at 508–18 (Powell, J., dissenting) (arguing that the degree of disproportionality in the case at issue was not itself enough to make out a *prima facie* case of discrimination).

⁷⁷ In 1986, in the entire United States there were no blacks receiving doctoral degrees in geometry, astronomy, astrophysics, acoustics, theoretical chemistry, geology, aerospace engineering, or computer engineering. "Only 14 engineering and 25 physical science doctorates went to blacks out of more than 8,000 awarded — less than one-half of one per cent." Hirschorn, *The Doctorate Dilemma*, NEW REPUBLIC, June 6, 1988, at 26; see also Lewis, *Study Finds Decline of PhDs Among Black Males*, Boston Globe, Feb. 20, 1989, at 7, col. 1.

directly engaging the competing hypotheses that others use to explain the situation.

In *The Unspoken Limit on Affirmative Action*, Bell notes in a footnote that some observers explain the small numbers of black academics by the small pool of candidates qualified by conventional criteria.⁷⁸ But he makes no attempt to engage that argument. Instead he adopts the posture of one who believes that merely stating the opposing argument is enough to refute it. That is a mistake, assuming that he seeks to persuade people who are not already committed to his position. Professor Bell needs to offer such people a careful, detailed exposition. What he delivers is mere assertion. Moreover, even if one believes — as does Bell — that conventional standards governing appointments are inadequate or misleading, it is still important to know why a disproportionately large number of black and other minority candidates fail to satisfy these criteria.

After all, even if traditional standards are faulty, they are, nonetheless, significant features of the social landscape that one must master in order to accomplish certain goals. This is not to discourage efforts to unmask and reform criteria that fail, in actuality, to accomplish as efficiently and equitably as possible the purposes they purportedly serve. It is self-defeating, however, to leave unexplored why it is that criteria that seem innocuous and relevant on their face have such disastrous consequences for minority candidates. The “pool problem” in the minority community of student-scholars and mature scholars — the apparent inability to field a team that can put the white academic establishment to the test that Professor Bell constructs — is in dire need of investigation but is largely avoided by commentators who have concerned themselves with the race question in legal academia.⁷⁹

Others concerned with racial conflict within the cultural arena have adopted a different stance. Although John Hope Franklin speaks poignantly about the racist exclusion and belittlement to which black historians were subjected,⁸⁰ he refused to exempt them (or himself, of course) from critical evaluation even though they worked under the pall of open, formalized racial discrimination. He maintained that, even in the midst of such obstacles, black scholars were still free either

⁷⁸ See D. BELL, *AND WE ARE NOT SAVED*, *supra* note 14, at 269 n.4.

⁷⁹ A notable exception is Strickland, *Scholarship in the Academic Circus or the Balancing Act at the Minority Side Show*, 20 U.S.F. L. REV. 491 (1986). See also *infra* text accompanying note 99.

⁸⁰ Professor Franklin has written, for instance: “The world of the Negro scholar is indescribably lonely; and he must, somehow, pursue truth down that lonely path while, at the same time, making certain that his conclusions are sanctioned by universal standards developed and maintained by those who frequently do not even recognize him.” Franklin, *supra* note 27, at 72; see also *infra* note 123.

to hone or waste their talents. Writing about black historians in the 1940's and 1950's, Franklin observed:

Many black scholars of my own generation were reluctant to prepare the kind of papers that were required for the national professional meetings in my field. One needed only to have attended the black professional meetings to see the difference in quality and the willingness of some black scholars to settle for much less than first rate-papers. Indeed, the generation before me had stronger scholars who were at home both in the black groups and the white groups . . . [T]he papers in the *Journal of Negro History* for that period reflect that high standard.⁸¹

E. Franklin Frazier offered criticism that was far more damning. Writing in 1962, Frazier stated bluntly: "We have no philosophers or thinkers who command the respect of the intellectual community at large."⁸² Much to the same effect is Harold Cruse's *The Crisis of the Negro Intellectual*.⁸³ More recently, the conservative commentator Thomas Sowell has acknowledged academic "underachievement" by black students and professors,⁸⁴ as has Sowell's ideological opposite, the socialist scholar Cornel West. Echoing themes propounded by Frazier, Cruse, and Sowell, West charges that "mediocrity of various forms and in different contexts suffocates much of Black intellectual life."⁸⁵ He maintains that "despite the larger numbers of Black scholars relative to the past (though still a small percentage in relation to white scholars), Black intellectual life is a rather depressing scene."⁸⁶

⁸¹ Goggin, *Countering White Racist Scholarship*, 68 J. NEGRO HIST. 355, 359 (1983) (quoting a letter from John Hope Franklin to Goggin (Sept. 14, 1981)).

⁸² Frazier, *The Failure of the Negro Intellectual*, in E. FRANKLIN FRAZIER ON RACE RELATIONS 273 (G. Edwards ed. 1968). The Negro intellectual, Frazier charged, "[had] failed to study the problems of Negro life in America in a manner which would place the fate of the Negro in the broad framework of man's experience in this world." *Id.* at 274. Frazier continued: "[the Black intellectual] has carried on all sorts of arguments in defense of the Negro but they were mainly designed to protect his own status and soothe his hurt self-esteem." *Id.* at 278; see also E. FRAZIER, *BLACK BOURGEOISIE* 159 (1957) ("The lack of interest of the black bourgeoisie . . . in the broader issues facing the modern world is due to the fact that the Negro has developed no economic or social philosophy except the opportunistic philosophy that the black intelligentsia has evolved to justify its anomalous and insecure position.").

⁸³ H. CRUSE, *THE CRISIS OF THE NEGRO INTELLECTUAL* (1967).

⁸⁴ See T. SOWELL, *BLACK EDUCATION: MYTHS AND TRAGEDIES* (1972).

⁸⁵ West, *The Crisis of Black Leadership*, ZETA MAG., Feb. 1987, at 25.

⁸⁶ *Id.* at 25. At another point, West writes:

There has not been a time in the history of Black people in this country when the quantity of politicians and intellectuals was so great, yet the quality of both groups has been so low. Just when one would have guessed that Black America was flexing its political and intellectual muscles, *rigor mortis* seems to have set in.

Id. at 22. "Why," he asks, "hasn't Black America produced intellectuals of the caliber of W.E.B. DuBois, Anna Cooper, E. Franklin Frazier, Oliver Cox, and Ralph Ellison in the past few decades?" *Id.*; see also Watts, *The Case of a Black Conservative*, 29 DISSENT 301 (1982).

My purpose here is not to affirm the writings noted above; Frazier, Cruse, and West tend toward overstatement and neglect to illustrate their arguments by reference to specific, interracial comparative judgments. My purpose is to affirm the usefulness of at least posing the questions they ask — questions that consider not only the danger of racist response to intellectual work by blacks but also the possibility of *underachievement* by black intellectuals.

My comments should not be read to suggest that legal academia is free of racial prejudice. No white scholar of comparable stature would have faced the demeaning treatment that Derrick Bell received at Stanford Law School in 1986 when white students and professors, dissatisfied with his performance as a teacher, surreptitiously created a remedial series of lectures to supplement his course on constitutional law.⁸⁷ That this affront was inflicted upon a prominent black scholar at a top tier law school prompts concern about the fate of lesser-known black scholars at less-visible institutions. If anecdotal reports are accurate even by half, scholars of color at a broad range of institutions constantly face race-related difficulties in routine encounters with white colleagues, administrators, and students.⁸⁸

⁸⁷ Paul Brest, the current Dean at Stanford Law School, succinctly states the essential facts:

In the Spring of 1986, Derrick Bell was a visitor at Stanford Law School, where he taught an introductory course in Constitutional Law. Professor Bell was the former Dean of the University of Oregon Law School, and he teaches at Harvard Law School. He is a prominent legal scholar. He is also Black.

Students in Professor Bell's class criticized his teaching and complained that they were unable to learn the subject from him. Many began auditing other instructors' constitutional law classes. These events ultimately led to the idea of a series of public lectures in basic constitutional law to be given by various faculty members. Although these lectures would be open to the student body as a whole, their unstated purpose was to offer Professor Bell's students a supplement to his course. The series was called off after members of the Black Law Students Association protested the first lecture on the ground that both the students' dissatisfaction and the unprecedented lecture series were tainted by racism.

Statement of Dean Paul Brest, [Stanford] Campus Report, Dec. 2, 1987, at 15, reproduced in D. Bell, Stanford Law School Follow-Up (unpublished memorandum) (on file at the Harvard Law School Library). Along with other members of the Stanford Law School Faculty and Administration, Brest has expressed regret over the occurrence of this ugly incident and has apologized for it. See *id.*

For Derrick Bell's poignant account of this episode, see Bell, *The Price and Pain of Racial Perspective*, Stan. L. Sch. J., May 9, 1986, at 5. Describing his own reaction to the snub inflicted upon him, Bell wrote:

I find myself remembering with feelings approaching fondness the occasional Southern judge, who, to insure that I did not miss his disdain for both my competence and my cause, swiveled his chair and faced the wall when I approached the bench to argue a civil rights case. Back then, the racial hostility was patent and the insult expected. [By contrast] I accepted the invitation to visit Stanford as something of a reward for a decade and a half of 'proving myself worthy' to teach at a prestigious school. . . . As a guest welcomed with smiles at the door, I must confess that I simply was not prepared for what happened after I thought myself safe among friends.

Id.

⁸⁸ See, e.g., R. DELGADO, MINORITY LAW PROFESSORS' LIVES: THE BELL-DELGADO SURVEY

This rather depressing portrayal of the burden on black scholars should be leavened, however, by due recognition of counter-currents, including strong formal and informal condemnations of racism. At Stanford Law School, for instance, officials apologized profusely for the insult suffered by Derrick Bell and initiated actions designed to improve racial dynamics at the school, including increased efforts to bring minority scholars onto the faculty.⁸⁹ Moreover, deans and professors at leading law schools still express commitments to pursue affirmative action policies, even though at many of these institutions there is no legal obligation to do so.⁹⁰ These considerations suggest that more than the prejudice of white professors accounts for the current scarcity of minority scholars at the highest levels of legal academia.

Keeping in perspective the relative influence of racial prejudice is important because exaggerating its significance obscures other, probably more telling, explanations for the scarcity of black professors.⁹¹ One explanation, directly related to the pool problem, is that competition for entry into the top tier of legal scholarship comes at the end of a series of preparatory stages — elementary, secondary, collegiate, and professional schooling — at which minorities, on average, find themselves disadvantaged in comparison to whites.⁹² To a large extent, the disadvantage stems from structural inequalities that produce racially disparate patterns of poverty, schooling, crime, and lifestyle decisions that affect aspirations and opportunities.⁹³ These patterns and their consequences constrict the number of minorities in a position to attempt to ascend the academic hierarchy.

(Institute for Legal Studies Working Papers Series 3, Oct. 1988); Austin, *Resistance Tactics for Tokens*, 3 HARV. BLACKLETTER J. 52, 52 (1986) (complaining of being relegated to "solitary confinement" by racist white colleagues); Brooks, *Life After Tenure: Can Minority Law Professors Avoid the Clyde Ferguson Syndrome?*, 20 U.S.F. L. REV. 419, 420 (1986) (noting that minority scholars often "stand alone in an environment that offers token support and frequent antagonism").

⁸⁹ See Statement of Dean Paul Brest, *supra* note 87, at 3–5; Bell, Stanford Law School Follow-Up, *supra* note 87.

⁹⁰ See Kaplan, *supra* note 71, at 28, col. 3.

⁹¹ See generally Hirschorn, *supra* note 77, at 24 (arguing that a shortage of qualified blacks primarily accounts for the low number of black academicians).

⁹² Asked about the paucity of minority law professors, one law school dean is quoted as having said: "Most of the minority [law] students congregate at the lower end of their classes. We [the law schools] can't make up for past discrimination and the unbelievably low quality of inner-city schools, where most of the blacks are." The author of this statement requested anonymity. See Kaplan, *supra* note 71, at 28, col. 3.

⁹³ See e.g., R. FARLEY & W. ALLEN, *THE COLOR LINE AND THE QUALITY OF LIFE IN AMERICA* (1987); J. HOCHSCHILD, *THIRTY YEARS AFTER BROWN* (1985); J. OAKES, *KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY* (1985); W. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987); Hacker, *American Apartheid*, N.Y. REV. BOOKS, Dec. 3, 1987, at 26.

Another explanation is that opportunities that have only recently been opened to blacks now lure potential black scholars into career paths that are more attractive than faculty positions (at least in terms of financial remuneration).⁹⁴ The allure of high salaries in the business world affects the aspirations of white as well as minority students, but because whites are so much more numerous, their pattern of choice is neither as salient nor as socially consequential as that of their minority peers.

The variables discussed above affect the number of qualified candidates who *enter* the professoriat; other variables affect the numbers who excel as scholars. Because of their scarcity, minority academics probably find themselves beset by far greater demands from students (particularly black students) and administrators than their white counterparts.⁹⁵ This is a burden that cannot help but impede efforts to produce top-grade written legal scholarship.

Another explanation may involve self-limiting social-psychological adaptations. In their analysis of underachievement by black students in secondary schools and colleges, Jeff Howard and Ray Hammond conclude that disturbingly consistent "performance gaps" are largely "the result of a remediable tendency to avoid intellectual engagement and competition."⁹⁶ "Avoidance," they maintain, "is rooted in the fears and self-doubt engendered by a major legacy of American racism: the strong negative stereotypes about black intellectual capabilities."⁹⁷ Perhaps a similar dynamic affects some black scholars as well, causing them to engage in various strategies of avoidance: for example, exempting themselves from the risks of failure by refusing to compete on the same terms as whites or refraining from investing themselves wholeheartedly in their careers.⁹⁸ "Too often," observes Professor

⁹⁴ See Kaplan, *supra* note 71, at 29, cols. 1-2 (offering statistical and anecdotal evidence in support of the proposition that among minority law school graduates there has existed a relative lack of interest in pursuing academic careers); see also Lawrence, *supra* note 13, at 436 ("[W]hile law schools often claim they would welcome a [minority] tax professor, the financial lures of corporate practice make the minority academic with expertise in these areas a particularly rare specimen."). In a contradictory statement in the same article, Professor Lawrence rejects the view that the pool of qualified minority candidates for academic posts is diminished by minority students who choose to pursue more financially rewarding careers elsewhere. See *id.* at 431 ("[T]here is a misperception that the financial allure offered by large firms to outstanding minority law graduates . . . further reduces the size of the pool.").

⁹⁵ See D. BELL, *Unspoken Limit*, *supra* note 14, at 140; Bell, *Tipping Point*, *supra* note 14, at 320-21; Brooks, *supra* note 88, at 420 ("Tenured minority professors, like their white counterparts, are obliged to engage in full-time teaching, scholarship, and committee work. But unlike their white counterparts, they face . . . 'special burdens' that can make for a stressful life, both personal and professional."); Lawrence, *supra* note 13, at 430; Strickland, *supra* note 79.

⁹⁶ Howard & Hammond, *supra* note 23, at 18.

⁹⁷ *Id.*

⁹⁸ Although they do not appear to have focused upon black scholars in particular, Howard

Rennard Strickland, "minority faculty members sell their potential short. We accept [the whites'] stereotype that minority professors are incapable of producing first-rate scholarship. . . . It is far easier to talk about how busy we are, about the great demands on our time, about unfairness, . . . than it is to write books and articles."⁹⁹

A number of plausible explanations thus shed light on likely impediments to the creation of a flourishing crop of exemplary scholarship by minority legal academics. But Bell's writings, like much of the racial critique literature, give virtually exclusive attention to one explanation — the racial prejudice of white academics — while leaving the others underdeveloped. This is worrisome as an analytic matter, because exaggerating one aspect of a complicated issue almost inevitably entails underemphasizing other aspects of the problem. It is also worrisome as a political matter. As a result of this underemphasis, impediments other than the prejudice of white academics are likely to receive less consideration — including less remedial attention — than they should from those interested in changing current conditions.¹⁰⁰

2. *Delgado*. — The most elaborate attempt in the racial critique literature to document racial prejudice in the allocation of scholarly recognition is Professor Richard Delgado's *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*.¹⁰¹ Delgado charges

and Hammond contend that "[a]voidance of intellectual competition" does "affect[] the intellectual performance of black people of all ages and feeds public doubts about black intellectual ability." *Id.*

⁹⁹ Strickland, *supra* note 79, at 500.

¹⁰⁰ See *infra* Part III.

¹⁰¹ *The Imperial Scholar*, *supra* note 4. The title of Delgado's article brings to mind the theory of "internal colonialism" that was articulated in the 1960's to conceptualize racial oppression in the urban ghettos. See R. BLAUNER, *Internal Colonialism and the Ghetto Revolt*, in *RACIAL OPPRESSION IN AMERICA* 82 (1972). One of the principal analysts of the internal colonialism paradigm spoke of social scientists in terms that presaged Delgado's image of "the imperial scholar":

Like the policeman, storekeeper, teacher and welfare worker, [the social scientist] was usually a white outsider who entered ghettos and barrios to advance personal and institutional goals that were determined outside the community of study. His authority to diagnose group problems and interpret culture and life-styles conflicted with the demands for group self-definition and self-determination that were central to the new consciousness of the racially oppressed. From such a perspective, the fact that the major studies and analyses of Third World people in the United States have been carried out by whites took on new significance.

Blauner & Wellman, *Toward the Decolonization of Social Research*, in *THE DEATH OF WHITE SOCIOLOGY*, *supra* note 44, at 311-12.

An earlier version of Professor Delgado's article was delivered at Harvard Law School during the Greenberg-Chambers controversy as part of a lecture series organized as an alternative to the boycotted race-relations course. See Delgado, *The Imperial Scholar*, *supra* note 4, at 561 n.7; Hudson, *TWC [Third World Coalition] Offers Alternative Spring Course*, *Harv. L. Rec.*, Jan. 21, 1983, at 1, col. 3.

that the leading white commentators on race-relations law comprise a cadre of "imperial scholars" who have occupied the central areas of civil rights scholarship and have systematically excluded or minimized the participation of minority academics.¹⁰² Courts rarely cite the work of minority scholars, Delgado claims, "and the legal scholars whose work *really* counts almost never do."¹⁰³ He asserts, moreover, that white legal academics have neglected to use or to acknowledge the contributions of minority scholars in history, sociology, social psychology, and other fields relevant to studying the intersection of racism and law.¹⁰⁴ He makes this assertion on the basis of his review of twenty-eight articles by white commentators including Bruce Ackerman, Paul Brest, John Ely, Owen Fiss, Frank Michelman, and Laurence Tribe.¹⁰⁵ Delgado notes that in the overwhelming majority of instances, the works cited by these articles were also written by white men. These articles thus reveal, he maintains, a closed intellectual universe in which "the imperial scholars" discuss one another's ideas while excluding the ideas of scholars of color: "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."¹⁰⁶ In accounting for "the strange absence of minority scholarship from the text and footnotes of the central arenas of legal scholarship dealing with civil rights,"¹⁰⁷ Professor Delgado rejects both "conscious malevolence or crass indifference."¹⁰⁸ Rather, he posits that the imperial scholars' exclusionary conduct is mainly unconscious and prompted by their desire to maintain control, to prevent scholarly criticism from becoming too threatening to the academic and political status quo.¹⁰⁹

Professor Delgado's concern with the sociology of citation focuses attention on an important aspect of the theory and practice of academic governance: the political economy of scholarly recognition. Citation¹¹⁰ helps to create and allocate scholarly recognition by indicating that, at least in the eyes of the citator, the cited work is worthy

¹⁰² See Delgado, *The Imperial Scholar*, *supra* note 4, at 566.

¹⁰³ *Id.* at 562 (emphasis in original).

¹⁰⁴ See *id.* at 563-64.

¹⁰⁵ See *id.* at 562 n.3.

¹⁰⁶ *Id.* at 563 (citation omitted).

¹⁰⁷ *Id.* at 574.

¹⁰⁸ *Id.*

¹⁰⁹ See *id.* at 573-76.

¹¹⁰ There are, of course, all sorts of citations. The citation to which Delgado refers means reference to a given work as a source of intellectual authority. It means the sort of reference that prompts the author cited to feel that he or she is a significant and recognized part of academic discourse.

of attention.¹¹¹ It is a public letter of recommendation.¹¹² The person cited, moreover, is not the only potential beneficiary of citation. The scholar citing a particular work may benefit as well. Citation offers a way to display one's knowledge of a given literature, to show deference to those in a position to harm or help one's career, and to advance the careers of friends or ideological allies. The "artistic and abstruse discipline" of footnoting thus "functions as a subtle, but critical, influence in the determination of promotion, tenure, and professional status."¹¹³ It facilitates the formation of interpretive communities. By citing one another, intellectuals help to create standards of judgment, hierarchies of concern, and conventions of argument.

Delgado alleges that in elite race-relations law scholarship, citation is distributed, like many goods in our society, on a racially discriminatory basis. Before one can evaluate this claim, however, one must first have in mind a normative theory of citation. A work is appropriately citable if it provides support for a given proposition. Sometimes there may exist only one such work. Typically, however, a number of eligible candidates will exist. If an author is willing and able to cite all eligible sources of authority, then the question of discrimination never arises; all of the scholars whose work warrants citation obtain the benefits of scholarly recognition and have no grounds for complaint. But in many instances, an author will be either unable or unwilling to cite all of those works eligible for recognition. If choices are to be made, what considerations should govern them?

One model of academic procedure — a "meritocratic" model — dictates that, for purposes of citation, a scholar should be indifferent to the personal identity of the producers of scholarship. Under this model, all that is relevant is the relative merits of the works competing for recognition.¹¹⁴ This widely accepted ideal of scholarly procedure

¹¹¹ The value of citation in the marketplace of academic reputation is underlined by the care with which some treatise writers conspicuously note where and the extent to which their writings have been referred to as authority. See, e.g., 1 & 2 CORBIN ON CONTRACTS (Kaufman Supp. 1984) (passim); 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE (2d ed. 1987) (same).

¹¹² Explaining the value of a list of the most-cited law review articles, Professor Fred Shapiro suggests that such a list "draw[s] attention to writings that, by virtue of their objectively measured impact, deserve to be called classics of legal scholarship." Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540, 1540 (1985). Whether or not one agrees with this proposition, it does reflect an attitude toward frequently cited articles that I suspect is widespread. See also Matsuda, *Affirmative Action and Legal Knowledge*, supra note 5, at 5 ("Tenure and promotion review committees typically ask whether a candidate's work is cited."); Comment, *Citation Sources and the New York Court of Appeals*, 34 BUFFALO L. REV. 965, 965 (1985) (arguing that in their citation practices judges "are both seeking legitimacy and legitimizing the source used").

¹¹³ Austin, *Footnotes as Product Differentiation*, 40 VAND. L. REV. 1131, 1135 (1987).

¹¹⁴ I realize that standards of merit are intensely controversial. As I define the term, "merit"

reflects values at the heart of what Robert K. Merton describes as "the ethos of modern science."¹¹⁵ One of these values is universalism, which refers to "the canon that truth claims . . . are to be subjected to *preestablished impersonal* criteria."¹¹⁶ A related value is disinterestedness, meaning a commitment to truth above partisan social allegiances.¹¹⁷ Both these values find expression in such practices as "blind" grading and "blind" screening of articles for publication. These procedures seek to minimize partiality by withholding from evaluators the personal identity of those scholars whose work is being evaluated.

A second model of academic procedure is openly race-conscious. It dictates that racial background be used as a basis for preferring scholarship by academics of color.¹¹⁸ Faced with a choice between eligible candidates for citation, a proponent of the race-conscious model would consider the racial identity of the authors and prefer the work of minorities over that of whites.

Delgado assimilates the meritocratic and race-conscious models. He invokes the latter when he insists that racial background should matter in the evaluation of scholarship; he invokes the former when he claims that the scholarship of minorities in the area of civil rights is entitled to greater recognition because that work, nourished by minorities' experience of racial oppression, is analytically superior to "the unsatisfactory quality of the scholarship being produced by the [white] inner circle."¹¹⁹ This claim is meritocratic insofar as it implies that the scholarship of minority intellectuals would not be entitled to greater recognition if it was not intellectually equal or superior to competitors. As Delgado puts it, "[s]tudied indifference to minority writings on issues of race would be justified if the writing were second-rate."¹²⁰

Applying a meritocratic model, does Delgado show persuasively that in legal academia scholars of color are wrongly excluded on racial grounds from a proper share of academic recognition? His effort to

stands for achieved honor by some standard that is indifferent to the social identity of a given author. For an insightful discussion of contending definitions, see Fallon, *To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination*, 60 B.U.L. REV. 815 (1980).

¹¹⁵ R. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURES* 607 (rev. ed. 1968).

¹¹⁶ *Id.* (emphasis in original). Universalism means that "[t]he acceptance or rejection of claims entering the lists of science is not to depend on the personal or social attributes of their protagonist; his race, nationality, religion, class and personal qualities are as such irrelevant." *Id.*

¹¹⁷ See *id.* at 612-14.

¹¹⁸ For commentary expressly urging the use of this model, see Delgado, *The Imperial Scholar*, cited above in note 4, at 564-66; and Matsuda, *Affirmative Action and Legal Knowledge*, cited above in note 5.

¹¹⁹ Delgado, *The Imperial Scholar*, *supra* note 4, at 577.

¹²⁰ *Id.* at 573.

substantiate the allegation is unlikely to persuade those who are not already committed to believing his charge.

On the basis of twenty-eight articles published in law reviews between 1959 and 1979,¹²¹ Delgado states that certain well-known white scholars writing in the race-relations field "only infrequently" cite work by minority scholars.¹²² He argues further that this neglect is wrongful, and that it is related to race. The persuasive way to reveal this alleged sin of omission would be to identify scholarship that deserves to be recognized but that is unfairly overlooked. Yet Delgado fails to shoulder the essential burden of championing on substantive grounds specific works that deserve more recognition than they have been given. When critics of American historical studies rail against the white establishment's neglect of black historians,¹²³ they do not simply document that white academicians have ignored scholarship by blacks. They compare writings by blacks to work by whites and delineate the features that make the neglected writings worthy of attention.¹²⁴

¹²¹ See *id.* at 562 n.3.

¹²² See *id.* at 563.

¹²³ White academics' neglect of the scholarly contributions of black historians is well documented. See A. MEIER & E. RUDWICK, *supra* note 42; Winston, *supra* note 26. W.E.B. DuBois' *Black Reconstruction in America* challenged reigning interpretations of Reconstruction by portraying it as a salutary advance toward democracy that had largely been mobilized and shaped by former slaves. Published in 1935, it was an extraordinary work of scholarship, with insights that now inform the most advanced historical learning. See, e.g., E. FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, at xxi (1988) [hereinafter E. FONER, *RECONSTRUCTION*] (expressing intellectual indebtedness to DuBois). Yet during DuBois' lifetime, *Black Reconstruction* was largely ignored by white scholars; the *American Historical Review* did not even review it. See E. FONER, *NOTHING BUT FREEDOM: EMANCIPATION AND ITS LEGACY 6* (1983). Indeed, a considerable amount of revisionist writing on Afro-American history published by white historians in the forties, fifties, and sixties derived part of its perceived "originality" from an institutionalized ignorance of earlier work produced by black historians, much of it published in the *Journal of Negro History*. See Goggin, *supra* note 81, at 355; see also E. GENOVESE, *IN RED AND BLACK: MARXIAN EXPLORATIONS IN SOUTHERN AND AFRO-AMERICAN HISTORY* li (enlarged ed. 1984) (acknowledging the failure of white historians such as himself to credit adequately the work of important black scholars such as Carter G. Woodson).

Professor David Brion Davis captures the extent to which the achievements of black historians were rendered invisible when he recalls that even after having prepared for his PhD orals in 1954, he was "totally ignorant" of work produced by such seminal black scholars as W.E.B. DuBois, Carter G. Woodson, Benjamin Quarles, Eric Williams, and John Hope Franklin. See D. DAVIS, *Slavery, and the Post-World War II Historians*, in *FROM HOMICIDE TO SLAVERY* 189 (1986). Woodson "was virtually single-handedly responsible for establishing Afro-American history as a historical specialty." A. MEIER & E. RUDWICK, *supra* note 42, at 1. Woodson's writings include *The History of the Negro Church* (1921) and *The Negro Professional Man and the Community* (1934). As of 1954, Franklin's contributions included, among other works, *From Slavery to Freedom: A History of Negro Americans* (1947). Eric Williams authored *Capitalism and Slavery* (1944); and Benjamin Quarles wrote *Frederick Douglass* (1948) and *The Negro in the Civil War* (1953).

¹²⁴ See, e.g., Goggin, *supra* note 81. Similarly, when the literary critic Mary Helen Wash-

By contrast, Delgado's concern with authors' racial identity ends up dwarfing his attentiveness to the work he seeks to advance. He writes with little specificity about the merits of the writings that, according to him, have wrongly been ignored. He refers to Judge A. Leon Higginbotham's history of race-relations law in colonial America as "monumental" and the social-psychological analysis of Drs. W. Grier and P. Cobbs as "powerful."¹²⁵ Yet these encomia do nothing to explain what, as a matter of substance, distinguishes these works. At another point, Delgado lists a number of articles by scholars of color that, according to him, illustrate that "[m]inority writers . . . have focused on difficult problems overlooked by mainstream writers."¹²⁶ But when he describes these "difficult problems" with such generality, it becomes immediately apparent that, contrary to his assertion, white scholars, too, have seen and addressed the problems supposedly overlooked.¹²⁷

ington complains about the reception that was accorded to Gwendolyn Brooks' 1953 novel *Maud Martha*, she does not rest after pointing out simply that Brooks was a woman, and that the reviewers were men. See M. WASHINGTON, *INVENTED LIVES: NARRATIVES OF BLACK WOMEN, 1860-1960*, at xv-xvii (1987). She pushes further, as she must, in order to establish her point persuasively. She discusses the merits of *Maud Martha*, the qualities that made it worthy of more extended and respectful attention. See *id.* at xvi. Washington's description of a story that appeared in the *Negro Digest* in 1950 vividly illustrates the way in which achievement can be unfortunately obscured by misapplied attentiveness to an individual's social background. The article that Washington rightly excoriates focused on everything about the Pulitzer-Prize-winning Brooks — except her poetry. "The entire article," Washington observes, "was an act of sabotage, situating Brooks in a domestic milieu where her 'proper' role as wife and mother could be asserted and her role as serious artist . . . could be undercut." *Id.* at xv.

¹²⁵ Delgado, *The Imperial Scholar*, *supra* note 4, at 563 (citing A. HIGGINBOTHAM, *IN THE MATTER OF COLOR* (1978), and W. GRIER & P. COBBS, *BLACK RAGE* (1968)).

¹²⁶ *Id.* at 576 n.76.

¹²⁷ Delgado describes one article as a "proposal for achieving racial diversity in professional schools." *Id.* (citing Ravenell, DeFunis and Bakke . . . *The Voice Not Heard*, 21 HOW. L.J. 128 (1978)). He describes another article in terms of its attentiveness to "the shortage of minority professionals and the need to alleviate that shortage." *Id.* (citing Romero, Delgado & Reynoso, *The Legal Education of Chicano Students: A Study in Mutual Accommodation and Cultural Conflict*, 5 N.M.L. REV. 177 (1975)). These are large topics that have attracted the attention of scholars from a variety of racial backgrounds. White scholars who have written in these areas include O'Neil, *Racial Preferences and Higher Education: The Larger Context*, 60 VA. L. REV. 925 (1974); Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975); and Tribe, *Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice?*, 92 HARV. L. REV. 864 (1979).

The article cited by Delgado that has the best claim to topical distinctiveness is Derrick Bell's *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976). But that article, along with the other articles by Bell which Delgado cites, can hardly be said to have been overlooked. Bell's *Serving Two Masters* is particularly well-known and widely cited. See, e.g., R. COVER & O. FISS, *THE STRUCTURE OF PROCEDURE* 271-82 (1979); P. BREST & S. LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* xxxv (2d ed. 1983). Moreover, with respect to the general topic that Bell's article explores — tensions between ideologically motivated lawyers and clients seeking immediate and personal relief — it is worth noting, in light of Delgado's

Even where Delgado expressly attempts to add specificity to his account, he says strikingly little about the scholarship he champions. Consider an anecdote he relates about an interaction he had with an unnamed white colleague who requested criticisms on a draft of an article. According to Delgado, the article involved an elaboration of the ideal of "equal personhood" and a critique of the way that this ideal is undermined by excluding persons from acceptance in a given political community. He describes the article as "excellent" and agrees with its premises and conclusions.¹²⁸ Yet the piece disturbs him because on reading its footnotes, he "noticed that [the author of the article] had failed to cite Black or minority scholars, an exclusion from the community of kindred souls as glaring as any condemned in the paper."¹²⁹ To demonstrate to the white colleague the inadequacies of his citation practice, Delgado noted that in a discussion of "withered self-concepts" — the psychological consequences of exclusion — the colleague had referred to an article by Frank Michelman, a white professor at Harvard Law School.¹³⁰ "I pointed out," Delgado writes, "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 [my colleague] add references to such works as Kenneth Clark's *Dark Ghetto* and Grier and Cobb's *Black Rage*, and he agreed to do so."¹³¹ Delgado thus clearly implies that the reason for citing the works he recommended is the minority status of their authors and certain experiences he *presumed* they had had on account of that status.

The laxity of Delgado's argumentation in favor of the works for which he seeks more attention may stem, in part, from the belief that, at least with respect to issues involving race relations,¹³² there is no need to argue on behalf of the merit of work done by scholars of color. He appears to think that their work in this area is self-evidently entitled to recognition. Comparing legal academia unfavorably with the social sciences, Delgado contends that with respect to the latter:

comments, that a racially diverse set of commentators have addressed that topic, some of whom set forth arguments that Bell built upon. See, e.g., Cahn & Cahn, *Power to the People or the Profession? — The Public Interest in Public Interest Law*, 79 YALE L.J. 1005 (1970); Wasserstrom, *Postscript: Lawyers and Revolution*, 30 U. PITT L. REV. 125 (1968).

¹²⁸ See Delgado, *The Imperial Scholar*, *supra* note 4, at 564.

¹²⁹ *Id.*

¹³⁰ *Id.* at 565.

¹³¹ *Id.*

¹³² According to Professor Delgado, "minority writers have had little trouble gaining recognition outside the core areas of civil rights." *Id.* at 573. He does not state this proposition as a speculation or tentative hypothesis. Rather, he posits it unqualifiedly. His support for this proposition is insubstantial, however, in that it does not provide any comparative analysis to suggest that non-race-related scholarship is cited more frequently than other types of scholarship produced by minority academics. See *id.* at 565 n.19.

[M]inority status constitutes virtually a presumption of expertise; Blacks writing about the Black community and Chicanos about the Chicano community are accepted as equal (perhaps more than equal) partners. Indeed, ethnic studies departments sometimes resist hiring Caucasian faculty members out of the belief that they are generally less qualified for the position than candidates who are members of the minority group in question.¹³³

That statement, however, is problematic. First, although some have argued in favor of reforming canons of evaluation along the lines he suggests,¹³⁴ these arguments have generally been rejected, at least formally; no significant academic institution as a matter of policy accords to minority scholars a presumption of expertise merely on the basis of racial identity.¹³⁵ Second, his analogy between race-relations law and black or Chicano studies is inapt. By definition, *race-relations* law involves more than the study of any one community; it involves the study of communities in conflict and how legal structures have mediated their interaction. Given that race-relations law necessarily embraces more than any single group, it is difficult to see the justification for presuming expertise on the part of scholars of one racial identity as opposed to another.¹³⁶

Third, even if the scholarship at issue was narrowly concerned with the inner-experience of a single racial group, it would still be improper to presume expertise merely on the basis of a scholar's membership in a given group. One's racial (gender, religious, regional) identity is no substitute for the disciplined study essential to achieving expertise. Although one is born with certain physical characteristics to which society attaches various labels, one is not born with the knowledge we expect of experts; that characteristic is something that is attained and not merely inherited.

My comments on Professor Delgado's presentation should not be read as an implicit exoneration of legal academia. The law school

¹³³ *Id.* at 564 n.15.

¹³⁴ See *supra* p. 1755.

¹³⁵ For rebuttals to arguments in favor of imputing scholarly expertise on the basis of racial identity, see R. MERTON, cited above in note 45; W. WILSON, cited above in note 45; Blassingame, *Black Studies: An Intellectual Crisis*, in *NEW PERSPECTIVES IN BLACK STUDIES*, cited above in note 44, at 149; Kilson, *Reflections on Structure and Content in Black Studies*, 3 J. BLACK STUD. 297 (1973); and Rosovsky, *Black Studies at Harvard: Personal Reflections Concerning Recent Events*, 38 AM. SCHOLAR 562 (1969).

On the other hand, I suspect, although I cannot prove, that as a matter of unspoken practice, some institutions do discourage "outsiders" from teaching in areas set aside for "insiders" to a given subject. This may be due to some extent to an intuition that minorities (or women) bring "special" insight to these subjects. It may also stem from prudential considerations, a desire to avoid confrontation with minority (or women) students who insist that race (or gender) does constitute an intellectual credential.

¹³⁶ Cf. Minow, *The Supreme Court, 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 13-14 (1987) (discussing "whose point of view matters").

professoriat is, as I note elsewhere,¹³⁷ beset by troublesome racial problems. Delgado, however, fails to support his specific allegations. One simply cannot make an effective argument that work by academics of color is being treated in a racially invidious manner without taking the time, energy, and risk of elaborating in detail the substantive merits of that scholarship in comparison with that produced by white competitors.

B. Matsuda and Claims of Racial Distinctiveness

Professor Mari Matsuda's criticisms of legal academia¹³⁸ are generally congruent with those articulated by Professors Bell and Delgado. She, too, maintains that the allocation of academic prestige is distorted by an illicit racial hierarchy that favors whites over blacks.¹³⁹ In contrast to Bell and Delgado, however, who emphasize the racial exclusion theme that is prevalent in racial critiques, Matsuda emphasizes the theme of racial distinctiveness. She argues that by the exclusions imposed by existing practices, legal academia loses the sensibilities, insights, and ideas that are the products of racial oppression. She insists that, because of their minority status and the experience of racial victimization that attaches to that status, people of color offer valuable and special perspectives or voices that, if recognized, will enrich legal academic discourse. "Those who have experienced discrimination," she writes, "speak with a special voice to which we should listen."¹⁴⁰ "The victims of racial oppression," she asserts, "have distinct normative insights."¹⁴¹ "Those who are oppressed in the present world," she avers, "can speak most eloquently of a better one."¹⁴²

But what, as a function of race, is "special" or "distinct" about the scholarship of minority legal academics? Does it differ discernibly in ways attributable to race from work produced by white scholars? If so, in what ways and to what degree is the work of colored intellectuals different from or better than the work of whites?

Matsuda's answers to these questions are revealing, though what they reveal is undoubtedly at odds with what she intends to display.

¹³⁷ See *supra* notes 87-90 and accompanying text.

¹³⁸ See Matsuda, *Affirmative Action and Legal Knowledge*, *supra* note 5; Matsuda, *Looking to the Bottom*, *supra* note 10.

¹³⁹ See Matsuda, *Affirmative Action and Legal Knowledge*, *supra* note 5, at 2 (decrying "apartheid in legal knowledge").

¹⁴⁰ Matsuda, *Looking to the Bottom*, *supra* note 10, at 324.

¹⁴¹ *Id.* at 326.

¹⁴² *Id.* at 346; see also Bell, *A Question of Credentials*, *supra* note 8, at 14, col. 1 ("Race can create as legitimate a presumption as a judicial clerkship in filling a teaching position intended to interpret to law students the impact of racial discrimination on the law and lawyering. [Moreover, the] special and quite valuable perspective on law and life in the country that a black person can provide is not limited to civil rights issues . . ."); Delgado, *The Imperial Scholar*, *supra* note 4, at 568-73.

She writes that readers "will delight in the new insights gleaned from writers previously unknown,"¹⁴³ that "[t]he new voices will emphasize difference,"¹⁴⁴ and that "[t]he outsiders' different knowledge of discrimination . . . is concrete and personal"¹⁴⁵ and will force readers "to confront the harsh edge of realism."¹⁴⁶ Yet, at least with respect to legal scholarship, she fails to show the newness of the "new knowledge" and the difference that distinguishes the "different voices."

In the course of building her argument, she refers to a broad range of cultural expression: speeches by Frederick Douglass,¹⁴⁷ writings by W.E.B. DuBois,¹⁴⁸ poetry by Pauli Murray,¹⁴⁹ music by John Coltrane,¹⁵⁰ essays by Audrey Lorde,¹⁵¹ novels by James Weldon Johnson¹⁵² and Ishmael Reed,¹⁵³ and the oral memoirs of Japanese-Americans detained in American concentration camps during World War II.¹⁵⁴ She counsels legal academics to look to these and other sources that embody insights offered by people who have been oppressed. She includes within the ranks of such people legal academics of color.¹⁵⁵ But their work is virtually non-existent among the prominent examples of the cultural expression she champions. Like Delgado, she offers little detailed advocacy in favor of particular works of legal scholarship that have supposedly been wrongly overlooked.

Matsuda claims that the racial status of minority scholars uniquely deepens and sharpens their analysis of racism and their resolve to end it. She suggests, in other words, that victimization breeds certain intellectual and moral virtues.¹⁵⁶ She writes, for instance, that "Black

¹⁴³ Matsuda, *Affirmative Action and Legal Knowledge*, *supra* note 5, at 5.

¹⁴⁴ *Id.* at 8.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 9.

¹⁴⁷ See Matsuda, *Looking to the Bottom*, *supra* note 10, at 334, 347 (citing Douglass, *West Indian Emancipation*, in W. MARTIN, *THE MIND OF FREDERICK DOUGLASS* (1984)).

¹⁴⁸ See *id.* at 333 (citing W.E.B. DuBois, *THE SOULS OF BLACK FOLK* (Signet Classic ed. 1969)).

¹⁴⁹ See *id.* (citing P. MURRAY, *DARK TESTAMENT AND OTHER POEMS* (1970), which is reprinted in E. STETSON, *BLACK SISTER* 90 (1981)).

¹⁵⁰ See *id.* at 335 (citing Gates, *The blackness of blackness*, in *BLACK LITERATURE AND LITERARY THEORY* 291 (H. Gates ed. 1984), which refers to John Coltrane's rendition of *My Favorite Things*).

¹⁵¹ See *id.* at 342 (citing A. LORDE, *SISTER OUTSIDER* (1984)).

¹⁵² See *id.* at 351 (citing J. JOHNSON, *THE AUTOBIOGRAPHY OF AN EX-COLORED MAN* (1912)).

¹⁵³ See *id.* at 351, 353, 391-93 (citing I. REED, *YELLOW BACK RADIO BROKE-DOWN* (1969), which is quoted in Gates, *The blackness of blackness*, in *BLACK LITERATURE AND LITERARY THEORY* 285 (H. Gates ed. 1984)).

¹⁵⁴ See *id.* at 327 n.21, 367 (citing J. TATEISHI, *AND JUSTICE FOR ALL: AN ORAL HISTORY OF THE JAPANESE AMERICAN DETENTION CAMPS* (1984)).

¹⁵⁵ See *id.* at 331.

¹⁵⁶ The intuition behind this idea has a long, distinguished, but ultimately disappointing history. Marx, for instance, suggested that capitalism would provide the schooling that would

Americans, because of their experiences, are quick to detect racism, to distrust official claims of necessity, and to sense a threat to freedom."¹⁵⁷ When closely scrutinized, however, this line of distinction blurs and erodes.

This is not to say that Matsuda's assertions are wholly incorrect. For example, *some* black Americans undoubtedly do display certain moral and intellectual virtues derived from experience with racial oppression. But Matsuda's proposition distorts reality by ignoring significant tendencies that run counter to the ones she acknowledges. She notes that some black Americans displayed laudable solicitude for Japanese-Americans whom the United States government confined in internment camps during World War II.¹⁵⁸ She suggests that that solicitude stemmed from an empathy grounded in blacks' experience with racism. But what about the passivity with which *most* blacks — like *most* whites — responded to the internment of Japanese-Americans? Significantly, neither the NAACP nor any other predominantly black organization submitted an amicus curiae brief to the Supreme Court in *Korematsu v. United States*¹⁵⁹ or the other cases challenging the government's internment policy.

The mere experience of racial oppression provides no inoculation against complacency. Nor does it inoculate the victims of oppression against their own versions of prejudice and tyranny. One need only consider, for example, the phenomena of free blacks owning slave blacks,¹⁶⁰ or lighter-skinned Negroes shunning darker-skinned Ne-

instruct the proletariat of the necessity for communist revolution. "Not in vain," he wrote, "does [the proletariat] go through the harsh but hardening school of labour." Marx, *Alienation and Social Classes*, in *THE MARX-ENGELS READER*, *supra* note 21; cf. Lenin, *What Is To Be Done*, in *THE LENIN ANTHOLOGY* 50 (R. Tucker ed. 1972). As Lenin wrote:

The history of all countries shows that the working class, exclusively on its own effort, is able to develop only trade union consciousness The theory of socialism, however, grew out of the philosophic, historical, and economic theories elaborated by educated representatives of the propertied classes, by intellectuals. By their social status the founders of modern scientific socialism, Marx and Engels, themselves belonged to the bourgeois intelligentsia.

Id. at 24-25.

¹⁵⁷ Matsuda, *Looking to the Bottom*, *supra* note 10, at 360; see also Dalton, *supra* note 7, at 435-41; Delgado, *The Imperial Scholar*, *supra* note 4, at 573-74.

¹⁵⁸ See Matsuda, *Looking to the Bottom*, *supra* note 10, at 360 & n.152.

¹⁵⁹ 323 U.S. 214 (1944). See generally P. IRONS, *JUSTICE AT WAR* (1983); Rostow, *The Japanese-American Cases — A Disaster*, 54 *YALE L.J.* 489 (1945).

¹⁶⁰ Here, of course, I do not refer to free blacks who rescued slave relatives or friends by buying them. In some of these instances, rescuers were prevented by state law from freeing their "slaves." Rather, I refer to the appreciable number of free blacks in the South who, internalizing one of the reigning ideas of their society, bought slaves for profit and convenience. See I. BERLIN, *supra* note 25, at 274-75; M. JOHNSON & J. ROARK, *BLACK MASTERS: A FREE FAMILY OF COLOR IN THE OLD SOUTH* (1984).

Professor Patricia Williams thus speaks too broadly when she writes that "from the *experiential perspective of blacks*, there was and is no such thing as 'slave law,'" and that "[t]he individual and unifying cultural memory of black people is the helplessness, the uncontrollability

groes,¹⁶¹ or the participation by substantial numbers of blacks in the subjugation of other people of color both domestically and internationally.¹⁶² Matsuda refers to Martin Luther King, Jr., and the Civil Rights Movement in the course of suggesting that rebellion has been the natural, inevitable response of those who have experienced racial oppression. Under many circumstances, however, oppression is as likely to breed docility as resistance.¹⁶³ King himself repeatedly emphasized that breaking their own habitual acquiescence to racist oppression would constitute one of the heaviest burdens blacks would have to overcome in their struggle for greater freedom.¹⁶⁴

The negative side of the idyllic portrait Matsuda paints should indicate that the relationship between thought, experience, and racial status is not nearly so predictable as she suggests. Moreover, internalization of color prejudice, acquiescence to subordination, and indifference or hostility toward others victimized by racism cannot be dismissed as the idiosyncratic responses of relatively few people of color.¹⁶⁵ These behaviors and forms of consciousness constitute central aspects of the complex way in which racial minorities have re-

of living under slavery." Williams, *supra* note 2, at 417 (footnote omitted) (emphasis in original). Not all blacks in the pre-Civil War United States were slaves. Some were free. Some were slave-masters.

¹⁶¹ See I. BERLIN, *supra* note 25, at 276-80; E. FONER, RECONSTRUCTION, *supra* note 123, at 100-01; G. MYRDAL, AN AMERICAN DILEMMA, *supra* note 43, at 695-96 ("The American order of color caste has . . . directly stamped the Negro class system by including relative whiteness as one of the main factors determining status within the Negro community.") Although the Black Power Movement of the 1960's changed the color consciousness of many blacks, older patterns continue to exert some influence. For an examination of this issue in a present-day setting, see S. LEE & L. JONES, UPLIFT THE RACE: THE CONSTRUCTION OF SCHOOL DAZE 85, 94-95 (1988).

¹⁶² See generally B. NALTY, STRENGTH FOR THE FIGHT: A HISTORY OF BLACK AMERICANS IN THE MILITARY (1986). For a particularly strong antidote to sentimentality about the effects of racist oppression on Negro Americans, see W. TERRY, BLOODS: AN ORAL HISTORY OF THE VIETNAM WAR BY BLACK VETERANS (1984).

¹⁶³ See B. MOORE, INJUSTICE: THE SOCIAL BASES OF OBEDIENCE AND REVOLT (1978).

¹⁶⁴ See, e.g., M. KING, STRIDE TOWARD FREEDOM 20-25 (Perennial Library ed. 1964). According to King, a striking fact about the Negro community in Montgomery, Alabama prior to the famous bus boycott of 1955-1956

was the apparent passivity of the majority of the uneducated. . . . [The] largest number accepted [segregation] without apparent protest. Not only did they seem resigned to segregation per se; they also accepted the abuses and indignities which came with it. . . . Their minds and souls were so conditioned to the system of segregation that they submissively adjusted themselves to things as they were.

Id. at 21-22.

¹⁶⁵ For an insightful discussion of the broad range of adaptations that people of color and other marginalized groups have exhibited in the midst of oppressive social environments, see G. ALLPORT, THE NATURE OF PREJUDICE 142-64 (25th anniversary ed. 1988). In a chapter titled "Traits Due to Victimization," Allport discusses, among other things, denial of membership in the disparaged group, withdrawal, pacificity, clowning, strengthening in-group ties, self-hatred, militancy, and enhanced striving. See *id.* at 142-61.

sponded to conditions in the United States and are thus clearly relevant to any attempt to derive theories based upon that response.

Matsuda's analysis is marred by both her tendency to homogenize the experience of persons of color and her tendency to minimize the heterogeneity of opinions held and articulated by persons of color.

Because, in Matsuda's view, the experience of racial oppression is a profoundly significant, if not decisive, determinant of intellectual work, it would seem important for her to focus on the actual experience of colored scholars. Matsuda, however, simply *presumes* that any scholar of color will have undergone the experience — the initiation into racial victimhood — that she deems so important. In her analysis, racial status and the experience of racial victimization are fastened together inextricably and unambiguously, creating a vestment that comes in one size and is apparently supposed to fit all people of color. Matsuda is aware, to some degree, of questions raised by her emphasis on racial as opposed to other social determinants of thought and conduct. She thus rejects the suggestion that economic class affiliation may have equal if not more influence than race on cultural expression and political viewpoint. Racial perspective, she writes, "cuts across class lines There is something about color that doesn't wash off as easily as class."¹⁶⁶ To some extent, that proposition serves as a useful antidote to the belief, propounded by social thinkers of varying political stripes, that the integrative forces of the modern world would dissolve racial, ethnic, nationalistic, religious, and other parochial attachments.¹⁶⁷ Not only do racial and other ascriptive loyalties continue to organize a great deal of social, political, and intellectual life throughout the world; in many areas such loyalties have intensified.¹⁶⁸ It is also true, however, that racial groups are not monolithic and that social divisions generate differences in interests and consciousness within racial groups. Matsuda's analysis wraps in one garment of racial victimization the black law professor of middle-class upbringing with a salary of \$65,000 and the black, unemployed, uneducated captive of the ghetto. In the overwhelming majority of cases, however, these two social types will inhabit radically dissimilar social universes;¹⁶⁹ worlds as different as those evoked by

¹⁶⁶ Matsuda, *Looking to the Bottom*, *supra* note 10, at 360-61.

¹⁶⁷ The classic statement is by Karl Marx and Friedrich Engels, who believed that with the coming of capitalism "[a]ll fixed, fast-frozen relations, with their train of ancient and venerable prejudices and opinions, are swept away. . . . All that is solid melts into air" *Manifesto of the Communist Party*, in *THE MARX-ENGELS READER*, *supra* note 21, at 476.

¹⁶⁸ See generally S. GREENBERG, *RACE & STATE IN CAPITALIST DEVELOPMENT: COMPARATIVE PERSPECTIVES* (1980) (surveying the impact of capitalist development on patterns of racial and ethnic domination); N. Glazer & D. Moynihan, *Introduction to ETHNICITY* 5 (N. Glazer & D. Moynihan eds. 1975) (noting that the resurgence of ethnicity suggests that "a very great deal of radical and even liberal doctrine of the past century and a half is wrong").

¹⁶⁹ As Professor William Julius Wilson states:

Andrea Lee on the one hand and John Edgar Wideman on the other.¹⁷⁰ Even during the eras of slavery¹⁷¹ and de jure segregation,¹⁷² the structure and experience of racial oppression often varied along class lines *within* black communities. There are, moreover, other important cross-cutting variables, largely ignored by Matsuda, that diversify the experiences of persons of color, including gender,¹⁷³ region,¹⁷⁴ and differing group affiliations within the catch-all category "people of color."¹⁷⁵

Unlike more affluent blacks, many of whom continued to experience improved economic opportunity even during the recession period of the 1970s, the black underclass has evidenced higher unemployment rates, lower labor-force participation rates, higher welfare rates, and, more recently, a sharply declining movement out of poverty. The net effect has been a deepening economic schism in the black community.

W. WILSON, *THE DECLINING SIGNIFICANCE OF RACE* 142 (2d ed. 1980); *see also* Hochschild, *Race, Class, Power, and the American Welfare State*, in *DEMOCRACY AND THE WELFARE STATE* 163-64 (A. Gutmann ed. 1988) ("Although all blacks continue to operate at a disadvantage . . . some operate at a much greater disadvantage than others The problem of race in the United States is, in sum, not really one problem.")

¹⁷⁰ Compare A. LEE, SARAH PHILLIPS (1984) (evoking the texture of life of upper-middle-class black characters) with J. WIDEMAN, *HIDING PLACE* (1981) (evoking the texture of life of lower-class black characters).

¹⁷¹ *See, e.g.*, I. BERLIN, *supra* note 25; M. JOHNSON & J. ROARK, *supra* note 160.

¹⁷² *See* C. JOHNSON, *PATTERNS OF NEGRO SEGREGATION* (photo. reprint ed. 1970). Consider, for instance, the following observation made by Professor Johnson about racial etiquette in the pre-World War II southern United States:

The different social classes of the Negro population have somewhat different areas of exposure to contacts with whites. The lower economic classes are not concerned with highway etiquette because they do not own cars. Nor do they often encounter whites in voting, in public buildings, or in the more exclusive stores, as do Negroes of the upper classes. The upper-class Negroes avoid contacts with white workers and with other lower middle-class whites There is little or no problem of proper titles of respect for the lower economic groups of Negroes who do not expect them. These titles of respect, however, are more important to upper-class Negroes than the indignity of segregation itself.

Id. at 122.

¹⁷³ Compare W.E.B. DuBois, *THE SOULS OF BLACK FOLK* 54 (New American Library ed. 1969) ("The problem of the twentieth century is the problem of the color line") with MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS* 635, 638 (1983) ("[M]ale dominance is perhaps the most pervasive and tenacious system of power in history."). Some feminists insist that the situation of the black woman cannot adequately be grasped by an analysis that, ignoring gender, focuses solely on racial dynamics. *See, e.g.*, P. GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 349-57 (1984); B. HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* 7 (1981).

¹⁷⁴ Writing about the Jim Crow South, Charles Johnson observed:

The Negroes who live . . . in a particular locality know what can and what cannot be done; the stranger from another city of the South is less certain of details but knows the broad pattern; the Negro from the North is lost and, unless escorted by a native, is almost certain to get into trouble.

C. JOHNSON, *supra* note 172, at 272.

¹⁷⁵ *See generally* T. SOWELL, *ETHNIC AMERICA* (1981).

Incomes, occupations, and unemployment rates differ substantially among American ethnic groups, as do rates of crime, fertility, and business ownership. The *explanation*

In defense of Matsuda's position, even taking into account class, gender, and other divisions, there might remain an irreducible link of commonality in the experience of people of color: rich or poor, male or female, learned or ignorant, *all* people of color are to some degree "outsiders" in a society that is intensely color-conscious and in which the hegemony of whites is overwhelming.¹⁷⁶ But even assuming that limited but still appreciable experiential commonality, there remains a second and more fundamental problem with Matsuda's analysis: a tendency to repress the diversity of ways in which similarly situated people conceptualize the world. Ironically, although "diversity" is the banner under which she marches, Matsuda slights the heterogeneity of people of color.¹⁷⁷ She exhibits this tendency in her treatment of intra-racial conflict. Matsuda acknowledges more than some other racial critiques the reality of intra-racial disputes. She is more sensitive with respect to this matter than, for instance, Professor Delgado. His portrait of the intellectual universe is so starkly manichean — so black and white, if you will — that it is devoid of all intra-racial disagreement. Even though race-conscious preferential treatment is one of his major points of discussion and one of the main areas in which, according to him, intellectuals of color have been marginalized, Delgado completely overlooks the contributions of black conservative intellectuals who vigorously oppose race-based preferential treatment.¹⁷⁸ Matsuda, by contrast, does at least acknowledge ideological disagreements among people of color. Yet she portrays these disagreements in a way that dramatically understates their sharpness and significance.

Nothing better illustrates this tendency than her portrayal of the relationship between W.E.B. DuBois and Booker T. Washington, the

of those differences is complex and in many ways surprising. . . . Color has obviously played a major role in determining the fate of many Americans, and yet a black ethnic group like the West Indians earns more than a predominantly white ethnic group like the Puerto Ricans, and [Japanese-Americans] earn more than whites in general.

Id. at 4-5 (emphasis in original).

¹⁷⁶ To drive home this point, Malcolm X is supposed to have stated the following: "What do you call a black man with a PhD? . . . Nigger." Dalton, *supra* note 7, at 440.

¹⁷⁷ Cf. Genovese, *Black Studies: Trouble Ahead*, in *IN RED AND BLACK*, *supra* note 123, at 221 ("One of the new hallmarks of white racism is the notion of one black voice, one black experience, one black political community, one black ideology — of a black community without an authentic inner political life wracked by dissension and ideological struggle.").

¹⁷⁸ See, e.g., T. SOWELL, *AFFIRMATIVE ACTION RECONSIDERED: WAS IT NECESSARY IN ACADEMIA?* (1975); Sowell, Weber and Bakke, and the *Presuppositions of "Affirmative Action,"* 26 WAYNE L. REV. 1309 (1980); Daniels, *The New Black Conservatives*, N.Y. Times, Oct. 4, 1981, § 6 (Magazine), at 20, col. 2 (discussing opposition of black conservatives to affirmative action and other policies). On the other hand, Professor Bell suggests that black conservatives receive all too much attention. See D. BELL, *AND WE ARE NOT SAVED*, *supra* note 14, at 14. For criticism of a variety of approaches to race-relations law, including work by black conservatives, see Crenshaw, cited above in note 2.

two leading black political thinkers during the first decade of this century. According to Matsuda:

W.E.B. DuBois . . . disagreed strongly with Booker T. Washington's position that black Americans must temporarily forego the quest for political equality in order to achieve conciliation with white America, and yet DuBois wrote of Washington with respect and admiration. While Washington's position seems a shocking sell-out by today's standards, it arose in the context of post-emancipation violence against blacks. Washington believed that the only way to achieve political equality and to end racist violence was to set aside immediate demands for the vote and to focus instead on education and economic development in the black community. Washington succeeded in educating hundreds of poor blacks with money solicited from rich white patrons. Despite his opposition to Washington's contentions, DuBois recognized the historical constraints that Washington faced. His public criticism of Washington was tempered by public praise and acknowledgment of a common goal.¹⁷⁹

This image of respectful disagreement softens to the point of distortion a ferocious ideological struggle that degenerated into bitter personal enmity. DuBois repudiated Washington's views and thereafter insistently denounced them — actions that were more than matched by Washington's antagonism. Even more telling, however, than the ideological war between DuBois and Washington is that both found that they had more in common with white allies than they did with one another. Both had experienced racist oppression directly (Washington far more than DuBois) and both confronted the nadir of Afro-American fortunes after the collapse of Reconstruction. Yet DuBois found himself more at home with white reformers than black conservatives, while Washington found himself more at home with white conservatives than black reformers.¹⁸⁰

Another example that illuminates the inadequacy of an exclusively racial paradigm to explain patterns of thinking about race-relations involves comparing reactions to the work of Derrick Bell on the one hand, and that of CLS writers on the other. Various contributors to the racial critique literature have maintained that CLS scholarship shows too little appreciation for the way in which progressive activists have used the rhetoric of rights to produce salutary changes in the day-to-day lives of people of color.¹⁸¹ These critics maintain that this

¹⁷⁹ Matsuda, *Looking to the Bottom*, *supra* note 10, at 352 (footnotes omitted).

¹⁸⁰ See L. HARLAN, BOOKER T. WASHINGTON: THE MAKING OF A BLACK LEADER: 1856-1901 (1972); L. HARLAN, BOOKER T. WASHINGTON: THE WIZARD OF TUSKEGEE, 1901-1915 (1983); A. MEIER, NEGRO THOUGHT IN AMERICA, 1880-1915 (1963); E. RUDWICK, W.E.B. DuBois (1960).

¹⁸¹ See, e.g., Bracamonte, *supra* note 13; Dalton, *supra* note 7; Delgado, *The Ethereal Scholar*, *supra* note 6; Williams, *supra* note 2.

deficient appreciation is related to the racial status of white CLS scholars. According to this argument, white proponents of CLS, as beneficiaries of racial privilege, have the luxury of fantasizing abstractly in their ivory towers. By contrast, scholars of color, disciplined by the exigencies of their own oppression, tend to deal concretely and practically with the present and urgent problems that beset racial minorities. Scholars of color are thus aware of the folly of eschewing reformist strategies in race relations; for unlike white CLS writers, they experience directly the benefits which, through struggle, can sometimes be wrested from the status quo.

Derrick Bell is the most widely-known black legal academic in the country and the most prominent contributor to the racial critique literature. Yet his own work articulates positions and attitudes for which white CLS scholars are criticized. No scholar in the CLS movement has expressed more disdain than Bell towards the efficacy of rights rhetoric, more skepticism about the supposed benefits of legal reforms, or more pessimism regarding the capacity of racial minorities to affect decisively the environment in which they live.¹⁸² White CLS scholars have lauded Bell's work¹⁸³ and it is wholly appropriate that his writings are included in a bibliography of CLS literature.¹⁸⁴ The leading CLS article on race-relations law — Alan Freeman's *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*¹⁸⁵ — is fully consistent with Bell's writings. Yet Bell's work receives none of the criticism aimed at CLS work, even though it displays several of the same features for which white CLS scholars are chided.¹⁸⁶

My central objection to the claim of racial distinctiveness propounded by Professor Matsuda and others of like mind can best be

¹⁸² See D. BELL, AND WE ARE NOT SAVED, *supra* note 14; D. BELL, RACE, RACISM AND AMERICAN LAW, *supra* note 3.

¹⁸³ See, e.g., Freeman, *Race and Class: The Dilemma of Liberal Reform* (Book Review), 90 YALE L.J. 1880 (1981) (reviewing D. BELL, RACE, RACISM AND AMERICAN LAW, cited above in note 3).

¹⁸⁴ See, e.g., Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461, 466 (1984).

¹⁸⁵ 62 MINN. L. REV. 1049 (1978).

¹⁸⁶ Another example of white scholars being charged with "sins" for which black scholars are forgiven is the controversy surrounding the 1965 *Moynihan Report on the Negro Family*. One criticism frequently aimed at that analysis is that it represented simply another example of the bias and blindness of "white" social science. Some of the aspects of the *Moynihan Report* that were most bitterly denounced, however, were simply repetitions of what E. Franklin Frazier — a black social scientist — had previously written. While observers pressing a racial critique of sociology roundly condemned Moynihan and other white social scientists, they either ignored or lauded Frazier. For a striking example of this racially selective criticism, see Billingsley, *Black Families and White Social Science*, in THE DEATH OF WHITE SOCIOLOGY, cited above in note 44, at 431. For a general overview of the controversy that surrounded the Moynihan Report, see L. RAINWATER & W. YANCEY, THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY (1967) [hereinafter THE MOYNIHAN REPORT].

summarized by observing that it *stereotypes* scholars. By stereotyping, I mean the process whereby the particularity of an individual's characteristics are denied by reference to the perceived characteristics of the racial group with which the individual is associated. This is the process that, in its grossest form, produces the statement "they all look alike to me."¹⁸⁷ In the past, negative images of colored groups prevented or diminished appreciation for the particular characteristics of individual colored intellectuals. The work of Negro intellectuals, for instance, was (and in many contexts probably still is) prejudged according to expectations governed by the perception that Negroes as a group lack certain valued capacities.¹⁸⁸ Professor Matsuda's stereotyping is of a very different sort insofar as she perceives colored groups in a uniformly favorable light and spreads that favorable perception over all the colored intellectuals or artists whom she discusses. Matsuda's analysis, like Delgado's, lacks any discussion that hints of any dissatisfaction with work produced by people of color. Matsuda thus substitutes for the traditional, i.e., *negative* stereotype, a *positive* stereotype. But as Louis Lusk once noted, "*any* stereotype results in a partial blindness to the actual qualities of individuals, and consequently is a persistent and prolific breeding ground for irrational treatment of them."¹⁸⁹ The effect of such stereotyping is a subject to which I turn in Part III when I discuss the political function of Matsuda's argument and the costs it imposes.¹⁹⁰

III. RACIAL CRITIQUES AND THE POLITICS OF ARGUMENTATION

In this Part, I examine some of the intended and unintended consequences of certain arguments made in the racial critique literature. I discuss, in short, their politics. It should not be thought that I am implicitly suggesting that racial critiques are "political" while other genres of argument are apolitical. With varying degrees of self-consciousness, *all* writers seek to make an impact on the world and, furthermore, whatever the intentions of authors, *all* writings that reach an audience create some impact — even if nothing more than boredom.¹⁹¹ I seek to explain and evaluate the politics of certain

¹⁸⁷ For an important discussion of racial stereotypes that has influenced my analysis, see G. ALLPORT, cited above in note 165.

¹⁸⁸ See *supra* pp. 1751-52; see also *infra* p. 1819.

¹⁸⁹ Lusk, *The Stereotype: Hard Core of Racism*, 13 BUFFALO L. REV. 450, 451 (1964) (emphasis in original); see also Sontag, *The Third World of Women*, 40 PARTISAN REV. 180, 186 (1973) ("Women should work toward an end to *all* stereotyping of any kind, positive as well as negative, according to people's sexual identity." (emphasis in original)).

¹⁹⁰ See *infra* pp. 1801-07.

¹⁹¹ Cf. L. TRILLING, *THE LIBERAL IMAGINATION* 96 (1950). As Lionel Trilling observes: "[O]ur fate, for better or worse, is political. It is therefore not a happy fate, even if it has an heroic sound, but there is no escape from it, and the only possibility of enduring

arguments advanced for: (1) a doctrine of racial standing; (2) affirmatively taking race into account in evaluating scholarship; and (3) identifying white legal academics as the primary impediment to the creation and recognition of scholarship by academics of color.

A. Race, Standing, and Scholarship

In *The Imperial Scholar*, Professor Delgado asks the question: "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]." ¹⁹² 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*." ¹⁹³ Elaborating upon 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 consequences 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. ¹⁹⁴

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." ¹⁹⁵ They occur, Delgado suggests, because white scholars have

it is to force into our definition of politics every human activity and every subtlety of human activity. There are manifest dangers in doing this, but greater dangers in not doing it. Unless we insist that politics is imagination and mind, we will learn that imagination and mind are politics, and of a kind that we will not like.

Id.

¹⁹² Delgado, *The Imperial Scholar*, *supra* note 4, at 566.

¹⁹³ *Id.* at 567.

¹⁹⁴ *Id.* (citation omitted).

¹⁹⁵ *Id.*

not suffered the analogue to "injury in fact."¹⁹⁶ 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 in order 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.¹⁹⁷ Professor Delgado's ideas, in other words,

¹⁹⁶ See *id.* at 567–69. The Supreme Court has held that in order 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., Fallon, *Of Justiciability, Remedies and Public Law Litigation*, 59 N.Y.U. L. REV. 1 (1984); Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials*, 88 COLUM. L. REV. 247, 295–313 (1988); Nichol, *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635 (1985); Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

¹⁹⁷ 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 1960's 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

are by no means isolated. Some commentators have argued that within the subject area embraced by black studies, white intellectuals have no standing whatsoever.¹⁹⁸ 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.¹⁹⁹ 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.²⁰⁰

a component of the human judgment." 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 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 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 chapter 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." Merton, *Insiders and Outsiders*, *supra* note 45, at 12. In a fascinating article, Michael H. Kater recently 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." Kater, *Forbidden Fruit? Jazz in the Third Reich*, 94 *AM. HIST. REV.* 11, 21 (1989). Ironically, "[t]he 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.*

¹⁹⁸ See sources cited *supra* note 44.

¹⁹⁹ See, e.g., Blauner & Wellman, *supra* note 101, at 328-29:

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. (emphasis in original).

²⁰⁰ 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 suggests, "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).

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."²⁰¹

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 standing analogy 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;²⁰² it is a device that advances a broader social interest.²⁰³

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"²⁰⁴ 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."²⁰⁵ He contends that this theoretical divergence stems from racially conditioned differences in perspective and deems the reparations theory analyti-

²⁰¹ Delgado, *The Imperial Scholar*, *supra* note 4, 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.

²⁰² See Kelson, *supra* note 55, at 70 ("[B]lack intellectuals . . . have sought aesthetic strategies for limiting the boundaries of blackness in such a way that blacks would control its market value . . ."); Watts, *supra* note 86, at 306 (arguing that racial distinctiveness claims "can be seen as a rather shrewd way of cornering an academic market . . . by eliminating whites from job competition").

²⁰³ See Delgado, *The Imperial Scholar*, *supra* note 4, at 566–73.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 569.

cally superior to its competitors.²⁰⁶ He writes that justifications of affirmative action based on utilitarian or distributive justice theories are "sterile."²⁰⁷ These theories, he says, enable "the writer to concentrate on the present and the future and overlook the past . . . rob[bing] affirmative action programs of their moral force."²⁰⁸ Delgado, however, offers no persuasive reason for labeling as "sterile" the theories he derides. Although Delgado criticizes these works for "overlook[ing] the past,"²⁰⁹ a fair reading of their work belies that charge. In an article that Delgado singles out for criticism,²¹⁰ 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."²¹¹ 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.²¹²

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

²⁰⁶ See *id.* at 569-73.

²⁰⁷ See *id.* at 570.

²⁰⁸ *Id.* According to Professor Delgado, recourse to utilitarian or distributive justice justifications avoids avoidance of history:

[U]npleasant 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.

²⁰⁹ See *id.*

²¹⁰ See *id.* at 569 n.43 (citing Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955 (1974)).

²¹¹ Karst & Horowitz, *supra* note 210, at 966. Delgado also singled out 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 4, 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.

²¹² For other efforts to ground affirmative action on bases other than appeals to history, see Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147-70 (1976); and Sullivan, *The Supreme Court, 1986 Term — Comment: Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 96-98 (1986).

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.²¹³

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 upon procedural and legalistic issues to the exclusion of extra-legal studies, including sociology, history, and psychology — I agree with him, at least in part.²¹⁴ 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,²¹⁵ institutional competence,²¹⁶ and standards of judicial review.²¹⁷

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.²¹⁸ On the one hand, he concedes that there are at least some white scholars who produce work that transcends the failings he notes.²¹⁹ 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.²²⁰ 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

²¹³ Delgado, *The Imperial Scholar*, *supra* note 4, at 568–69 (footnotes omitted).

²¹⁴ See Kennedy, *Martin Luther King's Constitution: Montgomery*, 98 YALE L.J. 999, 1004 (1989).

²¹⁵ 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).

²¹⁶ 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).

²¹⁷ 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).

²¹⁸ This is the flip side of the problem arising from the positive stereotyping of work by minority academics. See *supra* p. 1787.

²¹⁹ See Delgado, *The Imperial Scholar*, *supra* note 4, at 569.

²²⁰ See *supra* note 178 and accompanying text.

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.²²¹ 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.²²² 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.²²³ 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" sug-

²²¹ See, e.g., *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 720-21 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279-80 (1986) (opinion of Powell, J.); *Korematsu v. United States*, 323 U.S. 214, 216 (1944). For a probing discussion of rationales behind strict scrutiny in the racial context, see Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 117-30. The great irony, of course, is that in the decision that first explicitly referred to race as a "suspect" criterion, the Court — to its everlasting shame — *upheld* an overtly racist policy that led to the mass internment of persons of Japanese ancestry during World War II. See *Korematsu*, 323 U.S. 214. In another irony, strict scrutiny is mainly used currently to invalidate policies that seek to prefer minorities on a racial basis. See *Croson*, 109 S. Ct. 706; *Wygant*, 476 U.S. 267.

²²² See Delgado, *The Imperial Scholar*, *supra* note 4, at 567-72.

²²³ In other words, we are all outsiders and insiders in various contexts. See Merton, *Insiders and Outsiders*, *supra* note 45, at 29-30.

gests that he may "see patterns that may be more difficult for those immersed in the situation to see."²²⁴ Tocqueville, Lord Bryce, and Gunnar Myrdal are examples of insightful outsiders.²²⁵ 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."²²⁶ 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."²²⁷ To restrict the field on a racial basis would surely — and rightly — drive the reputation of the field to far lower depths.²²⁸ 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.²²⁹

²²⁴ Collins, *Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought*, SOC. PROBS., Dec. 1986, at S15.

²²⁵ See A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1848); J. BRYCE, *THE AMERICAN COMMONWEALTH* (1888); G. MYRDAL, *AN AMERICAN DILEMMA*, *supra* note 43.

²²⁶ Collins, *supra* note 224, at S14.

²²⁷ Several scholars have suggested that, for the sake of my own reputation, I should direct my efforts toward subjects that are perceived to be more "intellectually rigorous" than race-relations law. See also Boyle, *In Memoriam: Clyde W. Ferguson, "With Compassion,"* 97 HARV. L. REV. 1259, 1260 (1984) (indicating that one reason Professor Clyde Ferguson began his career as a law professor by teaching and writing in the area of commercial law is that he "wanted to prove to his colleagues . . . that a Black man could establish an outstanding reputation in one of the so-called 'hard core' areas of the law before he moved into the allegedly 'soft' . . . fields of civil rights and, eventually, international law"). Professor Delgado has received similar advice, see Delgado, *The Imperial Scholar*, *supra* note 4, at 561. He suggests, however, that it reflects a desire on the part of white "imperial scholars" to keep the territory of race-relations scholarship all to themselves. See Delgado, *The Author Replies*, *supra* note 15, at 263.

²²⁸ Cf. Raphael, *The Maturing of Jewish American Historiography*, 1 REVS. AM. HIST. 336 (1973). Discussing what he perceived as the low reputation of American Jewish historical studies, Professor Marc Raphael observed that "[n]on-Jews [had] decided that this is a field for Jews," and that frequently, Jewish scholars who "ventured to research and write American Jewish history, no matter how distinguished their contributions in other fields, have reverted to filiopietism in their Judaica volumes." *Id.*

²²⁹ During the 1960's and 1970's, an appreciable number of white and colored academics fled from research having to do with race-related subjects as a result of pressures imposed by

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.²³⁰ Furthermore, as is so often the case in our society, the negative consequences of misconceived policy will fall with particular harshness upon 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,²³¹ 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.²³² Scholars should do so by evaluating other scholars as individuals, without prejudg-

cultural commissars of the Black Power Movement. Their departure undoubtedly lowered the quantity and quality of research and writing produced at various institutions. See, e.g., Record, *Responses of Sociologists to Black Studies*, in BLACK SOCIOLOGISTS, *supra* note 45, at 389-94.

²³⁰ The case of Robert Starobin is instructive. Describing Starobin's experience as a white teacher of Afro-American history at the University of Wisconsin in the late 1960's, Linda Forcey writes: "Many black students resented him, felt that the color of his skin disqualified him from teaching the course. They often heckled, jeered, or even walked out while [he] lectured." See A. MEIER & E. RUDWICK, *supra* note 42, at 291 (quoting L. Forcey, *Personality in Politics: The Commitment of a Suicide*, PhD dissertation, SUNY-Binghamton, 1978, at 133).

Starobin "was a leader in the Free Speech Movement and a participant in both Friends of SNCC [Student Nonviolent Coordinating Committee] and in the militant mass civil rights sit-ins of [the 1960's]." *Id.* at 203. He authored, among other works, *Industrial Slavery in the Old South* (1970) and *The Negro: A Central Theme in American History*, 3 J. CONTEMP. HIST. 37 (1968).

Starobin's experience was not atypical. As August Meier comments: "Regardless of their interests or credentials, the presence of white scholars in the classroom was everywhere sharply questioned. . . . No matter what their perspective, no matter what their expertise, whites teaching the Afro-American history courses were under attack." A. MEIER & E. RUDWICK, *supra* note 42, at 291; see also Record, *supra* note 229.

²³¹ There is, moreover, the further difficulty of stigmatization once we begin designating topics as "black" subjects. Stigmatization may occur in part because of residual racism that tends to belittle cultural forms associated with people of color. But there is also a *legitimate* reason for looking askance at a subject set aside as the intellectual property of a particular group. Such a field will tend to degenerate into an exercise in group therapy or public relations.

²³² For an incisive discussion of the rationale and implications of generally prohibiting racial distinctions that burden racial minorities even when race would constitute the best available proxy for the traits that governments and private decisionmakers seek to identify, see Strauss, cited above in note 221, at 108-13.

ment, no matter what their hue.²³³ Scholars should, in other words, inculcate what Gordon Allport referred to as "habitual open-mindedness,"²³⁴ a skeptical attitude toward all labels and categories that obscure appreciation of the unique features of specific persons and their work.

Literary critic Philip Rahv vividly displayed one pernicious consequence of intellectual stereotyping when he once declared that no one other than a white southerner would have been able, in the 1960's, to write a great novel about a Negro slave insurrection.²³⁵ The particular white southerner he had in mind was William Styron, author of *The Confessions of Nat Turner*.²³⁶ According to Rahv:

A [white] Northerner, . . . would have been too much 'outside' the experience to manage it effectively; and a Negro writer, because of a very complex anxiety not only personal but social and political, would have probably stacked the cards, producing in a mood of unnerving rage and indignation a melodrama of saints and sinners.²³⁷

In Rahv's view, in other words, emotion would have overwhelmed a black novelist. Yet the white southerner William Styron was able "at once [to] seize[] upon his own background and transcend[] it."²³⁸

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."²³⁹ But for purposes of evaluating a novel, play, law review article, or the entire written product of an individual,

²³³ Here it is useful to note that the word *prejudice* refers, among other things, to "a judgment formed before due examination or consideration." 12 OXFORD ENGLISH DICTIONARY 356 (2d ed. 1989).

²³⁴ See G. ALLPORT, *supra* note 165, at 24.

²³⁵ See Rahv, Book Review, N.Y. REV. BOOKS, Oct. 26, 1967, at 6 (reviewing W. STYRON, *THE CONFESSIONS OF NAT TURNER* (1967)); cf. Wirin, Book Review, 3 LAW & TRANSITION Q. 55, 56 (1966) ("Only a Negro lawyer could have written *The Petitioners* [a history of race-relations cases before the Supreme Court that was written by attorney and civil rights activist Loren Miller].").

²³⁶ W. STYRON, *THE CONFESSIONS OF NAT TURNER* (1967). Styron's novel touched off a heated dispute over the portrayal of black characters by white authors. See generally WILLIAM STYRON'S NAT TURNER (J. Clarke ed. 1968) (collecting essays by black authors in response to Styron's work); E. GENOVESE, *William Styron Before the People's Court*, in IN RED AND BLACK, *supra* note 123, at 200 (discussing the reaction of black intelligentsia).

²³⁷ Rahv, *supra* note 235, at 6.

²³⁸ *Id.* Rahv is careful not to speak expressly in terms of absolutes. Hence he asserts only that a Negro writer would "probably" have failed to take the right tack in fictionalizing Nat Turner's rebellion. But while his language does not go so far as to erect an irrebutable presumption against the worth of a slave rebellion novel by a Negro writer, it does suggest rather clearly the presence of some adverse presumption against such a novel.

²³⁹ Edley, *supra* note 52, at A23, col. 3.

there is no reason to rely on such a proxy because there exists at hand the most probative evidence imaginable — the work itself.²⁴⁰

Another negative aspect of the racial standing doctrine is illuminated by an essay by Richard Gilman significantly titled *White Standards and Black Writing*.²⁴¹ 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."²⁴² Ironically, although Gilman was undoubtedly attempting

²⁴⁰ Another interesting example of the bad consequences that flow from concepts of cultural standing involves a literary controversy that erupted in 1983 when it became known that a white anglo writer, Daniel Lewis James, had written, under the pseudonym Danny Santiago, a prize-winning novel, *Famous All Over Town* (1983), about life in the Chicano barrio of Los Angeles. Initially praised for its authenticity, the novel was later condemned by various observers, including some Chicano intellectuals who believed that James had committed an unpardonable act of cultural imperialism. Responding to his critics, James commented: "The book. The book. That's the important thing. Not the skin color or the ancestry of the author." Folkart, *Daniel James: Writer Who Masqueraded as a Latino*, L.A. Times, May 21, 1988, at 22, col. 3; see also Abrams, *The Three Lives of Dan James*, L.A. Times, June 19, 1988, § 6, at 1, col. 1.

An interesting and useful paper could be written on institutional mechanisms and private strategies designed to avoid prejudgment in the realm of culture. Charlotte Brontë (Currer Bell), Emily Brontë (Ellis Bell), Baroness Dudevant (George Sand), and Marian Evans (George Eliot) are just a few of many outstanding writers who adopted masculine pen names to neutralize the reflex of readers who would have otherwise downgraded their work solely on the basis of their gender. See Oates, *Success and the Pseudonymous Writer: Turning Over a New Leaf*, N.Y. Times, Dec. 6, 1987, at 12, col. 1. On the other hand, the French novelist, Romain Gary, adopted a pseudonym to avoid the burden of his fame; one's established reputation can, like race or gender, intrude wrongly upon critical judgments. See *id.*

Many orchestras seek to limit the corrupting influence of extraneous factors by requiring that candidates audition while they are hidden behind screens. Recently, the Detroit Symphony Orchestra altered its policy of screened auditions at the behest of public officials who complained about the paucity of black musicians on the orchestra staff. After the change, the ninety-eight member orchestra hired its second black member. Significantly, "[t]he developments in Detroit have particularly outraged black musicians who fear that abrogating standard procedures diminishes their legitimate and hard-won achievements." Wilkerson, *Discordant Notes in Detroit: Music and Affirmative Action*, N.Y. Times, Mar. 5, 1989, § 1, at 1, col. 5. The black person hired by the orchestra also objected, and stated that he "would have rather auditioned like everybody else" because "[s]omehow this [change in procedure] devalues the audition." *Id.*

²⁴¹ R. GILMAN, *White Standards and Black Writing*, in *THE CONFUSION OF REALMS* 3 (1969).

²⁴² *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.

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.²⁴³ 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."²⁴⁴ 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.²⁴⁵ Freeman's earlier article *Legitimizing Racial Discrimination Through Antidiscrimination Law*²⁴⁶ articulated one of the most useful concepts we have for analyzing the jurisprudence of race-relations — the distinction between the "victim" and the "perpetrator" perspectives.²⁴⁷ Yet, after having contributed creatively to the development of a critical, anti-racist approach to race-relations law, Freeman stated, in the course of responding to racial critiques of CLS:

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.²⁴⁸

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.²⁴⁹ Both Freeman

²⁴³ Gilman's essay offers, in fact, a double irony. On the one hand, by identifying Cleaver's novel and others like it as unassailable by the dominant culture, he puts "black" writing into a cultural ghetto. On the other hand, he engages in the judgment he vowed to avoid, remarking that he found much of *Soul on Ice* "unsatisfying intellectually." See *id.* at 10.

²⁴⁴ *Id.* at 5.

²⁴⁵ Freeman, *supra* note 13.

²⁴⁶ 62 MINN. L. REV. 1049 (1978).

²⁴⁷ See *id.* at 1052.

²⁴⁸ Freeman, *supra* note 13, at 299.

²⁴⁹ See Matsuda, *Looking to the Bottom*, *supra* note 10, at 348. Illustrating her point, Matsuda says, for instance, that while "[w]hites became abolitionists out of choice; blacks were

and Matsuda are mistaken, however, in believing that a person's racial status compels him to contribute to struggles against racism.²⁵⁰ 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.²⁵¹ Harriet Tubman was not compelled by her color to perform her remarkably heroic feats on the Underground Railroad.²⁵² She may 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.²⁵³

Participation in struggles against racial tyranny or any other sort of oppression is largely a matter of choice, an assertion of will.²⁵⁴ 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

abolitionists out of necessity." *Id.* at 348 n.110 (quoting W. MARTIN, cited above in note 147, at 25).

²⁵⁰ There may be situations in which people of color, whether they want to or not, are compelled to fight racism in order to satisfy their own, strictly personal ambitions. Imagine, for instance, a Chicano associate at a law firm that has never had a Chicano partner because of anti-Chicano prejudice. Imagine, too, that the associate wants very much to become a partner. That associate will, by necessity, have to fight anti-Chicano prejudice in order to fulfill his or her own ambitions, even if he or she does not want "to join" any collective struggles against prejudice. Matsuda and Freeman, however, seem to refer to a broader, more outer-directed commitment than this.

²⁵¹ See W. MARTIN, *supra* note 147, at 18-19; B. QUARLES, *BLACK ABOLITIONISTS* 56-58 (1969); B. QUARLES, *FREDERICK DOUGLASS* (1948).

²⁵² According to Matsuda, Tubman "made nineteen trips of over 1,000 miles through Appalachian mountains, helping Southern slaves reach freedom in the North via the Underground Railroad." Matsuda, *Looking to the Bottom*, *supra* note 10, at 349 n.112 (citing B. APTHEKER, *WOMAN'S LEGACY* 34 (1982)).

²⁵³ See B. QUARLES, *BLACK ABOLITIONISTS*, *supra* note 251, at 56-58.

²⁵⁴ Indeed, in some cases, individuals can choose their own racial identity. Walter White, the long-time leader of the NAACP, maintained his identity as a Negro although, because of his appearance, many thought him to be white. See W. WHITE, *A MAN CALLED WHITE* 3 (1948) ("Why . . . do I insist that I am a Negro, when nothing compels me to do so but myself?"); see also W. Wright, *Power, Politics, and Naming* 16 (unpublished paper on file with author) (noting that White was "an African American who passed as a white man in order to infiltrate the Ku Klux Klan and investigate lynchings and mob violence for the NAACP"). Other individuals who once considered themselves Negroes have decided "to pass" for white in order to escape the burdens imposed on blacks by the American color line. See, e.g., Kousser, *Separate but Not Equal: The Supreme Court's First Decision on Racial Discrimination in Schools*, 46 J. SO. HIST. 17, 43-44 (1980) (noting the decision of black petitioners to pass as whites after an unfavorable holding in a case challenging the administration of public schools in a deep south community in the late nineteenth century); see also W. Wright, *supra*, at 16-22 (discussing the phenomenon of "passing").

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.

B. Race as an Intellectual Credential

Although promoted in the name of an insurgent, liberatory, intellectual endeavor, race-based standing doctrine replicates deeply traditional ideas about the naturalness, essentiality, and inescapability of race — ideas that have for too long stunted American culture. Chief among these baneful notions is the belief that race is destiny — that knowing a person's race can properly lead to certain assumptions or conclusions about the worthiness of that person or her knowledge or her capacity to accomplish a certain task. Certain racial critiques display this mode of thought when they assert that the racial background of a minority scholar should be seen as an intellectual credential because the experiences associated with it create a distinctive scholarly "voice" that is of value insofar as we prize intellectual diversity.

Promoting race as an intellectual credential meshes, at least superficially, with the dominant ideology of elite universities. This ideology envisions the ideal allocation of intellectual power — jobs, promotions, and other indicia of intellectual recognition — as a function of individual scholarly achievement. Thus, transforming membership in an oppressed racial group into an intellectual credential enhances the prestige and marketability of minority scholars by recourse to the academy's own conventional meritocratic rhetoric.²⁵⁵

Another way that the claim of racial distinctiveness functions to empower minorities within academia is by validating and ennobling their history as victims of racial oppression. Credentializing racial

²⁵⁵ For a particularly insightful discussion of the ideal of meritocracy within academia, see Elstain, *Reflections on Academic Freedom, Equality, and Excellence*, in *REGULATING THE INTELLECTUALS* (C. Kaplan & E. Schrecker eds. 1983). See also D. BOK, *HIGHER LEARNING* 76–78 (1986); D. BOK, *BEYOND THE IVORY TOWER: SOCIAL RESPONSIBILITIES OF THE MODERN UNIVERSITY* 110–15 (1982); D. BELL, *THE COMING OF POST-INDUSTRIAL SOCIETY* 416–19 (1973); Thomson, *Preferential Hiring*, 2 *PHIL. & PUB. AFFAIRS* 364 (1973); Simon, *Preferential Hiring: A Reply to Judith Jarvis Thomson*, 3 *PHIL. & PUB. AFFAIRS* 312 (1974).

Justice Powell's decisive opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 311 (1978), lends support to the strategy of assimilating claims of racial distinctiveness to meritocratic criteria. This is somewhat ironic because *Bakke* is often viewed as a major defeat for race-conscious decisionmaking. In his pivotal opinion, Justice Powell suggested that, under appropriate circumstances, race might be taken into account to advance an educational institution's efforts to produce intellectual diversity. See *id.* at 311–15.

status on the basis of racial distinctiveness makes that legacy of racial oppression a coveted source of intellectual authority. It makes minority academics a "chosen people."²⁵⁶

Troubling consequences will flow, however, from acceding to demands to view racial status as an intellectual credential.²⁵⁷ First, legitimating the notion of racial credentials imperils the ideal of a cosmopolitan intellectual community in which there exist no stereotyping expectations imposed upon an individual's work because of his or her race. That ideal is endangered by efforts to categorize ideas and sensibilities on a racial basis. One hears that there is a need to consult the racial identity of candidates for citation or for faculty positions in order to attain a given racial perspective — for example, "a black perspective" or, as it is frequently stated, "*the* black perspective." But what makes a perspective or opinion or style "black"? What constitutes a "black" perspective, for instance, in a debate over affirmative action where the antagonists are themselves blacks? If all the antagonists are deemed to voice black perspectives simply because they are black, the term "black perspective" would seem to have only a circular, tautological character: a black perspective is a perspective articulated by a black.²⁵⁸ If, on the other hand, the concept of a "black perspective" is to have a substantive character apart from the racial identity of a given speaker or author, there must be some means of determining that character, some criterion for "blackness."²⁵⁹

²⁵⁶ Intellectuals of a wide variety of social identities have used claims of distinctiveness for purposes of public relations and therapeutic self-glorification. See, e.g., J. CUDDIHY, *THE ORDEAL OF CIVILITY: FREUD, MARX, LEVI-STRAUSS AND THE JEWISH STRUGGLE WITH MODERNITY* 203–22 (1974) (describing various strategies by which Jewish intellectuals have used what might be termed the "Jewish mystique" for purposes of advancement). One of the most interesting contests over distinctiveness claims in American political culture involves competition between Jews and blacks over which group merits the title of most persecuted. See *id.* at 210–13.

²⁵⁷ In the 1960's and 1970's, the acquiescence of academic authorities to certain demands of the Black Power Movement on college campuses represented the acme of disrespect for those making the demands. They were often given just what they asked for, which included, among other things, a debased version of black studies. See Blassingame, *Black Studies: An Intellectual Crisis*, in *NEW PERSPECTIVES ON BLACK STUDIES*, *supra* note 44; E. GENOVESE, *Black Studies: Trouble Ahead*, in *IN RED AND BLACK*, *supra* note 123, at 219. With characteristic verve, Genovese suggested that those "who were falling all over themselves to placate the least sensible and constructive black students were unprincipled scoundrels whose fancy rhetoric disguised an overriding commitment to peace and quiet at any price." *Id.* at 228–29; see also Record, *supra* note 229, at 374–78 (describing interviews with white academics who expressly stated that they viewed black studies and the academic credentializing of popular but unqualified minorities as a convenient means of pacification).

²⁵⁸ Consider, for example, Professor Collins' statement that "Black feminist thought consists of ideas produced by Black women that clarify a standpoint of and for Black women." Collins, *supra* note 224, at S16. She adds that "[n]o one Black Feminist platform exists from which one can measure the 'correctness' of a particular thinker; nor should there be one." *Id.*

²⁵⁹ For one scholar's important effort to give substantive content to "blackness" as a distinc-

None of the contributors to the racial critique literature who have articulated what I have called the racial distinctiveness thesis have offered a substantive definition of blackness. This is unsurprising, for such a definition would pose difficulties for them. Their claim of racial distinctiveness accentuates commonality among scholars of color and difference between them and white scholars.²⁶⁰ But given the reality of intra-racial disagreement and interracial crossover, a substantive definition of blackness would give rise to a situation in which an appreciable number of white intellectuals would be deemed to espouse "black" points of view.²⁶¹

A substantive conception of blackness is better than the tautological conception. It differentiates the status of racial background from the characteristics that define "blackness" as an idea, sensibility, or point of view. It affirms the possibility of black scholars thinking "white" and white scholars thinking "black." It makes clear the complexity and contingency of the relationship between racial background and intellectual work. Under a substantive definition, "blackness" becomes the description for a state of mind or set of beliefs that a person, regardless of race, can choose to adopt, discard, use, or modify. Having gone this far, however, toward separating blackness as a sociological condition from blackness as an intellectual category, it would seem useful to drop the racial identification of the latter. Instead of referring to a "black" perspective, we should articulate the substantive content of the perspectives to which we refer. An enhanced clarity will eventually emerge from having to express ourselves more precisely without the aid of misleading rhetorical shortcuts upon which for too long we have uncritically relied.²⁶² At the very moment when archaic racial categories are being increasingly challenged in

tive cultural attribute, see H. GATES, JR., *THE SIGNIFYING MONKEY: A THEORY OF AFRO-AMERICAN LITERARY CRITICISM* (1988). For apt criticisms of this effort, see Delbanco, *Talking Texts*, NEW REPUBLIC, Jan. 9 & 16, 1989, at 34, which notes that "Gates' work . . . flirts with the compensatory but potentially insidious idea of a residual race-consciousness that somehow survives in the blood."; and Tate, *Yo! Hermeneutics!: Hiphopping Toward Poststructuralism*, Village Voice, June 1985 (Literary Supplement), at 2, col. 3. "By the way, Henry, we got to figure out some other distinction besides this black and Western stuff, being as how blackness is a Western category in itself, and all that's black ain't purely African or non-Western even, semantic convenience notwithstanding." *Id.* For other works seeking to delineate a black or "Afrocentric" aesthetic, see M. ASANTE, *THE AFROCENTRIC IDEA* (1987); and *THE BLACK AESTHETIC*, cited above in note 43.

²⁶⁰ See *supra* pp. 1778-80.

²⁶¹ Cf. A. MEIER & E. RUDWICK, *supra* note 42, at 296-97 (noting the concession by some black historians that some of the best historical work evidencing "a black point of view" is by white historians).

²⁶² Cf. H. ROSENBERG, *Is There Jewish Art?*, in *DISCOVERING THE PRESENT* 225 (1973) ("[W]hile Jews produce art, they don't produce Jewish art."); Brenson, *supra* note 59, at 1, col. 2 ("The sources and approaches of black artists are so diverse that there is absolutely no such thing as black art.").

other sectors of our culture,²⁶³ the justification for racial preference that arises from the racial distinctiveness thesis reasserts the essentiality and virtue of a color line in the realm of legal academic thought.

Ralph Ellison's commentary on American culture provides a critical vantage point from which to view this disturbing development.²⁶⁴ Ellison articulates two closely-related themes. First, he recognizes that neither one's racial status nor the experience one suffers as a result of that status is capable of translating itself into art, a point applicable as well to scholarship, the "art" of academicians. An experience is simply inert — something that happened. That something only becomes knowable in a public way through an act of will: interpretation.²⁶⁵ Professors Bell, Delgado, and Matsuda make much of the instructive force of the experience of oppression. Ellison, by contrast, is not at all willing to presume that oppression is intellectually enriching. Moreover, he positively abhors the notion that writings should be viewed with special favor because of the sufferings endured by their authors. "The kindest judgment we can make of [such a notion]," he writes, "is that it reveals a sad misunderstanding of the relationship between suffering and art."²⁶⁶ For as he observes:

[T]he question of how the 'sociology of his existence' presses upon a Negro writer's work depends upon how much of his life the individual writer is able to transform into art. What moves a writer . . . is less meaningful than what he makes of it. How much, by the way, do we know of Sophocles' wounds?²⁶⁷

Second, Ellison rejects conceptual pigeonholes that circumscribe intellectuals on the basis of crude assumptions. In response to an

²⁶³ See L. LEVINE, *HIGHBROW LOWBROW: THE EMERGENCE OF CULTURAL HIERARCHY IN AMERICA* 243-48 (1988) (arguing that cultural categories are softening, overlapping, and in some instances merging); Perry, *Ain't No Mountain High Enough*, *supra* note 59, at 69 (praising cosmopolitanism within the popular music industry); Tate, *Stagolee vs. The Proper Negro: Eddie Murphy, Wynton Marsalis, and Prince Cross Over*, *Village Voice*, Sept. 11, 1984, at 1, col. 1; Watrous, *Living Colour Breaks Racial and Rock Stereotypes*, *N.Y. Times*, Apr. 24, 1989, at C15, col. 1 (describing the effort by the rock group Living Colour to dismantle restrictive racial stereotypes in the rock music industry); Fricke, *Back in Black*, *ROLLING STONE*, Sept. 24, 1987, at 64 (describing the effort by the Black Rock Coalition to dismantle restrictive racial stereotypes in the rock music industry).

²⁶⁴ See R. ELLISON, *supra* note 1. For an essay that criticizes certain feminist distinctiveness claims along lines similar to those Ellison articulates with respect to distinctiveness claims made on behalf of African-Americans, see C. OZICK, *Literature and the Politics of Sex: A Dissent*, in *ART & ARDOR* 284 (1983). Ozick's essay played a major role in orienting my views toward various issues examined in this Article.

²⁶⁵ See *id.* at 146 ("[W]e select neither our parents, our race nor our nation; these occur to us out of the love, the hate, the circumstances, the fate, of others. But we *do* become writers out of an act of will, out of an act of choice.").

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 111-12.

article by Irving Howe²⁶⁸ that examined Ellison's cultural relationship to Richard Wright,²⁶⁹ Ellison objected to Howe's assumption that Wright had naturally served as his literary role model. Ellison responded that his search for enlightenment had fortunately avoided the racial limits Howe had assumed:

[I]n Macon County, Alabama, I read Marx, Freud, T.S. Eliot, Pound, Gertrude Stein and Hemingway. Books which seldom, if ever, mentioned Negroes were to release me from whatever "segregated" idea I might have had of my human possibilities. I was freed not . . . by the example of Wright but by composers, novelists, and poets who spoke to me of more interesting and freer ways of life. [Their work gave] me a broader sense of life and possibility It requires real poverty of the imagination to think that this can come to a Negro only through the example of *other Negroes*²⁷⁰

Ellison's writing is distinguished by a keen appreciation for cultural fluidity, intellectual freedom, and individual autonomy. While cognizant of the extent to which these characteristics have been trampled by racism, he also recognizes the large extent to which they have still managed to nourish the cultural life of intellectuals in the United States, including scholars of color. By contrast, the tendency of the racial critiques with which this Article is concerned is to exaggerate the influence of racism and prescribe a program that threatens to diminish the fluidity, freedom, and autonomy that Ellison and others rightly cherish.

The strategy of elevating racial status to an intellectual credential undermines the conception of intellectual merit as a mark of *achieved* distinction²⁷¹ by confusing the relationship between racial background and scholarly expertise; the former is a social condition into which one is born, while the latter is something that an individual attains.

²⁶⁸ I. HOWE, *Black Boys and Native Sons*, in *A WORLD MORE ATTRACTIVE* 98 (1963).

²⁶⁹ Wright is best known for his autobiography, *Black Boy* (1945), and his novel, *Native Son* (1940).

²⁷⁰ R. ELLISON, *supra* note 1, at 116-17 (emphasis in original).

²⁷¹ I recognize that, according to some definitions, race can count as "merit":

There may be situations in which it can be predicted that black policemen will function more effectively than whites, either because they are more likely to understand [black] ghetto culture, or because they are better able to win the trust and cooperation of members of the black community. Black teachers may communicate more effectively with students from ghetto backgrounds. In such cases, it is argued, blackness constitutes 'merit.'

Fallon, *supra* note 114, at 819 (citations omitted). In the cases noted above, the fact of being black — like that of being tall, being able to see, or simply being alive — may help one to accomplish something admirable. Blackness, however, should not be viewed in and of itself as an indicia of merit. A badge of merit should not be pinned onto someone simply because she exists in a state that she had no hand in creating. Merit should be limited to describing something that a person *adds* to their received condition. We *could* define merit in the way noted above, a way that deprives the word of its honorific connotations; we should, however, refrain from doing so.

Confusing accidental attributes and achieved distinctions in turn derogates the process by which all individuals, simultaneously limited and aided by the conditions they inherit, personally contribute to human culture.²⁷²

As I use the word, "merit" is an honorific term that identifies a quality of accomplishment that has been achieved; it does not refer to inherited characteristics such as race or gender. As a matter of theory, this conception of merit is rather conventional. As a matter of practice, however, this conception has received all too little validation. What has been called meritocracy has often been in actuality a sham arrangement in which access to self-development and social recognition has been regulated, typically, to the advantage of affluent white men and to the disadvantage of other sectors of society.²⁷³ This ugly reality has victimized the very *ideal* of meritocracy. Just as the ideals of liberal democracy have been besmirched in the eyes of many people in the Third World by the hypocritical violations of those ideals by European colonialists, so too has the ideal of meritocracy been discredited in many eyes by the many violations of its stated norms by whites in favor of whites.

In addition to invidious racial discrimination, there has long existed other significant dangers to the meritocratic ideal. Previously I noted that in deciding which of several competing sources to cite, scholars often engage in academic nepotism by using citations to promote friends.²⁷⁴ Such practices might well have an adverse, albeit

²⁷² I think here of a criticism that a professional basketball player, Isiah Thomas, leveled at the way in which, in his view, sportscasters characteristically describe black athletes. He complained that while white athletes are typically portrayed as self-made figures who have earned by hard work their status as "stars," outstanding black athletes are typically portrayed as "naturals," as if, to use Thomas' imagery, they emerged from their mothers' wombs with the ability to dribble (or hurdle or jump or box). See Berkow, *The Coloring of Bird*, N.Y. Times, June 2, 1987, at D27, col. 1. Parodying sportscasters, Thomas is quoted as having said:

When [Larry] Bird makes a great play, it's due to his thinking, and his work habits. It's all planned out by him. [The same is] not the case for blacks. All we do is run and jump. We never practice or give a thought to how we play. . . . Magic [Johnson] and Michael Jordan and me . . . we're playing only on God-given talent, like we're animals. . . .

Blacks have been fighting that stereotype about playing on pure instinct for so long, and basically it still exists

Id. Thomas' complaint arises from the insult of having his achievement reduced, in large part, to a consequence of his natural ability. Thomas did not maintain that he is devoid of certain God-given (e.g., unearned) attributes such as hand-eye coordination. Nor would he likely deny that his talents are, to some degree, socially constructed. After all, the rules of the game determine what counts as good or bad playing; the value of being able to dunk, for instance, is determined by rules that allow "dunking." All he rightly argues is: (1) that observers not be so overwhelmed with his God-given attributes that they fail to appreciate what he, on his own, adds to them, and (2) that commentators offer evenhanded recognition to the achievements of black and white performers.

²⁷³ See, e.g., note 31 and accompanying text.

²⁷⁴ See *supra* p. 1772.

unintended, impact on the competitive position of scholars of color given the influence of race on patterns of friendship. One might contend that the prevalence of such ameritocratic factors as friendship in the day-to-day reality of academic evaluation underscores the futility of attempting to reconstitute a purified academic meritocracy that pays no heed to extra-intellectual aspects of a scholar's identity. Because ameritocratic factors will inevitably be taken into account, why resist the use of race-based ameritocratic criteria that arguably benefit people of color?²⁷⁵

In my own view, there is nothing necessarily wrong with race-conscious affirmative action; there may be compelling reasons in some circumstances to support it. For instance, one might fear that without a sufficient number of minority professors a school will be beset by an intolerable degree of discord or believe that an institution ought to make amends for its past wrongs or insist upon taking extraordinary measures in order to integrate all socially significant institutions in American life. I simply do not want race-conscious decisionmaking to be naturalized into our general pattern of academic evaluation. I do not want race-conscious decisionmaking to lose its status as a deviant mode of judging people or the work they produce. I do not want race-conscious decisionmaking to be assimilated into our conception of meritocracy. It is true, as I have noted, that there are many nonracial and ameritocratic considerations that frequently enter into evaluations of a scholar's work. The proper response to that reality, however, is not to scrap the meritocratic ideal. The proper response is to abjure *all* practices that exploit the trappings of meritocracy to advance interests — friendship, the reputation of one's school, career ambitions, ideological affiliations — that have nothing to do with the intellectual characteristics of the subject being judged.

C. The Racial Exclusion Claim as a Form of Politics

Claims of racial exclusion constitute an important aspect of the programmatic side of the racial critique literature. These claims have two discrete but frequently overlapping facets: an outer facet addressed principally to whites and an inner facet addressed principally to minorities. The main function of the outer facet is to generate

²⁷⁵ Cf. Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1332–33 (1986) ("The significance of personal associations and informal networks is what gives durability and resonance to the adage, 'It's not *what* you know, it's *who* you know. . . . Would anyone claim that Henry Ford II [was] head of the Ford Motor Company because he [was] the most qualified person for the job?" (citation omitted)). The question, however, is whether we should be satisfied with a regime, particularly an academic regime, in which who you know counts the same, or more, than what you know. Explaining why Henry Ford II was made head of Ford Motor Company should not be confused with normatively justifying the explanation.

feelings of guilt that will mobilize white academics. To help achieve this effect, Delgado, Matsuda, and Bell use highly charged rhetoric and imagery. Delgado evokes the image of colonial subjugation,²⁷⁶ Matsuda employs the specter of apartheid,²⁷⁷ and Bell creates the vision of a law school Dean openly rejecting a black candidate on the basis of his race.²⁷⁸ They concentrate their critique, moreover, on prejudiced white academics while largely ignoring other possible impediments to minority scholars.²⁷⁹ Proceeding in this fashion enables Bell, Delgado, and Matsuda to identify a wrong that all respectable people abhor — racial prejudice. Moreover, this approach not only locates precisely the alleged perpetrators of that wrong but identifies as culprits a group responsive to censure — radical or liberal white academics. Hesitance, and in some cases, complete unwillingness to acknowledge the relevance of persons or conditions outside the ranks of white academics²⁸⁰ might reflect in part an unspoken and, perhaps to some degree, unconscious calculation that acknowledging other factors would have deleterious practical consequences. Perhaps the fear is that if variables other than the prejudice of white academics are taken into account, the resulting definition of the problem may appear so large and complex that political paralysis will ensue. By portraying the problem as they do, Bell, Delgado, and Matsuda make the problem appear remediable by persons that minority scholars can confront directly.²⁸¹

While the exclusion thesis challenges white academics, it reassures academics of color. Indeed, the main function of the inner facet of racial exclusion claims is to explain in a morale-enhancing way the current plight of minority academics. For according to the exclusion thesis, the reason for the diminutive scholarly presence of legal academics of color is wholly unrelated to their performance; it is the white academic establishment that is completely to blame.

Claims of racial exclusion appear to have succeeded in varying degrees. Such claims have certainly gained the sympathetic attention of at least some of those in the CLS Movement.²⁸² They have also

²⁷⁶ See *supra* pp. 1751–53.

²⁷⁷ See Delgado, *The Imperial Scholar*, *supra* note 4; see also *supra* note 101 (discussing Delgado's title).

²⁷⁸ See Matsuda, *Affirmative Action and Legal Knowledge*, *supra* note 5, at 2.

²⁷⁹ See D. BELL, *Unspoken Limit*, *supra* note 14, at 143.

²⁸⁰ See Delgado, *The Author Replies*, *supra* note 15, at 263–64.

²⁸¹ Cf. L. TRIBE, *supra* note 196, § 16-20, at 1502–14 (arguing that the prevailing jurisprudence of the equal protection clause has largely been shaped by the Justices' insistence that substantive violations be conceptualized narrowly to fit judicially manageable remedies); see also Freeman, *supra* note 246, at 1057, 1079–118; Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1414–16 (1988); Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Law*, 92 YALE L.J. 328 (1982).

²⁸² In 1987, the annual Conference on Critical Legal Studies was devoted to racial critiques

obtained the sympathetic attention of more centrist scholars.²⁸³ Furthermore, these claims have helped to energize broad sectors of the minority scholarly community and provide a set of ideas around which to organize scholarship and practical politics.²⁸⁴

There are ways, however, in which some of the rhetorical and argumentative strategies of the racial exclusion claims are bad for minority scholars and, by extension, the academic community as a whole. First, as noted above, by focusing solely upon the prejudice of white academics, Bell, Delgado, and Matsuda obscure other, probably more significant barriers to the production and recognition of scholarship by minority academics. By *underestimating* the problems that need to be addressed, they offer a deficient diagnosis that will tend to facilitate an inadequate, perhaps even counterproductive, program for change. A better foundation for reform would be to acknowledge openly the various barriers, to state frankly the limits of existing knowledge concerning their significance and interaction, and to fashion remedies for *all* of them.

Another problem with the exclusion thesis as presented by Delgado, Bell, and Matsuda is that some readers will dismiss it because of its empirical weaknesses and inflated rhetoric. Worse, their reaction will likely spill over to other allegations of invidious racial discrimination. The racial critiques nourish the perception that, all too frequently, accusations of prejudice constitute merely a way of playing what some observers refer to as "the race game": deploying accusations of prejudice in order to exploit the stigmatization of racial bigotry.

The strategic use of accusations of prejudice has received little scholarly attention; for illumination, one must turn to essayists, jour-

of CLS. The conference was significantly titled "The Sounds of Silence: Racism and the Law." To be sure, some members of the CLS movement were, and probably still are, hostile to the racial critiques. See, e.g., Williams, *supra* note 2. I suspect, however, that most of those who identify themselves with CLS are generally supportive. These speculations are based on my observations of and participation in the "Sounds of Silence" Conference and subsequent conversations with people who attended it. See also Freeman, *supra* note 13 (responding to the minority critique of CLS).

²⁸³ Robert M. O'Neil, for instance, a professor of law and the President of the University of Virginia, writes that Professor Delgado's *The Imperial Scholar* "makes a telling and timely point . . . that all legal scholars must take seriously." *A Reaction to The Imperial Scholar and Professor Delgado's Proposed Solution*, 3 LAW & INEQUALITY 255, 255 (1985). Dean Susan Prager, writing in her capacity as President of the Association of American Law Schools (AALS), affirmed the "need to explore how to increase the number of minority law teachers and how to improve the quality of their professorial experiences." Prager, *President's Message: Minority Law Teachers*, AALS Newsl., Nov. 1986, at 1 (on file at the Harvard Law School Library). In making that statement, she expressly acknowledged the influence of racial critiques. A "starting point" for reform, she suggests, "is the increasingly rich and candid literature growing out of the reflections of minority law teachers." *Id.*

²⁸⁴ See generally *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987); *The 1985 Minority Law Teachers' Conference*, 20 U.S.F. L. REV. 383 (1986).

nalists, and novelists.²⁸⁵ This stratagem, however, is real; those who employ it occasionally reap considerable benefits. But its social cost is high; "crying wolf" too casually exacts a toll of increased cynicism and decreased sensitivity. One manifestation of these reactions is the unwillingness on the part of some whites even to answer their accusers. This accounts, in part, for the silent treatment that some white scholars have applied to the racial critique; convinced that its accusations are disingenuous "moves," these scholars refuse to participate in what they perceive as an exploitive maneuver.²⁸⁶ Whether or not their estimation of the motives behind the racial critique's accusations are correct, these scholars' strategic silence constitutes a loss to everyone — including proponents of racial critiques.²⁸⁷

IV. CONCLUSION: THE POLITICS OF PUBLICITY

In this concluding Part, I address several serious criticisms that have been made of my effort in this Article to analyze racial critiques openly before a racially and ideologically mixed audience. Some critics

²⁸⁵ See Steele, *I'm Black, You're White, Who's Innocent? Race and Power in an Era of Blame*, HARPER'S, June 1988, at 45:

In the late 1960s . . . it was such great fun to pinion some [white] professor or housewife or, best of all, a large group of remorseful whites, with the knowledge of both their racism and their denial of it. The adolescent impulse to sneer at convention, to startle the middle-aged with doubt, could be indulged under the guise of racial indignation. And how could I lose? My victims — earnest liberals for the most part — could no more crawl out from under my accusations than Joseph K. in Kafka's *Trial* could escape the amorphous charges brought against him.

Id. at 46; see also T. WOLFE, *Mau-Mauing the Flak Catchers*, in *THE PURPLE DECADES* 201-32 (1982) (describing manipulation of white liberals by black militants in the 1960's); G. Hymanowitz, *Racial Tension in Legal Education* (describing the use of racial rhetoric by white and black students at Harvard Law School) (manuscript on file at the Harvard Law School Library).

²⁸⁶ Commenting on the CLS "Sounds of Silence" Conference in Los Angeles, California, in January, 1987, Professor Patricia Williams observes:

Many staunch white CLS-ers, attendees of every conference in the past, did not attend the one . . . whose subject was Racism and Critical Legal Studies. . . . In discussion groups addressing this issue, the low white attendance was reported to be attributable to fears that minorities would just 'act out' their 'displaced rage,' or 'guilt-trip' white participants

Williams, *supra* note 2, at 422 n.66; see also Dalton, *supra* note 7, at 442 (contending that white scholars' complaints about being subjected to "guilt-tripping" by academics of color is itself a mechanism of silencing). For further discussion on responses to racial critiques, see pp. 1818-19 below.

²⁸⁷ Cf. Detlefsen, *White Like Me: Racism 101 at Harvard*, NEW REPUBLIC, Apr. 10, 1989, at 18. Describing a week-long program at Harvard College that was designed to inculcate greater racial sensitivity, Robert Detlefsen recounts hearing "a black student say that he preferred to sit at the 'black table' in the dining hall because he found whites 'boring.' 'They don't want to contend with me on anything.'" *Id.* at 21. Detlefsen then asks: "who can blame [the whites]? What can one expect from a group of people who have been told incessantly that they are racist, and that they must be highly circumspect in their relations with blacks lest their racism reveal itself in the form of an offensive word or two?" *Id.*

of previous drafts have expressed concern over the effects of my analysis in a political atmosphere that has grown increasingly resistant to claims made on behalf of racial minorities. Thus, I have been advised — in some instances warned — to forgo publishing this Article because, among other things, it will be put to bad use by enemies of racial justice.²⁸⁸ Critics issuing this advice argue, first, that my discussion of claims of racial exclusion implicitly affirms the status quo by suggesting that illicit racial exclusion poses little or no barrier to

²⁸⁸ An interesting but as yet undeveloped topic is the history of efforts by sectors of marginalized groups to regulate the presentation of information and images that they fear will be used against the group. See, e.g., Stanfield, *Introductory Essay: Bitter Canaan's Historical Backdrop*, in C. JOHNSON, *BITTER CANAAN: THE STORY OF THE NEGRO REPUBLIC* lvii-lxv (1987). Professor Stanfield details the successful efforts in the 1940's by various sectors of the black intelligentsia in the United States to discourage publication of *Bitter Canaan*, a scathing critique of Liberia by the sociologist Charles Johnson. Liberia, governed by descendants of black American slaves, was at the time the only black-governed, independent nation in western Africa. Some critics of Johnson's manuscript feared that its publication would fuel the argument of white colonialists that blacks were not yet ready for self-determination. See also I. SUNDIATA, *BLACK SCANDAL: AMERICA AND THE LIBERIAN LABOR CRISIS, 1929-1936* (1980) (describing the reaction in America to the discovery of slavery-like labor conditions in Liberia).

For additional commentary on efforts to regulate the public image of racial minorities, see R. KLITGAARD, cited above in note 71, at 157-59, which discusses the political constraints on research on differences in performance among minority and white college students; THE MOYNIHAN REPORT, cited above in note 186, at x-xi, which discusses the political constraints on social science research involving governmental efforts to stabilize families of impoverished blacks; T. SOWELL, cited above in note 84, at 123-40, which discusses "[t]he poisonous atmosphere surrounding any attempt to debate issues involving race"; W. WILSON, cited above in note 93, at 3-19, which discusses the political constraints on social science research and policy recommendations relating to poverty, but particularly the black poor; and G. Loury, *The Problem of Ideology and Political Discourse Among Afro-Americans* (unpublished manuscript on file with the author).

For discussion of efforts to control the presentation of Jews in fiction, see P. ROTH, *Writings about Jews*, in *READING MYSELF AND OTHERS* 149-69 (Farrar, Straus & Giroux ed. 1975), which argues against the proposition that writers, particularly Jewish writers, should censor their presentations of Jewish life because of danger that anti-Semites will seize upon unflattering portrayals to justify bigotry.

For discussion of efforts to control the interpretation of the history of women in the workforce outside the home, see Haskell & Levinson, *Academic Freedom and Expert Witnessing: Historians and the Sears Case*, 66 TEX. L. REV. 1629, 1631-32 (1988). More specifically, Professors Haskell and Levinson note pressures exerted by feminists upon a feminist historian who testified as an expert witness on behalf of a defendant charged with sex-discrimination in its employment practices. Responding to the controversy raised by this historian's testimony, a committee of women in the historical profession recently declared that "as feminist scholars we have a responsibility not to allow our scholarship to be used against the interests of women struggling for equity in our society." *Id.* at 1631 (quoting Coordinating Committee of Women in the History Profession Newsletter, Feb. 1986, at 8).

For discussion of efforts to control open criticism by CLS scholars of other CLS scholars, see Kennedy, *Psycho-Social CLS*, 6 CARDOZO L. REV. 1013 (1985). According to Kennedy, CLS scholars "developed a strong norm of not criticizing each other's work in any way that might invalidate it, even within the gossip network among ourselves, but especially in our individual contacts with mainstream scholars." *Id.* at 1018.

minority academics (or would-be academics) and that the real source of their difficulty resides in their own failings. Second, they argue that my comments on racial distinctiveness claims are hostile to affirmative action insofar as they throw into doubt certain ideas that have been mobilized in favor of racial preferences in faculty hiring, particularly the notion that race should serve as a positive intellectual credential for minority scholars. Furthermore, it has been intimated that, given my status as a black scholar, publishing this Article shows a *special* lack of political responsibility.

This advice to avoid public criticism of racial critiques is mistaken. One surely ought to be concerned with the political implications of one's work. In certain circumstances, therefore, it would seem to me morally and politically correct to avoid publicizing one's views. But in making the calculation whether to express one's ideas openly, it is important to consider not only the risk of publicity. One must also consider the consequences of remaining silent in the face of analyses one believes to be wrong and misleading in important respects. Avoiding a public challenge to the racial critiques I have focused upon facilitates acceptance of theories and styles of thought that are seriously flawed, detrimental in effect, but nonetheless influential within important sectors of legal academia. In this case, keeping quiet is far more damaging than taking the risk that some of my ideas will be misappropriated.

The most important negative consequence of Professor Bell's portrayal of racial exclusion is its obfuscation of "the pool problem": the social conditions that produce the frustratingly small number of minority candidates equipped with the credentials typically required for admission to elite positions in legal academia. My impression is that Bell largely ignores the pool problem because he fears that acknowledging a potential weakness or failure on the part of minorities themselves would play into the hands of forces hostile to them.²⁸⁹ This same defensive insistence upon avoidance has surfaced with respect to public discourse relating to problems of crime,²⁹⁰ family instabil-

²⁸⁹ Cf. M. KING, JR., *supra* note 164, at 199. Addressing himself to the entire American public, and to Negro readers in particular, at a time when overt racism was still fashionable in many sectors of our national life, Martin Luther King, Jr., confidently declared:

One of the sure signs of maturity is the ability to rise to the point of self-criticism. Whenever we are objects of criticism from white men, even though the criticisms are maliciously directed and mixed with half-truths, we must pick out the elements of truth and make them the basis of creative reconstruction. We must not let the fact that we are victims of injustice lull us into abrogating responsibility for our own lives.

Id.

²⁹⁰ See, e.g., Hacker, *Black Crime, White Racism*, N.Y. REV. BOOKS, Mar. 3, 1988, at 36; Campbell, *The Victim Trap*, Village Voice, May 9, 1989, at 31, cols. 1-2; Tate, *Leadership Follies*, Village Voice, May 9, 1989, at 33, cols. 1-4; Sargent, *The Curse of Blacks Killing Blacks*, Washington Post, Mar. 2, 1986, at C1, col. 1; G. Loury, *supra* note 288.

ity,²⁹¹ and, more recently, the disproportionate incidence of Acquired Immune Deficiency Syndrome (AIDS) in minority communities.²⁹² It is an understandable response given the ways that problems of this sort have been used to stigmatize groups that have already been victimized by historical patterns of oppression.²⁹³ Such a response, however, is frequently self-defeating. First, in a society as open as the United States, it is virtually inevitable that in one way or another the difficulties besetting closely-watched minority groups will become a locus of public attention. Second, discouraging open discussion of these issues often encourages a furtive discourse in which people feel unable to state clearly what they are thinking and instead resort to a sort of aesopian language that obscures issues in need of public understanding.²⁹⁴ Third, the strategic avoidance of deep-seated problems has sometimes led to a situation in which the problems disappear for a time from the political agenda only to reappear later in more ominous dimensions.²⁹⁵

Fourth, the best way to prevent a social problem from being turned into a polemical tool that threatens one's interests is to define that problem in terms congruent with one's interests. There is nothing necessarily conservative, for instance, about acknowledging the pool problem or that some aspects of its etiology are nonracial in character. To the contrary, recognizing that social conditions other than preju-

²⁹¹ See D. MOYNIHAN, *FAMILY AND NATION* 35-36 (1986); THE MOYNIHAN REPORT, *supra* note 186.

²⁹² See Nickens, *AIDS, Race, and the Law: The Social Construction of Disease*, 12 NOVA L. REV. 1179, 1183-84 (1988) (detailing statistics indicating a disproportionate incidence of AIDS in minority communities); Cmons, *Minorities Slow To React to High Rate of AIDS*, L.A. Times, Dec. 5, 1988, § 1, at 1, col. 5; Kosterlitz, "Us," "Them," and AIDS, 20 NAT'L J. 1738 (1988).

²⁹³ See also Cmons, *supra* note 292, at 1, col. 5; Kosterlitz, *supra* note 292, at 1738; Nickens, *supra* note 292, at 1179-80. See generally W. RYAN, *BLAMING THE VICTIM* (1971).

²⁹⁴ For a cogent analysis of the deplorable ramifications of furtive discourse about race and crime in American electoral politics, see Estrich, *The Hidden Politics of Race*, Washington Post Mag., Apr. 23, 1989, at 20. For discussions about the phenomenon of aesopian language — "code words" — in other racial contexts, see Jackson, *It's Not the Bus, It's Us*, N.Y. Times, Mar. 8, 1982, at 19, col. 3, which argues that "antibusing" rhetoric in the context of school desegregation is frequently coded language expressing racial animus; and Herbers, *Race Issue in Campaign: A Chain Reaction*, N.Y. Times, Sept. 27, 1980, at 8, col. 3, which describes the perception of some black leaders that "state's rights" rhetoric constituted code language intended to win support of white racists during the 1980 Presidential campaign.

²⁹⁵ See D. MOYNIHAN, *FAMILY AND NATION*, *supra* note 291, at 146 (describing worsening conditions for lower-class black families); W. WILSON, *supra* note 93, at 4. According to Wilson: [T]he controversy surrounding the Moynihan report had the effect of curtailing serious research on minority problems in the inner city for over a decade, as liberal scholars shied away from researching behavior construed as unflattering or stigmatizing to particular racial minorities. . . . [W]hen liberal scholars returned to study these problems in the early 1980s, they were dumbfounded by the magnitude of the changes that had taken place and expressed little optimism about finding an adequate explanation.

diced attitudes play a major role in limiting the numbers of minority scholars broadens and deepens our understanding of the predicament of legal academia. It does so by situating that predicament within a larger framework than that provided by a narrow focus on white racism.²⁹⁶

Fifth, even for the purpose of focusing on racism, it makes sense to consider fully all the facts relevant to the problem under consideration. Paying heed, for instance, to the smallness of the pool of minority law school graduates who express an interest in academic careers does not necessarily exonerate the law schools. Heeding that fact makes room for essential questions: Does the professoriat negatively shape the aspirations of minority students? If so, is that influence related to racial bias? Regardless of the answers to the previous questions, should law schools take special steps to create a larger pool of qualified minority academics? One does not even begin asking these questions, however, if one insists that no pool problem exists.

Negative consequences also stem from Professor Delgado's portrayal of racial exclusion. First, to the extent that his analysis is believed and emulated, it disseminates a methodology that, as I have shown, is seriously marred. Given the failure to evaluate comparatively specific works of scholarship, Delgado's project cannot persuasively support the conclusions he draws even if, in fact, the conclusions are correct. Some readers have objected to this aspect of my analysis on the grounds that it constitutes an inappropriate response to what were intended to be merely provocative "thought pieces," and not exhaustively researched briefs. Such objections, however, are

²⁹⁶ In urging that practitioners of racial critiques recognize the limits of *racial* analysis — that they acknowledge that not everything bad that happens to minorities has a racial, as opposed, say, to an economic class basis — I associate myself with a tradition of social analysis that has enjoyed only marginal intellectual and political influence. See, e.g., R. ALLEN, *BLACK AWAKENING IN CAPITALIST AMERICA* (1969); J. HOCHSCHILD, *supra* note 93; W. WILSON, *supra* note 93; Kahn, *Problems of the Negro Movement*, in *THE RADICAL PAPERS* 148 (I. Howe ed. 1966); Rustin, *From Protest to Politics*, in *THE RADICAL PAPERS*, *supra*, at 347. Two developments largely explain this marginalization: the relative success with which purposeful racial discrimination has been stigmatized and the relative failure of efforts to stigmatize other, more impersonal barriers that confront whites and minorities alike, but that tend to trap racial minorities in disproportionately large numbers. Constitutional law reflects this broad tendency in various ways, including the Supreme Court's insistence that purposeful discrimination rather than discriminatory effect is the touchstone for a constitutional violation of the equal protection clause, see, e.g., *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Washington v. Davis*, 426 U.S. 229 (1976), and the Court's refusal to make economic class discrimination subject to heightened scrutiny, see, e.g., *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Dandridge v. Williams*, 397 U.S. 471 (1970).

The fact that governing moral and legal conventions hold out the possibility of attaining relief for claims based on racial discrimination but discourage the provision of relief for claims based on other grounds has created, unsurprisingly, a strong incentive to interpret problems as solely or predominantly *racial* problems — even when, in reality, nonracial factors constitute the primary ingredients of such problems.

misplaced. The writings by Professor Delgado that I have examined do not simply raise questions, advance tentative answers, and pose further questions for additional study. His writings make accusations against *named* individuals, offer definite answers to the questions he propounds, and propose concrete action on the basis of his answers. They are put forth as contributions to the scholarly investigation of legal academia, and they warrant scrutiny on that basis.

Second, Professor Delgado's writings express and popularize a militarization of academic discourse.²⁹⁷ The very imagery of his rhetoric — such as the reference to "imperial" scholars — calls to mind a notion of "us" and "them," a conception of academia as battleground. Adopting that conception of the situation might very well entail, for many of "us," adopting a mode of conduct that would include a disposition to assume the worst about everything said and done by "them." If warlike conditions really do exist, defensive thinking of this sort makes perfect sense. If, on the other hand, one mistakenly perceives a condition as warlike, the defensive thinking generated by that misperception may be wasteful, cutting one off, for instance, from fruitful collegial exchange. Worse, it may actually help to create or exacerbate hostilities via a self-fulfilling prophecy.²⁹⁸ Because descriptions can help to create the very thing they purport to describe, one ought to be cautious in the way one defines socially vexing situations. Professor Delgado fails to use appropriate caution. Instead of alleging racial bias at the end of a process in which other plausible explanations have been fully considered and found wanting, he seems eager to make such allegations as a first choice.

The militarization of discourse also increases pressure on intellectuals to "choose sides" and to display loyalty to the side chosen. In such a setting, disagreement becomes attack and dissent becomes betrayal — hardly an atmosphere conducive to free intellectual discussion or self-critical reflection. Moreover, as in so many other contexts in our society, the overall burden of a bad situation falls especially hard upon minorities. The sense of isolation that many minority academics feel creates a particularly powerful demand for loyal conformity to whatever becomes the group's dominant political program. This is the socio-psychological dynamic that lays behind the charge

²⁹⁷ In conversation, one colleague admiringly likens Professor Delgado's racial critiques to "hand grenades" that were designed first and foremost to blast away the complacency insulating the scholars targeted.

²⁹⁸ "The self-fulfilling prophecy is, in the beginning, a *false* definition of the situation evoking a new behavior which makes the originally false conception come *true*." R. MERTON, *The Self-Fulfilling Prophecy*, in *SOCIAL THEORY AND SOCIAL STRUCTURE*, *supra* note 115, at 477 (emphasis in original). Merton's masterful essay on the concept of the self-fulfilling prophecy is an elaboration upon the basic idea that if persons "define situations as real, they are real in their consequences." *Id.* at 475 (quoting W. Thomas).

that an article like this one, written by a minority scholar, displays a special lack of political responsibility.

The principal negative consequence of Professor Matsuda's racial critiques stems from the legitimacy they lend to ingrained habits of thought that tend both to homogenize people of color and to segregate them from the main currents of American culture. I do not maintain that no appreciable differences exist in the prevailing opinions and sensibilities of various racial groups.²⁹⁹ Nor do I maintain that it is improper ever to make decisions based on racial generalizations. If a defense attorney in a capital trial knew nothing about a potential panel of jurors other than the race of the individuals comprising it, she would be well-advised to attempt to place as many blacks as possible on the jury because, as a general matter, Negroes are more likely than whites to oppose capital punishment.³⁰⁰ Nevertheless, racial generalizations, whether positive or negative, derogate from the individuality of persons insofar as their unique characteristics are submerged in the image of the group to which they are deemed to belong.³⁰¹ In light of this danger, Matsuda fails to use appropriate caution in positing racial generalizations. Indeed, a striking feature of her analysis is the casualness with which she resorts to racial stereotypes,³⁰² while paying scant attention to evidence that falls outside the confines of her tidy paradigm.

This eager yearning to perceive and celebrate moral and intellectual differences between racial groups is part of a more general tendency. One sees it in the extraordinary extent to which certain feminist theorists have successfully entrenched the concept of "women's voice," even in the face of compelling (although largely ignored) empirical and theoretical challenges.³⁰³ One also sees it in the work of

²⁹⁹ See, e.g., H. SCHUMAN, C. STEEH & L. BOBO, *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* (1985); Johnson, *Poll Finds Blacks and Whites "Worlds Apart,"* N.Y. Times, Jan. 12, 1989, at 18, col. 1 (describing a national survey finding that "blacks and whites are 'worlds apart' in their perception of race relations, with large majorities of whites believing that blacks are treated equally in America and similarly large majorities of blacks disagreeing").

³⁰⁰ See *Grigsby v. Mabry*, 569 F. Supp. 1273, 1293-94 (E.D. Ark. 1983) ("Differences between the attitudes of blacks and whites with respect to the death penalty are highly statistically significant."), *aff'd en banc*, 758 F.2d 226 (8th Cir. 1985), *rev'd sub nom.* *Lockart v. McCree*, 476 U.S. 162 (1986).

³⁰¹ Cf. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding that prosecutors may not exercise peremptory challenges on the basis of a generalization that "black jurors as a group will be unable impartially to consider the State's case against a black defendant").

³⁰² The same can be said about Professor Delgado's analysis. See *supra* pp. 1793-95.

³⁰³ Some writers, for instance, have displayed a complete willingness to accept without question Carol Gilligan's notion of distinctive, gender-based masculine and feminine "voices" in moral development. See, e.g., Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986). Citing the work of Gilligan and Nancy Chodorow, Professor Sherry writes that "[t]he essential difference between the male and female perspectives [is that while] . . . [t]he basic feminine sense of self is connected to the world, the basic masculine

certain educators who conclude, on the basis of transparently flimsy evidence, that there exists a "black learning style" that distinguishes black children from the children of other racial groups.³⁰⁴ Left unchallenged, this tendency will seep into the culture at large and re-

sense of self is separate. Women thus tend to see others as extensions of themselves rather than outsiders or competitors." *Id.* at 584-85; see also Weiss & Melling, *supra* note 17, at 1302-04; West, *supra* note 17, at 16-19. Yet a substantial body of research "casts doubt on how different the different voice really is." Rhode, *The "Woman's Point of View," supra* note 17, at 43 (citing Greeno & Macoby, *How Different Is the "Different" Voice?*, 11 SIGNS 310 (1986); and Walker, *In a Different Voice: Cryptoseparatist Analysis of Female Moral Development*, 50 SOC. RES. 665 (1983)); see also Walker, *Sex Difference in the Development of Moral Reasoning: A Critical Review*, 55 CHILD DEV. 667 (1984); Williams, *supra* note 17, at 840-43. Criticizing both *In a Different Voice*, the bible of the "women's voice" movement, cited above in note 22, and the legal academic community's response to that work, Professor Joan Williams declares that it is "time to bring up out of the footnotes law reviews' treatment of the numerous and cogent critiques of Gilligan's methodology and conclusions The interesting thing from a cultural standpoint is how little impact these critiques have made on the widespread acceptance of Gilligan's theories." *Id.* at 840 n.181 (citations omitted).

³⁰⁴ See, e.g., J. HALE-BENSON, *BLACK CHILDREN: THEIR ROOTS, CULTURE, AND LEARNING STYLES* (rev. ed. 1986). The following excerpts provide something of the flavor of Hale-Benson's egregiously simplistic and ethnocentric analysis of what she perceives as a racially distinctive "black" style in family organization and educational development. "Black parents have always stressed to their children the importance of their exceeding white children's behavior and performance because falling short would reflect unfavorably upon the group." *Id.* at 48-49. "[I]n black families [gender] relations are egalitarian." *Id.* at 52. "Black child rearing has a strong religious orientation." *Id.* "Black families place a strong emphasis on work and ambition." *Id.* at 54. "Black people are a very rhythmic people." *Id.* at 64-65. "Competitive sports are very important in Afro-American culture." *Id.* at 65. "Black people are a very emotional people." *Id.* at 69. "Black children are more feeling oriented, people oriented, and more proficient at nonverbal communication than white children." *Id.* at 69. Although Professor Hale-Benson asserts these broad generalizations on the basis of little or no research that attempts rigorously to compare family characteristics of various racial groups, taking into account religious, regional, or class variables, her work is not without influence and will likely be used by some as a predicate for educational policy. See Berger, *What Do They Mean by "Black Learning Style"?*, N.Y. Times, July 6, 1988, at B4, col. 3; Uhlig, *Educators Call Regents' Booklet Racist*, N.Y. Times, Oct. 2, 1987, at B1, col. 3. For a useful critique of Professor Hale-Benson's work, see Mitchell, *Black Children After the Eighties: Surviving the New Technology?*, 55 HARV. EDUC. REV. 354 (1985).

Hale-Benson's analysis is consonant in style and substance with a considerable body of literature in the social sciences that has as its hallmarks: (1) the identification of racially distinctive styles, and (2) the assertion that "black" traits are superior to "white" traits or are functionally valuable to blacks given the social context in which they live. See, e.g., T. KOCHMAN, *BLACK AND WHITE STYLES IN CONFLICT* (1981). Indulging in the same sort of undisciplined generalizing that marks the work of Professor Hale-Benson, Professor Kochman observes:

[B]lack culture allows its members considerably greater freedom to assert and express themselves than does white culture. Black culture values individually regulated self-assertion. . . . White culture values the ability of individuals to rein in their impulses. White cultural events do not allow for individually initiated self-assertion or the spontaneous expression of feeling Because white culture requires that individuals check those impulses that come from within, whites become able practitioners of self-restraint.

Id. at 29-30. For bibliographical references to this genre of social science literature, see J. HALE-BENSON, cited above, at 199-207; and T. KOCHMAN, cited above, at 167-72.

inforce beliefs about "natural" divisions that have, for too long, constricted our imaginations.³⁰⁵

An additional reason for which I have decided to reject the advice of those who have urged me to avoid, or at least to "tone down," open criticism of racial critiques is that such a course reinforces the unspoken condescension that has played a part in shaping the response of the legal academic community to the writings I examine.³⁰⁶ There are several reasons why observers who disagree with significant aspects of the racial critiques have declined to express publically that disagreement. Some of the reasons suggested to me include: fear of being branded as racist; fear of being seen as defensive and self-serving; and, among some CLS scholars, fear of shattering interracial alliance within the CLS Movement.³⁰⁷ I suspect that another reason is that some observers do not have much confidence in the abilities,³⁰⁸

³⁰⁵ The most poignant example of this phenomenon is the scandalous situation that exists with respect to the formal and informal regulation of adoption. Although, in many jurisdictions there exists an urgent need for people willing to adopt abandoned or orphaned black children, whites have been prevented or dissuaded from adopting black children solely on racial grounds. Those who have stymied transracial adoptions, including some judges, have frequently justified their actions by reference to their own conceptions of what is "natural" or to intellectual work that, with little or no empirical support, warns of harms that will supposedly befall black children adopted by whites. For a particularly troublesome case, see *Drummond v. Fulton County Department of Family & Children's Services*, 563 F.2d 1200 (5th Cir. 1977), which affirmed a decision to deny white foster parents permission to adopt a child of mixed racial parentage; the court stated, among other things, that "[i]t is a natural thing for children to be raised by parents of their same ethnic background." *Id.* at 1205. The best single article on the transracial adoption controversy is O'Brien, *Race in Adoption Proceedings: The Pernicious Factor*, 21 TULSA L. REV. 485 (1986). See also Ballard, *Racial Matching and the Hard To Place*, 17 J. FAM. L. 333 (1978); Grossman, *A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings*, 17 BUFFALO L. REV. 303 (1968); Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503 (1984). For an article that argues in favor of permitting race to be a dispositive factor in adoption decisions, see Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interests of the Child*, 26 J. FAM. L. 487 (1988).

³⁰⁶ Within legal academia, the only direct responses of which I am aware that significantly challenge racial critiques are: O'Neil, *supra* note 283, Becker, *Racism and Legal Doctrine*, 67 TEX. L. REV. 417 (1988), and Graglia, Book Review, 5 CONST. COMMENTARY 436, 446-47 (1988) (reviewing D. BELL, *AND WE ARE NOT SAVED* (1987)). Though he makes several apt points, O'Neil's response to Professor Delgado's *The Imperial Scholar* is a vivid example of the dangers of excessive deference in the ventilation of intellectual disagreement. O'Neil praises Professor Delgado for "marshall[ing] impressive and credible evidence" in support of his argument of racial exclusion. See O'Neil, *supra* note 283, at 255. Immediately thereafter, however, O'Neil voices several problems with the argument that belie his abundant praise. See *id.* at 255-57. Professor Becker's review of Bell's *And We Are Not Saved* follows a similar pattern. See Becker, *supra*, at 421. Professor Graglia's response to Professor Bell's *And We Are Not Saved* is one-dimensional in its extreme negativity. See, e.g., Graglia, *supra*, at 448 (stating that Professor Bell's book is "a piece of mindless left-wing ranting").

³⁰⁷ Cf. Freeman, *supra* note 13, at 296 ("To avoid what I see as unproductive negativity, I am . . . not going to try to refute systematically arguments made [by racial critiques of CLS].").

³⁰⁸ Minorities have long been forced to confront those who, on a racial basis, underestimated

or perhaps even the capacities, of minority intellectuals.³⁰⁹ Therefore, they expect less and demand less of minority scholars than they do of others. They are not moved to publicize disagreement because they lack the sense that those with whom they disagree are their intellectual equals. The contempt that springs from that belief is manifested by silence, a powerful rhetorical weapon.³¹⁰ Although this Article highlights weaknesses in various racial critiques, it is premised on the belief that these works warrant the investment in time and energy that a close examination requires.

their abilities. *See supra* pp. 1751-53. Sometimes observers display lowered expectations by silence. Other times they display it by more generously praising work by minorities than they would praise similar work by whites.

³⁰⁹ Although whites can and have contributed to the racial critique literature, *see, e.g.*, Freeman, *supra* note 13, the overwhelming majority of the writings that constitute that literature have been produced by scholars of color.

³¹⁰ *See* Steele, *supra* note 285, at 46. "[T]olerant silence," Steele observes, "is itself a show of power . . . the power to let a small enemy sizzle in his own juices." *Id.*