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THE SALIENCE OF RACE

*Deborah Waire Post**

In January of 1998, at the Annual Meeting of the Association of American Law Schools, the organizing committee¹ for the 3rd Annual Northeast People of Color Conference got together in the lobby of the Hilton Hotel in downtown San Francisco. Dressed in our "We Won't Go Back"² tee shirts and caps and gowns, we held an impromptu brainstorming session. We needed a name for our conference in March, a name that was catchy and that would communicate the issues we expected to address.

We had already decided to highlight the continuities between the past and the present by honoring the "elders" in the

* The author is a Professor of Law at Touro College, Jacob D. Fuchsberg School of Law. She graduated cum laude from Hofstra University with a major in Anthropology and took a job first as an editorial assistant and then as a teaching assistant to Margaret Mead, the noted anthropologist, before attending Harvard Law School. She began her legal career working in the corporate section of a law firm in Houston, Texas. She left practice for a position at the University of Houston Law School and moved to New York to Touro Law Center in 1987. In the academic year 1994-95 she was a visiting professor at Syracuse Law School. In the Spring of 1999 she was the Distinguished Visiting Professor at DePaul Law School. She has also taught as an adjunct professor at St. Johns Law School in New York City. Professor Post has written extensively in what she considers her three areas of expertise; business associations, legal education and critical race theory. Professor Post seeks to apply an anthropologist's sensibilities and methodologies to the study of law. Among her most recent efforts are a book on legal education, *CULTIVATING INTELLIGENCE: POWER, LAW, AND THE POLITICS OF TEACHING* written with a colleague, Louise Harmon and published by New York University Press and a casebook for contracts called *CONTRACTING LAW* with co-authors Amy Kastely and Sharon Hom.

¹ Leonard M. Baynes (Western New England), Pamela Smith (Boston College), Cheryl Wade (Hofstra), Robert Ward (New England), Nancy Ota (Albany), and myself.

² The tee shirt message was borrowed from a recent book in defense of affirmative action, Charles R. Lawrence III and Mari J. Matsuda, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* (1997). The march in support of affirmative action was organized by the Society of American Law Teachers (SALT). A description of the march and photographs from the march appear in the *SALT EQUALIZER*, April 1998.

community of law faculty of color. In a way, this would be a celebration of our (relative) success in increasing the number of people of color present in the academy and in the profession.³

³ In the beginning, there was no data or very little data. There was very little to count. The *Review of Legal Education* published by the American Bar Association had remarkably little information about law schools. As late as 1960, the only information on law school demographics was the number of women attending law school in a parenthetical following the total number of students enrolled. The numbers merited parenthesis. If the numbers showed anything it was that women were little more than an afterthought, a "maybe we ought to" with respect to admission and/or recording their presence. See A.B.A. Section of Legal Education and Admissions to the Bar, *LAW SCHOOLS AND BAR ADMISSION REQUIREMENTS IN THE U.S. 1960-69*. There was no report on the number of minority students attending law schools and no information at all on the demographics of law school faculties.

The American Association of Law Schools has been in existence since 1900. It began systematically collecting data on law school faculty in 1990 or thereabouts. But it was the earlier surveys conducted and published by SALT that fueled a meaningful self examination by law schools of their hiring practices with respect to women and minorities. As late as 1987, two thirds of the 149 schools responding to a survey by SALT reported that they had one or no black faculty. Richard Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988). Women and Minorities have been hired in greater numbers since the counting began proving the truth of the aphorism "we care about the things we count." The percentage of law school faculty that is minority has increased from 2.8% in 1981 to 3.2 % in 1987, see Chused at 538, to 10.6% in 1991, Cheryl I. Harris, *Legal Education II: Law Professors of Color and the Academy: Of Poets and Kings*, 68 CHI-KENT L. REV. 331, 337 (1992), to 13.2% in 1997. *Association of American Law Schools Statistical Report on Law School Faculty and Candidates for Law Faculty Positions, 1997-98*, prepared by Richard A. White. (visited Jan. 20, 1999)

<<http://www.aals.org/statistics/rpt9798w.html>> The current AALS report shows an increase that is both more dramatic and more pitiful when the absolute numbers are examined. Using the most recent numbers provided by the AALS, there are 5,687 faculty in the positions of Professor, Associate Professor and Assistant Professor listed in the Directory of American Law Schools who provided information with respect to ethnicity. 21 are American Indian, 112 are Asian, 391 are black and 186 are Hispanic. If you use the ABA numbers for 1997, there are 5,395 full time teachers in law schools 719 of whom are minorities. (visited Jan. 20, 1999)

<<http://www.abanet.org/legaled/miscstats.html>>. In twenty years, much of this a time when law schools were expanding and adding faculty and when the

We would honor those who preceded us for their courage and endurance. At the same time, we could offer participants a chance to witness the differences faculty of color are making in legal scholarship with panel discussions and presentations exploring the relationship between legal doctrine, social justice, and economic opportunity.

We did not reach consensus during that meeting although we tried various combinations of words that we thought symbolized what we were trying to do, juxtaposing "pioneers" and/or "trailblazers" with words that signaled the passage of time like "across the generations" or "first and second wave." But it wasn't long before we knew that our focus on elders was appropriate, if not prescient. If we had conducted a market survey, we couldn't have done a better job identifying an idea that had captured the attention of many minority faculty.

At the SALT dinner in San Francisco, James Jones, Professor Emeritus at Wisconsin, recounted what amounted to an oral history of his career before and during his tenure at Wisconsin.

number of law schools was increasing, law school faculties were diversified to the extent of 735 or 713 minorities, depending on who you ask.

In 1981, the data referred to blacks and whites. The number of hispanics, was "so low that tabulations other than gross number of teachers" was considered useless. Chused at 538 n.5. In contrast, by 1997, the AALS was able to sort minority faculty into several categories: American Indian, Asian, Black, Hispanic and other minority.

While the increase in the number and diversity of minorities in law teaching seems dramatic, we are talking about an increase that occurred over approximately 20 years. Twice as many minority faculty were hired, but we are counting survivors. One AALS report notes the following data for a four year period. In 1992, 21 minority faculty left law school teaching while 48 were hired; in 1993 45 were hired and 26 left law teaching and in 1994 22 left law teaching while 46 were hired and finally in 1995, 31 left law teaching and 62 were hired. Richard A. White, *Variations in the Success Rates of Minority and Nonminority Candidates In the AALS Faculty Appointments Register*, (visited Jan. 20, 1999) <<http://www.aals.org/rw.htm>>. No wonder that it has taken us so long to get to the point where minority, American Indian, Asian, Black and Hispanic, as a group make up 13% of the over 5,000 people in law teaching. The attempt to move faculties along on the issue of diversity is a little like flying into a headwind. It takes twice as much effort to travel half the distance.

Perhaps that started people thinking about the other senior faculty members whose histories had not yet been recorded; histories that might well be lost. After we left San Francisco and traveled back to our homes and our schools, a thread about the “firsts” began to wind its way through the ether onto the monitors of members of the minority law professors listserv.⁴

Some of us experienced this thread as synchronicity—proof of the existence of a collective unconscious. Evidence of community is found in ideas, dreams, symbols, myths that percolate to the surface of more than one mind.⁵ It is easier to see this on the internet. Lists are groups formed by a process of self selection whose members meet regularly in a non-place, a “virtual” congregation, and converse with one another about facts, events and archetypal ideas. By its very nature, information gathering on the listserv is a collaborative process, but then so is the creation and the preservation of community.⁶ Last Spring, it seemed a lot of people were searching for (professional) ancestors

⁴ The minority law professor listserv is sponsored by the American Association of Law Schools (AALS) and the listserv manager is Professor Odeana Neal from University of Baltimore Law School.

⁵ The discussion was begun by Burlette Carter at George Washington University Law School who volunteered to send any information she collected to the head of the minority law teachers section. The conversation continued with contributions and suggestions from a number of other members of the listserv including Kevin Johnson, Pedro Malevet, Linda Green, Conrad Johnson, Joyce Hughes, Linda Green and Lisa Ikemoto. Eventually a list was published in a short article by Joyce A. Hughes, *Pioneer Black Law Professors*, AALS MINORITY SECTION NEWSLETTER, November 1998.

⁶ I ran across the phrase “imagined communities” in an article by Mary Louise Pratt. Mary Louise Pratt, *Arts in the Contact Zone*, reprinted in DAVID BATHOLOMAE AND ANTHONY PETROSKY, *WAYS OF READING: AN ANTHOLOGY OF WRITERS* (1993). She borrows the idea from a political scientist, I suppose, who wrote about the emergence of nation states in Europe. But the basic premise, that elites used literacy to create invisible networks that became nation states, seems relevant to the expanding use of the internet and of listservs. Modern nation states are imagined communities because most of the people never know nor do they expect to meet everyone else in that “community” but “in the minds of each lives the image of their communion.” *Id.* at 450.

and identifying elders, the people Derrick Bell refers to as the first Colonists.⁷

The “firsts” that were discussed on the listserv were not the first people of color to teach law. They were the first people of color to teach at white institutions.⁸ From the sometimes abbreviated form of individual email messages, a more detailed or elaborate tapestry can be woven. The thread in this case had a distinctively linear and quantitative aspect, as though we were counting up our successes and our casualties as a measure of our progress. History was being written while we watched, for history was made by the persons whose lives were being described. After all, the “firsts” were part of the larger picture, part of the modern civil rights movement; a particular stage in the continuing struggle against racism and white supremacy. They were the “first wave,” the front line in the ideological battle for integration and the politics of inclusion.

The story of the “firsts” was the story of an idea that took on a life of its own, a single stone thrown into a body of water, making waves that move out in ever large and more inclusive

⁷ Derrick Bell, *A Colony At Risk*, 15 *TOURO L. REV.* -- (1999).

⁸ The idea of “firstness” and the relationship between the historically black law schools and the predominantly (all) white law schools is slightly more complicated than the term “first” might suggest. See Bell, *supra* note 5. The psychological toll on those who are the “first” and often only person of color in white institutions; the various ways in which the hostility of those who object to integration or diversity or multiculturalism may be expressed, and the tragedies that attended the lives of the “firsts” is well known in the minority community. William Ming, for instance, was humiliated late in his career by people whose motives were suspect. The Seventh Circuit reversed a misdemeanor tax violation. He died six months later at age 62. The pain and humiliation suffered by another first, C. Clyde Ferguson, Jr. is probably better known. See, e.g., Stephanie Y. Moore, *In Memoriam, C. Clyde Ferguson, Jr.: Pain and Courage*, 97 *HARV. L. REV.* 1264 (1984). The relatively recent experience of a black woman who was a “first” and an “only” in a white law school is related in Harris, *supra* note 3. The experiences of several black women are collected in a 1991 symposium issue of the Berkeley Women’s Law Journal featuring articles by women in the Northeast Corridor Black Women Law Professor Collective. See Symposium, *Black Women Law Professors: Building A Community at the Intersection of Race and Gender*, 6 *BERKELEY WOMEN’S LAW JOURNAL* 1(1990-91).

concentric circles. In the early decades, the “firsts” were Black, Latino and Asian men.⁹ Women of color came later, sometimes much later. The number of American Indians has never risen above single digits in each category. While the number of African Americans hired increased in the early years, the recruitment of Asians and Latina/os lagged behind.¹⁰ It is hard to explain why this should be so even when we consider the recent discussions of the construction of racial identity and the

⁹ If one examines the list prepared by Joyce Hughes, the black men who entered law teaching at white institutions as early as 1947 (William Ming), but most began in the 1960s with two black men being hired in 1969 (Kellis Parker and Derrick Bell). Michael Olivas reports that the hiring of Latino men followed a similar pattern: Carlos Cadenas entering law teaching in the 1950s, Charles Cantu and Joe Thome began in 1965 and Cruz Reynoso and Leo Romero in 1972. Black women entered law teaching in the 1970s beginning with Joyce Hughes at University of Minnesota in 1971 but in 1973 two women were hired, Patricia King at Georgetown and Denise Carty Benia at Northeastern. See MINORITY NEWSLETTER, *supra* note 4. The first Latina, Graciela Olivarez, entered law teaching in 1973 but the next two women to follow in her footsteps were Rachel Moran and Berta Hernandez in 1982. Michael Olivas, First Latina/o Law Professors, January 1998. Patricia Chew reported that 70% of all Asian Law Professors were hired after 1980 and 40% were hired after 1986. Patricia Chew, *Asian Americans in the Legal Academy*, 3 ASIAN L.J. 7 (May 1996). In 1996, Erik K. Yamamoto reported that there were 61 Asian American law faculty. Eric K. Yamamoto, *Forward: We Have Arrived, We Have Not Arrived*, 3 ASIAN L.J. 1, 2-3 at n.8. The current AALS statistical report on law school faculty reports that there are 142 Asian faculty listed in the American Association of Law Schools directory. (visited Jan. 28, 1999) <<http://www.aals.org/statistics/rpt9798w.html>>. This data suggests that the number of Asian American faculty has doubled in two years.

¹⁰ Beginning in 1986, the National Hispanic Bar Association began creating a yearly list of law schools with a significant Latino/a student body but no latina/o faculty. Lisa Green Markoff and Edward A. Adams, *Hispanic Hit List*, NAT'L L.J. 4, November 6, 1989. In 1997, there were still four law schools, among them Yale Law School, that were on the original and that year's "Dirty Dozen" list. *Yale Law's Lack of Latinos*, THE CONN. L. TRIB., November 3, 1997. In 1992, Michael Olivas was quoted as saying that "Ten years ago there were 22 Hispanic full time professors, five at one school." In 1992, in contrast, there were "100 at 65 different schools." At the same time, the bar association noted that over 100 schools had no Hispanic faculty. Ken Myers, *Hispanic Bar Raps 'Dirty Dozen' - Institutions Without Latinos*, NAT'L L.J. 4, November. 9, 1992.

classification of Latinos and Asian Americans as white or as model minorities, respectively.¹¹

Our different and our shared history as people of color is part of a continuing dialogue. For the conference organizers, this dialogue was begun during the First Annual Northeastern People of Color Conference¹² and was continued in the panel discussion *The Way We Talk About Race* referenced in the articles by three of our authors: Professors Christopher Iijima, Reginald Robinson and Anthony Farley. All conversations about race are both public and intensely private discussions of diversity politics and the fragile coalition among groups of people who have

¹¹ There is a substantial body of law review literature discussing the "model minority" and "yellow peril" stereotypes and the related notion of "foreignness" with respect to Asian Americans. See, e.g., Symposium, *In Honor of Neil Gotanda*, 4 ASIAN L.J. 1 (1997), including Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of the Asian American Legal Identity*, 4 ASIAN L.J. 71(1997) and sources cited therein. For Latino/as, the debate over the black/white paradigm for race and the use of alternative concepts like ethnicity in legal and popular discourse is discussed in Symposium, *Race, Ethnicity & Nationhood*, 85 CALIF. L. REV. 1096 (October 1997). For a fairly detailed summary of the arguments by Latino/a scholars on the issue of race, see Ian F. Haney Lopez, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CALIF. L. REV. 1143 (October 1997). The exclusion of Mexican Americans and other Latino/as from participation in programs designed to remedy racial discrimination has been justified with reference to the racial categories that existed, without regard to the racialization of these groups. If you are part of the group that is in the majority, there is little or no political pressure to include you. You are, by definition (racial) already included. See also George A. Martinez, *African Americans, Latinos, and the Construction of Race: Toward an Epistemic Coalition*, 19 CHICANO L. REV. 213 (1998). Professor Martinez notes that while white identity and privilege are linked, most Mexican Americans were white but not privileged. While Mexican Americans and other Latinos were treated as "irreducibly other and non-white," policies adopted to reverse or remedy the exclusionary policies of the Jim Crow era would have been directed at those who were classified legally as 'black' not those who were legally 'white.' See also BILL PIAT, *BLACK AND BROWN IN AMERICA: THE CASE FOR COOPERATION* (1997).

¹² *Law Professors of Color in the Postmodern World: Panel: the Diversity Among Us*, 19 W. NEW ENG. L. REV. 19 (1997) (panelists included Professors Berta Esperanza Hernandez, Alfred Chueh-Chin Yen, Jenny Rivera and Leonard M. Baynes).

experienced racial classification as a tool of oppression and subordination.¹³

Much of the controversy involves the nature of race discourse in the United States. In her remarks on the panel, Professor Jenny Rivera referred to the asterisk included in some statistical breakdowns by racial and ethnic categories, a qualification to the category "hispanic" indicating that people in this category can be either white or black.¹⁴

The idea that we are all "people of color" does not sit comfortably with many people who are denominated "minorities" by the dominant culture. There are many who note with some chagrin that the process of assimilation for most immigrants begins with the lesson that the one thing you don't want to be Black or even "colored".¹⁵

¹³ Clinton's race panel struggled with some of the same issues: the discourse carried out (unsatisfactorily) in public on a national basis. The panel's beginning was marked with a disagreement about the starting point and the time that would be spent on slavery and the relationship between whites and blacks. The exchange was reported to have taken place between Angela Oh and John Hope Franklin. See Warren P. Strobel, *Clinton's Race Panel Divided Over Focus; Black-White Issues Too Exclusive, some say*, THE WASHINGTON TIMES, July 15, 1997. Unlike the spirited debate about the legitimacy of the "black white paradigm" for understanding the relationship between whites and other communities of color or ethnic groups, the discussion by the race panel just dissipated. The only other issue to receive several days coverage was the demand of conservatives that they be represented on the panel.

¹⁴ See Ian Haney Lopez, *supra* note 10.

¹⁵ A few years back the President of the Student Bar Association at Touro Law Center decided that he was opposed to students organizing around identity. He had no problem with the Criminal Law Society or the Entertainment and Sports Law Society or fraternities like Phi Alpha Delta but he objected to organizations like the Jewish Law Students, Columbian Law Students, Women's Bar Association, Black Law Students Association, Latino Law Students, South Asian Law Students, Emerald Law Society, Gay and Lesbian Law Students, Parents as Law Students, Older but Wiser Law Students, etc. He could not abolish such organizations, but he could, he decided, open them up to people who did not share the identity signaled by the group's name. He took aim at the rules that limited eligibility for membership or for election to office in these organizations. He decided that he would refuse to fund them. He announced that he would not sign the checks issued

In the discussion at *the Way We Talk About Race* at the Conference, Professor Reginald Robinson took the position restated in his article *Race Consciousness: A Mere Means of Preventing Escapes from the Control of Her Master*,¹⁶ that rejection of the concept of race is essential to the liberation of people of color. Professor Christopher Iijima argues in *Race as Resistance: Racial Identity As More Than Ancestral Heritage*, that race can be site of resistance for those who struggle against oppression and subordination.¹⁷

by the SBA for the organizations in violation of the non-discrimination rule he had just announced.

Now, as you might expect, this caused some furor among the student organizations. Some of them just laughed and decided to be pragmatic. It was unlikely that any gentile would be elected President of the orthodox Jewish organization, for instance, no matter what the bylaws said. But BLSA's president decided to stand up for the principle that a subordinated community could decide to limit eligibility for leadership positions to those who were members of the community. Since membership is a matter of self identification and not skin color, all one had to do to be President of BLSA was to identify as a Black person.

I tried very hard to understand this young man's passion on this subject. At one point, he came to see me in my office. He explained that his concern about identity politics arose from his experience as a student leader. The year before he had been elected President of the Latino Law Student Association. He was removed from office when they discovered he was not Latino. I told him that I thought the reaction of the Latino students was perfectly reasonable. Why should they make a white man the head of their organization? He could have caught me there by pointing out that many hispanics are white (the asterisk, remember?) Instead, he held out his arm to me and pointed: "Do I look white to you?" I was now completely confused. So, I asked, "Are you Latino?" He answered that his father was Irish but that his mother was from India. "Well, make up your mind," I told him, "you can't have it both ways. You can't be white and a person of color at the same time." I may have been impatient with him, but do appreciate how hard this choice is for some people, how ambivalent they are and how much energy and emotion they expend on the decision.

¹⁶ Reggie Robinson, *A Mere Means of Preventing Escape From the Control of the Master*, 15 TOURO L. REV. -- (Winter 1999).

¹⁷ See Christopher Iijima, 15 TOURO L. REV. -- (Winter 1999). See also Neil Gotanda, *Chen the Chosen: Reflections on Unloving*, 81 IOWA L. REV. 1585 (1996) (discussing in part Chen's confusion of biological race with

Every one of the panelists and the contributors to this symposium issue (save one, perhaps), understands that coalitions are difficult to create, hard to sustain, unimaginably fragile. So perhaps Professor Anthony Farley's remarks at the end of the panel and in his article, *Thirteen Stories*, suggesting that we adopt the philosophy of the liberation theologian Allan Boesak, is the approach that ultimately may serve to protect and preserve the coalition.¹⁸ We should all identify with the "least in our society." Or perhaps all that is needed to sustain the coalition is the consistent and unabashed assertions of privilege by white males like the one that turned the focus of the panelists outward, from an introspective examination of the relationships among the various groups represented by the panel participants to the relationship each of them has with the ruling class.¹⁹

People of color in the legal academy today are making history.²⁰ The internal debate about the direction we should take in furthering the interests of people of color will be part of that history. Some, like Reginald Robinson, argue that we should abandon the "village" we all inhabit in his allegorical tale.²¹ Professor Robinson feels that the village is built on shifting sands, an idea as artificial and as contested, from a scientific point of view, as the notion of race.²² The desire to escape the limitations

"descriptive, historical, sociological and linguistic dimensions" in the U.S. idea or concept of race).

¹⁸ Anthony Farley, *Thirteen Stories*, 15 TOURO L. REV. -- (Winter 1999).

¹⁹ Daniel Subotnik, *Critical Race Theory--The Last Voyage*, 15 TOURO L. REV. -- (Winter 1999).

²⁰ The idea that spillover (or trickle down) of ideas from the seminar room to the real world (otherwise known as "praxis") was the culprit in the O.J. Simpson case first appeared in Jeffrey Rosen, *The Bloods and the Crits*, THE NEW REPUBLIC, December 1996. The work of several critical race scholars has been reviled (and I chose this word carefully) in reviews of the book by Daniel Farber and Suzanna Sherry, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1998). See, e.g., Richard A. Posner, *The Skin Trade*, THE NEW REPUBLIC, October 13, 1997 (book review); Alex Kozinski, *Bending the Law*, NEW YORK TIMES BOOK REVIEW, Sunday, November 2, 1997.

²¹ See *supra* note 16.

²² Even though most scientists agree that the current racial classifications do not reflect the possible groupings genetically similar populations, race as a

of race, to “transcend” race,²³ is a theme that is played out in the minority community in a variety of ways. Some might even

biological concept, not a social construct, continues to give a scientific gloss to theories of racial inferiority. Those who defend racial biology call themselves “empiricists” and scientists. See, e.g., J. PHILIPPE RUSHTON, *Final Solutions: Biology, Prejudice and Genocide*, CURRENT (September 1997). Mr. Rushton, a Canadian biologist, calls himself a “racial realist” which he contrasts with anti-racist hermeneuticists. An award winning series on race and science that appeared in the Sacramento Bee in 1995 exposed J. Philippe Rushton as a biologist intent on showing that people of African heritage are biologically predisposed to violence. According to the author, Rushton announced this theory in 1989 that biology explains the “oversexed, overaggressive behavior of blacks.” See Deborah Blum, *Violence: Genes or Environment? Researchers Battle Over Answer. Third in a five day series. Only Human – the New Biology of Our Behavior*. SACRAMENTO BEE, October 25, 1995, at A1. Apparently there are forensic geneticists who want to find genes that will allow law enforcement officers to determine the race and the skin color to facilitate the apprehension of criminals. These “photofits” would be based on blood, semen or hair and could be used to identify the genes for hair color, eye color and skin color as well as facial features and stature. See, e.g., Gail Vines, *Genes in Black and White*, NEW SCIENTIST, July 1995. The current fascination with genetic research has fueled a debate about the use of race in medical research. See Frank Browning, *Africans in America – America’s Journey Through Racism*, (Part 1 and 2) NPR WEEKEND EDITION, October 24, 1998 and October 31, 1998 (transcript # 98102406-214) (series on the science of race).

²³ At present, there are two black men who whites claim have “transcended” race. One is Michael Jordan because Madison Avenue has embraced him as a person who can sell products across race lines. See, e.g. Edward Kiersh, *Mr. Robinson vs. Air Jordan: the Marketing Battle for Olympic Gold*, LOS ANGELES TIMES MAGAZINE, SUNDAY, March 22, 1992 (“His appeal seems to transcend race, allaying old corporate fears about using blacks in prominent marketing roles.”). The other is General Powell, who may have “transcended” race more while he was silent than he did after he began to speak out on issues like affirmative action. See Richard Burke, *Idea and Trends, President Powell? Not Just If, but Why?* N.Y. TIMES, SEC.4,1 July 30, 1995, Sec. 4,1 (Powell’s appeal “transcends race”); James Gerstenzang, *Powell’s Ideas Stand Front and Center Tonight*, LOS ANGELES TIMES, August 12, 1996 at A1 (Interestingly, Ward Connerly threatened to walk out of the convention if Powell said voiced opposition to Proposition 209). There are some who say that Eric Liu has rejected identity politics. See the summary of the book that describes THE ACCIDENTAL ASIAN: NOTES OF A NATIVE SPEAKER as a book that “rejects identity politics and commends a sort of “omniculturalism.” *Editors Choice*, NEW YORK TIMES BOOK REVIEW, June 7,

argue that the attack on affirmative action by two black men, Clarence Thomas and Ward Connerly²⁴, is motivated not just by their desire to escape their own identities, but by a desire to help other blacks transcend or escape the "stigma" of race.²⁵

1998. Some doubt about the appropriateness of characterizing Liu's position (a function of his ambivalence, perhaps) can be found in his basic thesis that position that the dominant culture is no longer "white." Liu has also written that politics is the only viable instrument for addressing "the fact that in countless unwanted ways, race still matters." Eric Liu, *Mingling Bloodlines Isn't Enough to Bridge the Race Gap*, U.S.A. TODAY, June 11, 1998.

²⁴ Clarence Thomas is, of course, the man who wrote in *Adarand v. Pena*, 515 U.S. 200 (1995) that the "paternalism" of affirmative action programs:

is at war with the principle of inherent equality that underlies and infuses our Constitution and Declaration of Independence. See Declaration of Independence (We hold these truths to be self evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are Life, Liberty and the Pursuit of Happiness.).

Id. at 240 (Thomas J., concurring). See THE DECLARATION OF INDEPENDENCE (U.S. 1776).

Ward Connerly, for his part, headed up the California Civil Rights Initiative, which has now done national. In a victory speech delivered the night Proposition 209 was approved, Connerly admitted that government protection from racial discrimination had been indispensable in the past. He then chided his "fellow black Americans" in a "personal conversation" that we have become "addicted to government and its occupation of our lives." Furthermore, he continued, affirmative action had become so indispensable to black people that we "could not leave home without it." And finally, he reminded us that "this land is, also our land . . . from California to the New York islands, from the Redwood forests to the Gulf Stream waters" Ward Connerly, *The Sweet Music of Equal Treatment*, November 5, 1996, (visited Jan. 28, 1999) <<http://www.calgop.org/server/wc110596.htm>>.

Justice Thomas has described the phenomenon of "self hate" as "psychosilliness." See *Excerpts from Speech by Justice Thomas*, N.Y. TIMES, July 30, 1998., at A1.

²⁵ The current legal meaning of "stigma" and "stereotype" seem to be different from the lay person's understanding of both of these terms. And it is not clear which definitions are being applied by black conservatives. See *supra* note 21 for discussion of "stereotype" by Justice Thomas in *Adarand*.

The relationship between "self hate" and fear of stereotypes is aptly described by Eric Liu. Mr. Liu argues that assimilation is about upward

mobility; about migration across class lines but his description of the fear that grips those who have confronted racism is apropos of this discussion of stigma:

The irony is that in working so duteously to defy stereotype, I became a slave to it. For to act self consciously against Asian 'tendencies' is not to break loose from the cage of myth and legend; it is to turn the very key that locks you inside. What spontaneity is there when the value of every act is measured, at least in part, by its power to refute a presumption about why you act? The typical Asian I imagined and the atypical Asian I imagined myself to be, were identical in this sense: Neither was as much a creature of free will as a human being out to be.

Eric Liu, *Notes of a Native Speaker, Isn't it time we understood assimilation as something other than the White Way of Being*, THE WASHINGTON POST, May 17, 1998.

Over the years stigma has been redefined by the United States Supreme Court in such a way that, although the rhetorical use arguably references the harm that is or has been done to black people, the term is now used regularly in decisions to justify white challenges to classifications that they feel diminish their power. Stigma is no longer the word that Justice Powell thought lacked Constitutional meaning. "The Equal Protection Clause is not framed in terms of 'stigma.' Certainly the word has no clearly defined constitutional meaning. It reflects a subjective judgment that is standardless." *Regents of the University of California v. Bakke*, 438 U.S. 265, 295 (1978). "Stigma" has been revitalized and redefined in recent Supreme Court decisions. Stigma is more than the use of negative assumptions or generalizations about a group in judging a particular individual. Stigma is broad enough to encompass any use of race or ethnicity, including data or analyses generated by the social sciences. It is no longer possible to assume that individuals belong to groups or that membership in groups will support an inference about shared beliefs or interests. "Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they think or act." *Metro Broadcasting, Inc. v. Federal Communications Commission, et al.* 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting). In *Shaw v. Reno*, O'Connor went even further. *Shaw v. Reno*, 509 U.S. 630 (1993). She argued that to assume that race rather than "age, education, economic status, or the community in which they live" could influence voters' decisions was a "racial stereotype." *Id.* at 642. Assumptions about shared interests and educational background are legitimate. Assumptions about the effects of a shared history of discrimination, where one group has been denied access to political power, is irrelevant in cases where the interpretation or application of a statute remedying such past practices is at issue.

Thomas and Connerly, among others, see themselves as dishonored prophets.²⁶ But if a community can honor its heroes, it can also condemn those who put it at risk. We are not talking simply about a difference of opinion, an honest debate, what Cornell West refers to as “principled and passionate discourse in and about black America.”²⁷ This is not a First Amendment issue, implicating a citizen’s right to free speech.²⁸

Punishment by public censure or condemnation, shunning or ostracism, are remedies imposed for injuries inflicted not on an individual, but on a community. It goes without saying that these are punishments that are not imposed lightly. Nor are they imposed by individuals. They represent a collective judgment, and a community’s response to what is perceived widely as betrayal or treachery. We are talking about people who actively use their power to harm the community. Modern day activists like Ward Connerly and Clarence Thomas have provided a contemporary example of what it means to sell someone “down

²⁶ “A prophet is not without honor save in his own country and in his own house.” 14 *Luke* 57 (King James).

²⁷ CORNELL WEST, *RACE MATTERS* 49-59 (1993) (discussing the aggressive attacks of black conservatives in an effort to destroy the hegemony of black liberalism). Black liberals have also criticized the use of race. Anthony Appiah and Orlando Patterson, among many others, have argued for the abandonment of race. See Lopez, *supra* note 10, at 51 n.29 and 1179-1182, for the discussion of their positions. See also Deborah W. Post, *Reflections on Identity, Diversity and Morality*, 6 *BERKELEY WOMEN’S L.J.* 136 (1991) (discussing Appiah’s theory).

²⁸ See editorial criticizing the NAACP for canceling a speech Justice Thomas was scheduled to give. *Who’s Afraid of Clarence Thomas*, *WASHINGTON TIMES*, January 12, 1997. Clarence Thomas was invited (although neither the full membership nor the board members of the judiciary committee were consulted or asked to approve the invitation) to speak to the National Bar Association. Those who opposed his appearance, lead by the late, great Judge Leon Higgenbotham, were answered with arguments that invoked “freedom of speech” to explain why Justice Thomas deserved a hearing. The First Amendment applies to government attempts to control speech. Advocates of “free speech” often ignore this point, but many of the free speech advocates have no trouble remembering that state action is necessary for the Equal Protection Clause of the Constitution to apply.

river.” Their treachery is both more substantial and more concrete than mere differences of opinion.

But whether we are talking about the treatment of Ward Connerly and Justice Thomas or the more complicated and nuanced discussion of the differences between race, ethnicity and conceptions of “foreignness”, the internal debates, the private conversations among people of color, are not really private. Our most private thoughts, our personal aspirations, are inspected, appropriated, manipulated. This scrutiny and the ever present, often overwhelming desire to be included makes us vulnerable. We have to guard against the rhetoric of equality used by those who feign disapproval of racism while they reassert white privilege and white supremacy.

Perhaps the organizing committee anticipated the direction that the panel on race talk would take. In any event, the discussion of a possible title or name for the conference also moved from intra-community concerns to the politics of race in the broader society. That inanity endemic in American culture, televised “talking heads,”²⁹ who opine but do not inform, ultimately provided the title for the conference. I was watching the McLaughlin Group (or channel surfing, if truth be known) when I heard George Will weigh in with a comment that “race has no salience,” a sentiment echoed moments later by Pat Buchanan and John McLaughlin.³⁰

Granted, this was not exactly a defining moment in television history. The purposeful “sound bite” of political pundits does not

²⁹ Here’s a question for William Safire: When did “talking heads” become a term that is used with such frequency that every search conducted on Lexis comes back “this search has been terminated because more than a thousand documents will be retrieved?” When I restricted the search to the period after June 1998, I retrieved a total of 610 newspaper articles.

³⁰ A summary review of the McLaughlin Group by a television critic described the program as “a 30 minute tour of superficial analysis” with a “formula (that) prizes verbal combat over idea content.” Eric Black, *Political Pundits; The National Pundits*, MINNEAPOLIS STAR TRIBUNE, July 5, 1996. Carl Bernstein has described it as an example of “idiot culture.” Hector Saldana, SAN ANTONIO EXPRESS NEWS, Sept. 27, 1998, at Part B at 1 (referring to speech at the 1998 Radio and Television News Directors Association meetings).

have the same emotional impact as a well-done documentary or a dramatic story illustrated with photographs on the evening news. If we limit the comparison to race relations, the pronouncements of George Will and Pat Buchanan are nowhere near as dramatic as the black and white television images that altered the lives of millions of Americans in the sixties: civil rights demonstrators attacked by police dogs and water hoses; faces of the white parents in Little Rock, Arkansas contorted with hate as they screamed and spat at black children escorted to school by federal troops. Nor are these comments as shocking, for the generation born after the 1960s, as the Rodney King videotape that re-ignited Los Angeles and placed race back on the national political agenda.³¹

But these comments, as undramatic and mundane as they seem, are important because they reflect a changed strategy on the part of those who oppose race conscious remedies. A populist politician, the self appointed spokesperson for the American people and one of the foremost conservative intellectuals have opined on the matter of race. The Silent Majority has regained its voice. The Manhattan Institute,³² the American Enterprise

³¹ Colloquia, *Racism in the Wake of The Los Angeles Riots*, 70 DENVER U.L. REV. 187 (1993).

³² For a description of the systematic attempt to change public opinion through the use of "think tanks," see JEAN STEFANCIC AND RICHARD DELGADO, NO MERCY (1996). See also Eric Alterman, *Fighting Smart*, MOTHER JONES, July 1994 ("conservative intellectual offensive" included "multimillion dollar think tanks: the American Enterprise Institute, the Heritage Foundation; the Center for Strategic and International Study, and the like."). The Manhattan Institute claims to be think tank that funds scholars to "write about issues that focus on free-market solutions to urban problems, school reform, and judicial studies." See Manhattan Institute (visited Dec. 1, 1998) <<http://Manhattan-Institute.org/html/about-m.i..htm>>. For an example of recent publications on race by scholars employed by the Manhattan Institute, see Heather MacDonald, *Law School Humbug*, CITY JOURNAL, Autumn 1995, at 46; Abigail Thernstrom, Editorial, . . . *before the divide gets wider*, N.Y. TIMES, available in 1995 WL 9299605; Abigail Thernstrom, *After the O.J. Trial, Are We Two Nations*, STAR TRIBUNE, October 23, 1995; Abigail Thernstrom, *Two Nations, Separate and Hostile?*, N.Y. TIMES, October 12, 1995. The articles by Abigail Thernstrom reveal one of the important strategies of the Institute -to obtain the widest possible exposure. I

Institute,³³ and now the McLaughlin Group³⁴ are part of a growing number of journalists/opinion makers who deny the existence of racism while they demonize those who expose racism and advocate race conscious remedies.

Perhaps it is my training as a lawyer and as a teacher of contracts law, but when I read commentaries and opinions, the editorials and the articles of people like George Will and Abigail Thernstrom, to name just two examples, I hold the authors responsible for what they have written. Authors cannot disclaim intentions that can be ascertained objectively. The intent of the author cannot and should not be divorced from what the author knows or can be presumed to know about his own history and culture as well as the history and the culture of the readers she expects or wishes to reach. I know the difference between an interpretive strategy that seeks to determine authorial intent and one in which the reader (usually a judge) constructs meaning from his/her sense of what is efficient, reasonable, or even commonplace. My task, when I hear a comment like "race has no salience" is not construction or deconstruction, but interpretation using an "objective" standard.

When I heard the unanimous endorsement of the statement that race lacked salience, I considered it ambiguous. It could several possible meanings. The statement could have been aspirational or normative as in "race should have no salience in contemporary society." It could have been an epirical statement: "nobody pays

assume that is why the same editorial appears in more than one newspaper. I have assumed, however, that the New York Times does not own the Minneapolis Tribune. This seems a far cry from the original conception of a "think tank." Attempts to unmask money and the identity of organizations sponsoring ballot initiatives was shot down by the Supreme Court in *Buckley v. American Constitutional Law Foundation*, 119 S. Ct. 636 (1999).

³³ The American Enterprise Institute ("AEI") is one of America's largest and oldest "think tanks". The AEI claims that it funds research on economics and trade; social welfare, government tax, spending, regulatory and legal policies, U.S. politics, international affairs, and U.S. defense and foreign policies. See American Enterprise Institute (visited Dec. 1, 1998) <<http://www.aei.org/aboutaei.htm>>.

³⁴ See *supra* note 28 (discussing the McLaughlin Group).

any attention to race anymore." I suspected it was neither of these.

My suspicions about George Will's meaning were confirmed when I found one of his columns that made the same point. George Will used the election results in Texas, Georgia and Florida to prove that race doesn't matter anymore.³⁵ In doing this he follows in the footsteps of Abigail Thernstrom, an opinion shaper employed by the Manhattan Institute. She and her husband Stephan Thernstrom, have made race the subject of their scholarship.³⁶ Abigail Thernstrom has written about the Voting Rights Act, a significant piece of civil rights legislation, in her book, *Whose Votes Count*.³⁷ In both her book and a series of law review articles, Abigail Thernstrom starts from the premise that majority minority districts are "unfair" to whites.³⁸ And since the

³⁵ George Will, *Good News But Liberals Refuse To See It That Way*, THE TIMES PICAYUNE, November 29, 1996, at B7.

³⁶ The most recent book by the Thernstroms is STEPHAN THERNSTROM AND ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1997). See also Nicholas Lemann, *Affirmative Action and Reaction*, N.Y. TIMES, Sunday, September 7, 1997 (reviewing STEPHAN AND ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE*).

³⁷ ABIGAIL THERNSTROM, *WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* (1987) (hereinafter *MINORITY VOTING*). See also Abigail Thernstrom, *More Notes From A Political Thicket*, 44 EMORY L.J. 911, 931 (1995) (hereinafter *Political Thicket*).

³⁸ I should have been on notice after reading her book that Abigail Thernstrom has a notion of fairness that is, I think, unique. At a conference sponsored by Touro Law School, Dr. Thernstrom was scheduled to debate an expert on voting rights law, Randolph Scott McLaughlin. Professor Scott-McLaughlin was unable to attend because of a court date and I filled in, although my comments were limited by my own lack of expertise. The best I could hope to do at that time was respond to the points she made and to speak generally on the issue of race conscious remedies. After the conference, I took the transcript and worked on it to make it more responsive to Dr. Thernstrom's arguments and to flesh out my own arguments. When my article was finalized, it was delivered to Dr. Thernstrom. She immediately withdrew her article from publication (arguably breaching a contract). There were a variety of explanations offered to me by the students for this decision. The principal argument was that Dr. Thernstrom felt she should be given time to respond to my arguments. Another was that I was calling her a racist, which

book was written, several majority minority districts have been rejected by the Supreme Court.³⁹

It was the re-election of black incumbents after the district lines were redrawn that prompted George Will to write his piece lambasting liberals and critical race scholars. The re-election of black incumbents by a predominantly white electorate was seen as a validation of Thernstrom's argument that majority minority districts are unnecessary.⁴⁰ The argument that Thernstrom made, however, was two fold. She argued that whites would vote for blacks. But she also argued that blacks would not vote for whites. Hence the "unfairness" of majority minority districts. It is Thernstrom's concern with "fairness" for whites that is

could be considered an ad hominum attack. See Richard Delgado, *Rodrigo's Book of Manners: How to Conduct a Conversation on Race—Standing, Imperial Scholarship and Beyond*, 86 GEO. L.J. 1051 (1998) (noting that Judge Richard Posner used a book review as an occasion to state that the presence of critical race scholars in legal education was a disgrace and that they are poor role models). I realize that it is a fine line and one that some cannot see, but I believe that as a scholars, one should expect criticism of the content of an argument or of the way it is made. Criticizing these is not the same thing as calling the author a racist. Certainly it is nothing like calling the authors of a body of scholarship "anarchists" or members of a "lunatic core." In the end, the law review refused to publish my article because they thought it would not be "fair." I was at a loss to understand the basis of the fairness argument.

³⁹ Justice Sandra Day O'Connor cites to Thernstrom's book in her majority opinion in *Shaw v. Reno*, 509 U.S. 630, 640 (1993).

⁴⁰ Minority majority districts were litigated and districts redrawn to reconstitute majority white districts in Florida, Georgia, Texas and Louisiana. Of the black candidates who ran in the redrawn districts, four won: Cynthia McKinney and Sanford Bishop (Georgia), Eddie Bernice Johnson and Sheila Jackson Lee (Texas) Cleo Fields (Louisiana) did not seek reelection. Michael Fletcher, *New Tolerance in the South or Old Power of Incumbency? Blacks Won in Five Redrawn Mostly White Districts*, THE WASHINGTON POST, November 23, 1996. Civil rights activists have argued that their victories represent the power of incumbency. *Id.* Will rejects the argument that these elections prove only that incumbents have a competitive advantage. *But see* Thernstrom on the reelection of whites in majority minority districts: "In majority black jurisdictions, whites often continue to win as incumbents but are replaced by blacks as soon as they retire. Without the advantage of incumbency, even well-positioned whites are defeated." MINORITY VOTING at 218.

disturbing. So is the recent flurry of attacks on critical race scholars, including Will's column, a column that purported to be about the demise of racism evident in the recent elections.

Will's column expanded on the cacophonous rantings of the McLaughlin Group. According to Will, "high theory, critical race theory" breeds anarchy and a disregard for the rule of law. For Will, "the unabated malignant salience of race" is a "fiction."⁴¹ In one fell swoop, or with the stroke of a keyboard, Will announces to the readers of his column that racism is a figment of the imagination of intellectuals in communities of color or even worse, that these scholars are fabricating instances of racial discrimination.

I assume that the use of the term "malignant" was intended to signal his disapproval of what we once called "invidious" discrimination.⁴² But to say that "race has no salience" is not the same thing as saying that there is no such thing as the "unabated malignant salience of race." The latter statement holds out the possibility of a "benign" salience of race, while in the former, race is made irrelevant.

If Will's enigmatic on air statement about race created a hermeneutic crisis for me, his column resolved it. The clues lay in his characterization of critical race theory as an "invitation to anarchy." In a single phrase "race has no salience" Will was offering both a critique of scholarship and a political strategy. Henceforth, government has no further role to play in policing the relationships between or among the various groups in this country. There is no need for government action, for government sanctioned or legally enforceable remedies for racism because there is no racism.

In his criticism of critical race theory, Will borrowed a page from critics like Abigail and Stephan Thernstrom, Daniel Farber and Suzanna Sherry and Jeffrey Rosen, among others.⁴³ This is

⁴¹ *Id.*

⁴² See Justice Powell's argument that a sense of deprivation on the part of whites could lead them to experience redistributive policies as invidious discrimination. *Regents of California v. Bakke*, 438 U.S. 265, 295 (1978).

⁴³ See *supra* note 17.

more than a "I see the glass as half empty and you see it half full" debate. The vituperativeness of some of the comments contained in what passes for criticism suggests that this is nothing short of no holds barred, ideological warfare. The Thernstroms, for example, are overt and unabashed in their advocacy on behalf of whites. But what I find more disturbing is their resort to asymmetrical arguments that compare whites and blacks in a way that evokes racist stereotypes.⁴⁴

Race has salience because it is used, with no shame and no regret, by those who know that what they seek is not an end to affirmative action for African Americans, but an end to "radical multiculturalism." Race is a weapon close at hand and easy to use. After all, the racial hierarchy has remained undisturbed in this country despite the civil rights movement, reparation⁴⁵ and

⁴⁴ As a teacher of contracts, I heed Justice Benjamin Cardozo's admonition that attention to symmetry may be less important than the "attainment of a just result." *Jacob & Youngs v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921). But where the issue is racism, justice may require attention to symmetry. The principal indicium of racism is asymmetry --the assignment of positive attributes to one group of people that are then compared to the negative attributes of another group. The claim of racial superiority is so deeply engrained in white Americans that they do not see the assumptions they make about their own racial superiority. See, e.g., JAMES R. KLEUGEL AND ELIOT R. SMITH, *BELIEFS ABOUT INEQUALITY: AMERICANS' VIEWS OF WHAT IS AND WHAT OUGHT TO BE* (1986) (discussing the psycho-social process by which people seek to explain and justify social inequality and their limited awareness of aspects of racial inequality). See also law review articles that explore the psychological aspects of racism, Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Peggy Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989). For a discussion of the sense of entitlement linked to claims of racial superiority. See generally Cheryl Harris, *Whiteness as Property*, 8 HARV. L. REV. 1707 (1993). For interesting discussions about the way racial identity is socially constructed see IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE*, NEW YORK (1996).

⁴⁵ Congress apologized to the individuals of Japanese ancestry "on behalf of the nation" for the "fundamental violations of the basic civil liberties and constitutional rights" of these individuals in the Civil Liberties Act of 1988 and provided funds for reparations to the Japanese and, to the residents of the Pribilof Islands of the Aleutian Islands. 50 U.S.C. app. 1989, 102 Stat. 903, (August 10, 1988).

apologies⁴⁶. When race is used to undo social policies that benefit a variety of constituencies, it is the black/white divide that is invoked. The headlines read "Blacks With Low LSATs do not belong at Harvard Law School."⁴⁷ When opponents of affirmative allege that admissions are "race driven" they do so with little or no regard to actual size of the applicant pool or the relative proportion of majority or minority students admitted.⁴⁸

⁴⁶ An apology was offered to the Hawaiian people for the overthrow of their government. Joint Resolution to acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii. Pub. L. No. 103-150, 107 Stat. 1510 (November 23, 1993). *But see infra* note 80 (discussing the controversy created by statements by President Clinton interpreted to be an apology for slavery).

⁴⁷ Cynthia Cotts, *Harvard Historian: Blacks With Low LSAT Scores Don't Belong*, NAT'L L.J., December 15, 1997. Although the article discusses Thernstrom's criticism of a study by Linda Wightman of admissions and bar passage rates for minorities, Thernstrom conclusions reference the differences between whites and blacks. And although 78% of all black students completed law school and 75% passed the bar, Professor Thernstrom concluded that "affirmative action students lack the intellectual rigor to face the challenges of the legal profession."

⁴⁸ In a newspaper story in which voters were asked why they voted for I-200, one man said that he was opposed to "race-and gender-driven affirmative action." Tom Brune, *Poll: I-200 Passage Was Call for Reform*, THE SEATTLE TIMES, November 4, 1998. How can an admission process that nets 744 black students out of a total of 34,000 be called "race driven"?

In the State of Washington, the most recent site of a referendum to undo affirmative action, I-200, the minority population has "burgeoned" according to one reporter from 5% in 1970 to 12% in 1998. Marsha King, *Who Gets In? UW Reinvents Rules - New Admissions System Changes Way Race is Treated, But Aims to Preserve Diversity*, THE SEATTLE TIMES, March 21, 1997. I would be considered reckless if I relied, as some voters probably did, on Ms. King's numbers. She reports that the number of black students at UW actually declined from 3.7% or 134 students to 2.9 or 117 students. *Id.* Asian American students represent 25.7% of the class. When I checked the numbers for myself on the University of Washington website, I found that in 1998, there are over 34,000 students enrolled at the University of Washington. There are 744 undergraduates identified as African American. (visited Jan. 31, 1999) <<http://www.washington.edu/admin/factbook/ta5.html>>.

All of the numbers used in the debate about affirmative action have a certain degree of imprecision. The Center for Equal Opportunity, whose President and CEO is Linda Chavez, released a report that stated that University of

Racism is predicated on the existence of a relationship of superiority and inferiority and the anti-affirmative action movement is fueled by the assumption that blacks are inferior to whites and that they are being given something they do not deserve.

The Thernstroms are not the only critics who use this technique, but they are among the very worst when it comes to dredging up unconscious racism and playing with the emotions of white readers. Abigail Thernstrom's arguments are filled with powerful metaphorical and rhetorical images. Whites cannot compete in minority districts where there is "maximum protection for black candidates from white competition."⁴⁹ The effect of creating a majority minority district is analogized to posting signs that read "whites need not apply."⁵⁰ When she discusses the behavior of voters in white districts, Dr. Thernstrom documents specific cases where whites have voted for blacks—where the voters in majority white districts were willing to look at the candidate's qualifications and position on the issues.⁵¹ Whites, the facts clearly show, can get beyond race. In the world that Abigail Thernstrom inhabits, only the decisions of Blacks are "race driven, race determined." Whites are rational, blacks are motivated by irrational considerations, blind loyalty, or a pathological obsession with issues of race.⁵²

Washington "discriminated in favor of blacks." The report alleged that 912 whites and 164 Asians had SAT scores *equal to* or higher than the medians for 100 black students attending UW. Marsha King, *Study: UW, WSU Favor Black Applicants -Release is Political and Tied to I-200 Official Says*, THE SEATTLE TIMES, September 16, 1998. The Chairman of the I-200 campaign, in his turn maintained that blacks are "undeserving" of a college education. Marsha King, *I-200 -Equality on Campus: Are We There Yet?* THE SEATTLE TIMES, October 18, 1998. Why the black student would be "undeserving" or the interests of academic excellence advanced by admitting whites who had scores equal to the medians of the black students is not clear.

⁴⁹ See *Political Thicket*, *supra* note 34, at 931.

⁵⁰ *Id.* at 918

⁵¹ *Id.*

⁵² Sherrilyn A. Ifill, a professor at the University of Maryland and the one of the attorneys representing black plaintiffs in a judicial redistricting case, *League of United Latin American Citizens v. Attorney General of Texas*, 902

Then, after building her entire argument on the assumption that blacks act in concert in political elections, Dr. Thernstrom makes a stunning reversal. She rejects any definition of "electoral equality" that references proportionality by pointing out the vast number of cases in which black or blacks and hispanics have elected white candidates.⁵³ The black community is not monolithic, Thernstrom argues. There is such diversity in our views that the courts and legislatures should not presume that a black candidate would be better qualified to represent the interests

F.2d 293 (5th Cir. 1990); the Supreme Court granted certiorari under the name *Houston Lawyers Association v. Attorney General of Texas*, 501 U.S. 419 (1991). Professor Ifill criticizes the decision of the appeals court, which assumed that judges elected in a white district would be "neutral" but judges elected in minority districts would be partisan. See Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95 (1997).

For her part, Thernstrom argues that majority black districts "almost inevitably" elects a black legislator because blacks are guilty of "bloc voting" a sin ascribed to the fact that participation in the process is "relatively novel" to them. *Political Thicket*, *supra* note 34, at 935. The assertion that black voters do not elect white legislators is false. See discussion of actual voting practices in majority minority districts. See *infra* note 53. The allusions to the lack of sophistication on the part of black voters and the insinuation that "bloc voting" is a kind of herd instinct rather than a reflection of conscious reflection on what is in the voters' self interest are patronizing as well as inaccurate. It is akin to the charge of "tribalism" which is leveled against the diversity movement or those associated with the identity politics of subordinated communities.

The choice of adjective is another way of expressing the assumption of inferiority, which is racist. Isn't Justice Powell partisan when he worries that white Protestant males might soon be outnumbered by other groups? *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 296 (1978) (if all groups that had experienced discrimination were given preferences, it would result in a "new minority of white Anglo Saxon protestants."). Why should the growing awareness of racial self interest reflected in claims of "reverse discrimination," a renewed assertion of the privileges of whiteness, or the movement whose members are described as "angry white males" escape labeling as either partisan politics or "tribalism?"

⁵³ In this section of the book Thernstrom cites cases of blacks or blacks and hispanics electing whites in East Chicago, Indiana, Brooklyn, Selma, Alabama, Norfolk, Virginia and other places as well. MINORITY VOTING at 210-215, 225.

of a black community.⁵⁴ She notes sanguinely that white candidates are politically astute enough to respond to black constituencies. She quotes a New York Congressman who is purported to have said, "I vote the same way a black would."⁵⁵ Implicit in this argument or this example is a concession. It must be possible to identify the interests that members of the black constituency have in common, a possibility that the Supreme Court and Thernstrom repeatedly reject.⁵⁶ To have mentioned these facts earlier when she was building a case for the unfairness of majority minority districts would have undermined her major premise: that whites cannot win in these districts. And facts cannot be allowed to cloud the issue.

The Thernstrom's inhabit a world that has been turned upside down. In that world, power relationships are inverted so that whites are powerless and blacks are powerful. Black voters are depicted as more powerful than white voters are because the government accords them unwarranted protection from competition. In another iteration of the same premise, that blacks have too much power, George Will points to the collusion between critical race scholars and big government liberals who suffer from a "self serving absorption [and irrational] obsession with race."⁵⁷

George Will's fear of big government seems entirely misplaced as Madeleine Plascencia points out in her article, *The Politics of*

⁵⁴ *Political Thicket*, *supra* note 34, at 937 n.105 (criticizing Justice Ginsburg's discussion of the relationship between shared interests, community and ethnicity.)

⁵⁵ MINORITY VOTING at 251.

⁵⁶ *Political Thicket*, *supra* note 34, at 936-939. Thernstrom argues that perception of separateness is a "psychofact" that threatens to become a reality if we continue to act as if it is true. It may be overstatement to say that whites and blacks live in completely different worlds, but it is not an overstatement to say that their interests may diverge on specific issues. Some of those issues, like affirmative action or voting rights legislation, may be singularly important to the well being of the black community.

⁵⁷ See Will, *supra* note 34.

Race on the Electronic Highway,⁵⁸ we adhere to a non-discrimination ideal. But in the telecommunications industry, as elsewhere, the federal government has not intervened to make the ideal a reality. Even when we are discussing the distribution of services that are critical to safety and well being of a community, when service is linked so directly to the democratic ideal of full participation in the political process, status is everything. The rural and the urban poor, the people of color living in center cities, are not part of the telecommunications revolution.

And what about Thernstrom's appropriation of the phrase "blacks need not apply" altered to suggest that now blacks are discriminating against whites?⁵⁹ Her argument is perfectly consistent with the upside down ideology of "reverse discrimination." The concern with "invidious" discrimination that animated earlier civil rights advances has been replaced as a matter of national concern and as the subject of legal activism by "reverse discrimination."⁶⁰ Justice Powell set the stage when he argued that "invidious" discrimination was subjective and that whites might experience redistributive policies as "invidious"

⁵⁸ Madeleine Mercedes Plasencia, *The Politics of Race on the Electronic Highway: An Analysis of the Video Dialtone Redlining Cases, and the Nynex Consent Decree in Roxbury*, 15 TOURO L. REV. -- (Winter 1999).

⁵⁹ The juxtaposition of arguments based on presumptions and those which are factually based has been examined in a discussion of the rhetoric of innocence that is used by those opposed to race conscious remedies. Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990). In the case of affirmative action, the presumption is that whites are innocent and the fact specific inquiry is required of blacks who must prove they are or were victims of discrimination before they may benefit from affirmative action programs.

⁶⁰ The idea that blacks were "advantaged" somehow because of their race has amazing currency even though most whites admit they would not want to be black. See, e.g. *blac*, although the exact opposite is acknowledged as true by most people, is expressed in popular culture in various ways: in movies like *SOUL MAN* (Warner Bros. 1986). See Margaret Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, in *THE CRITICAL RACE THEORY: THE CUTTING EDGE* 56 (Richard Delgado ed., 1995) and now in *Glamour Magazine*. Lisa Belkin, *She Says She was Rejected by a College For Being White. Is She Paranoid, Racist or Right*, *GLAMOUR* Nov. 1998.

discrimination.⁶¹ Racism was thus unhinged from the politics of subordination, from the ideology of racial superiority. Twenty years after *Bakke*, conservatives recite a litany about black or minority irrationality while they call everything, including the jury verdict in the O.J. Simpson case (but not the failure to convict police officers of excessive force), a racial "preference."

Invidious discrimination is not a matter of subjective experience. It is true that perception is referenced in more than one legal test designed to protect the liberties of individual citizens – like the freedom from unreasonable searches and seizures discussed by Professor Robert Ward in *Consensual Searches, The Fairy Tale That Became a Nightmare: Fargo Lessons Concerning Police Initiated Encounters*.⁶² But the standard is always objective, a standard of reasonableness that should be rooted in empirical evidence of what people feel and how that affects their behavior. The test is never completely subjective, even when the law applies a "situated" reasonableness test.⁶³

The Supreme Court's concern with the reaction of the dominant or more powerful or privileged class belies the claim of neutrality and objectivity in these decisions. People of color know all about the fear on the part of the judiciary that whites might get mad. The courts, the unelected branch of government, always seems preoccupied with the prospect of social dissension.⁶⁴ A similar, if more muted, concern was voiced in *Bakke*⁶⁵ and in *Shaw*.⁶⁶

⁶¹ *Bakke*, 438 U.S. at 295. Justice Powell also construed prior decisions to conform to this redefinition: "Nor has this court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious." *Id.* at 290.

⁶² Robert Ward, *Consensual Searches, The Fairy Tale That Became a Nightmare: Fargo Lessons Concerning Police Initiated Encounters*, 15 *TOURO L. REV.* -- (Winter 1999).

⁶³ *Id.*

⁶⁴ One of the favorite arguments used by courts denying blacks relief from segregation and exclusion is the argument that any other result would exacerbate tensions between the black and white community. Consider the following quote from an antebellum state court decision:

If those a shade more white than black were to be forced upon the white youth against their consent, the whole policy

A sense of entitlement and a corresponding sense of deprivation seem to be at the heart of white anger over affirmative action, redistricting and even the settlement of land claims of indigenous peoples in the United States. The settlement of land claims of American Indians and Alaskan Natives are designed to protect white property owners as much as well as to provide American Indians and native Alaskans with compensation for land.⁶⁷ It is that process that Marilyn Ford and Robert Rude critique in *ANCSA: Sovereignty and a Just Settlement of land Claims or An Act of Deception*.⁶⁸ And in these settlements, property rights of indigenous peoples are surrendered for amounts that no white person would consider fair if he or she were subjected to the same process.

Discussing race is, according to Abigail Thernstrom, extremely divisive. It can only lead to "deepening estrangement" between blacks and whites until we are like two hostile camps.⁶⁹ Discussions of race and racism are thought to be so divisive that George Will labels critical race scholars anarchists.⁷⁰ Labeling is a big part of the criticism of all critical race scholars. The label anarchist has a political undercurrent, a not so subtle reference to

of the law would be defeated. The prejudice and antagonism of the whites would be aroused; bickerings and contentions would become the order of the day, and the moral and mental improvement of both classes retarded.

Van Horn v. Board of Education of the Village of Logan, 9 Ohio St. 406 (1859) (the plaintiffs claimed that they were "white" and their children had the right to attend whites schools).

⁶⁵ In *Bakke*, Justice Powell refers to the "deep resentment" and the "outrage" who bear the burden of redistributive programs or policies. *Bakke*, 438 U.S. at 295.

⁶⁶ In *Shaw v. Reno*, Justice O'Connor writes that the "risk of lasting social harm to our society" is that race conscious remedies in the area of voting rights may "balkanize us into competing racial factions." *Reno*, 509 U.S. at 657.

⁶⁷ See *infra* note 54 for further discussion of public resistance to land claim settlements with American Indians.

⁶⁸ Marilyn Ford and Robert Rude, *ANCSA: Sovereignty and a Just Settlement of land Claims or An Act of Deception*, 15 TOURO L. REV. -- (1999).

⁶⁹ Thernstrom, *Two Nations*, *supra* note 29.

⁷⁰ Will *supra* note 34.

the consequences of anarchy, to the fate of the political dissidents in the time before the cold war and communism.⁷¹

Lest we think these threats are new, Derrick Bell in his essay, *A Colony at Risk*, writes of scholarship written in spite of warnings that it would be disvalued by tenure committees, scholarship that gave (and gives) weight and substance to the claim that race is salient to the legal regime in and outside of the United States. The life experiences of Constance Baker Motley whose autobiography is reviewed in this issue,⁷² particularly her experiences as a young lawyer, are a lesson in the complex and layered ways that oppression impedes progress, limits access to resources and to power. Her autobiography confirms something that was apparent to the organizers of people of color conferences, including the 3rd Annual Northeastern People of Color Conference from which many of the papers printed in this symposium issue are taken. It is apparent to Derrick Bell; to those who discussed the "firsts" over the internet and to any person of color who has ever taught at a white law school. The walls built up to keep out the "other" have not come tumbling down.

⁷¹ I would like to point out to George Will at this point that it does not seem consistent to call people "anarchists" in one breath and accuse them of collusion with supporters of "big government" in the next. One reviewer described the anarchist movement as a "heavily, but not exclusively ethnic, working class, libertarian movement." Paul Buhl, *Anarchist Voices: An Oral History of Anarchism in America*, THE NATION, April 10, 1995 (book review). For those readers who have an abiding interest in American history, Paul Avrich has written several books about the anarchist movement: THE RUSSIAN ANARCHISTS, AN AMERICAN ANARCHIST: THE LIFE OF VOLTARINE DE CLEYRE (1978), THE MODERN SCHOOL MOVEMENT (1980), ANARCHIST PORTRAITS (1988) and SACCO AND VANZETTI: THE ANARCHIST BACKGROUND (1991) and finally ANARCHIST VOICES: AN ORAL HISTORY OF ANARCHISM IN AMERICA (1995). *Id.* As for the legal treatment of anarchists, there is always the specter of Sacco and Vanzetti and the First Amendment cases upholding the right of the government to arrest, deport, exclude anarchists. *See, e.g.*, *Abrams et al. v. United States*, 250 U.S. 616 (1919) (affirming constitutionality of immigration law excluding and providing for the deportation of anarchists).

⁷² Lancelot Hewitt, *53 Years in the Struggle for Equal Rights: An African American Jurists Life in the Law*, 15 TOURO L. REV. -- (Winter 1999).

People like Constance Baker Motley and Derrick Bell and other "firsts" chipped away at small cracks, creating openings wide enough for others to follow. You might say that we now walk two abreast through gaping holes in what were once thought to be impenetrable defenses. The walls have been breached, but they still stand. *Brown v. Board of Education* may have "implicitly overruled" *Plessy v. Ferguson*, and led, as Judge Baker Motley believes, to the end of *de jure* segregation⁷³, but it did not vanquish the idea that the ability to see and interpret the symbols of racism is a form of mental illness.⁷⁴ George Will, Abigail Thernstrom, and Richard Posner describe a world populated by rational white people and paranoid people of color. But the idea that black people are imagining racism, that it is all in our minds is very, very old. According to Justice Brown, the Louisiana statute segregating white and black railway passengers challenged in *Plessy v. Ferguson* so long ago was not a badge of inferiority "by reason of anything found in the act but solely because the colored race chooses to put that construction on it."⁷⁵ George Will is the direct intellectual descendent of Justice Brown when he writes that malignant racism is a "fiction."

For Will, every person of color who writes about race poses a risk. The world view that allow for the subordination of working class people and the poor might be undermined by this scholarship. Facts, empirical evidence, or studies that promise to produce such evidence, are used in the scholarship of people of color. Professor Ward uses popular culture and the recent literature in the social sciences in his *Fargo Lessons*. Like many critical scholars, his interdisciplinary approach contrasts starkly with the jurisprudence of recent Supreme Court decisions. The Supreme Court rejects the body of knowledge created and the methodology used by social scientists. The Court has substituted ideology, radical individualism, for empirical evidence.

⁷³ *Id.*

⁷⁴ Judge Posner has referred to critical race scholars as the "lunatic core" while other "postmodern thinkers" like Michel Foucault, Stanley Fish and the "ablest radical thinkers" like Catherine MacKinnon and Duncan Kennedy are the "rational fringe" around that lunatic core. Posner, *supra* note 17.

⁷⁵ *Plessy v. Ferguson*, 163 U.S. 551 (1896).

A court that has abandoned the kind of analysis appropriate for the solution of complex social phenomena, will be unyielding in the face of pleas for justice and for leadership by Professor Beverly McQueary Smith, President of the National Bar Association. Her essay, *The Imposition of the Death Penalty in the United States of America: Does It Comply With International Norms?* examines the death penalty in the United States, a system of punishment that is irremediably flawed.

People of color in leadership positions like Professor McQueary Smith have to continue to ask the court why it chooses to ignore or discount the data presented to it.⁷⁶ Unsolved problems do not solve themselves, they widen and deepen and take on different forms.⁷⁷ When problems go unsolved, they begin to fester like an open sore. At a minimum, systemic dysfunction feeds into the overall perception of the criminal justice system as one that is illegitimate.⁷⁸

For his part, Dink Stover, in *A Welfare Prince Looks at Welfare Reform*,⁷⁹ examines the economic reality of welfare reform, the redistribution and subsidies to businesses, private and public, made invisible by rhetoric that refers to the "responsibility" and self reliance of the poor. There is no public discussion of the

⁷⁶ *Lockhart v. McCree*, 476 U.S. 162 (1986) (rejecting studies analyzing the effect of exclusion of jurors opposed to the death penalty); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (disregarding a study on the effect of race on the imposition of the death penalty).

⁷⁷ See, e.g., Ken Armstrong and Maurice Possley, *Trial and Error. How Prosecutors Sacrifice Justice to Win*, CHI. TRIB. (Parts 1-5) January 10-14, 1999. (381 homicide convictions overturned because of prosecutorial misconduct including 67 convictions that resulted in a sentence of death). The problem is not just prosecutorial misconduct, but the harm that is done when innocent people are executed, a known risk in a system where the pressure to apprehend and convict overwhelms a sense of professionalism or a commitment to justice.

⁷⁸ As one legal scholar puts it, the court's "empirical myopia ultimately undermines its political legitimacy." David Faigman, "Normative Constitutional Fact Finding": *Exploring the Component of Constitutional Interpretation*, 139 PA. L. REV. 541 (1991). See series of articles in Chicago Tribune exposing the extent of prosecutorial misconduct in death penalty cases.

⁷⁹ Dink Stover, *A Welfare Prince Looks at Welfare Reform*, 15 TOURO L. REV. — (Winter 1999).

subsidy offered in the form of reduced labor costs and far too few questions about the ethics or morality of abandoning those who are truly unemployable. The author is one of the many people who feel passionately about imagery that paints welfare recipients as freeloaders rather than people who need assistance to get on their feet. And because he knows first hand about the danger of stereotypes, he confronts us with facts about real people. Those facts challenge the underlying assumptions in the statement by Marilyn Vos Savant that the world would be a better place if her taxes were reduced so that she could someone employ who is currently on welfare. Why would she assume that she is entitled to those things associated with aristocracy – namely servants?⁸⁰ Why does she assume that there is no better form of employment available for those who are poor than cleaning up behind her? Why does she assume that she has no obligation to be charitable: to provide for those who are unable to provide for themselves? Why does she reject the idea that taxes are an obligation of citizenship; that taxes “provide for the general welfare” even if she cannot see an immediate and direct personal benefit to her? The absence of any sense of connection, of common interests or shared goals, the narcissism, of the Marilyn Vos Savant’s of this world go unchallenged. But people of color are admonished for attitudes that are said to undermine the development of a sense of national unity.⁸¹

⁸⁰ For a discussion of the ambivalence working class women feel about hiring someone to clean their homes, see Deborah Waire Post, *Homecoming: The Ritual of Writing History*, 10 HARV. BLACKLETTER J. 5 n.29-31 and accompanying text (1993).

⁸¹ Individualism promotes national unity according to Justice Sandra Day O'Connor, even in the matter of voting rights where the conflicts have been group based, not individual.

Here the individual is important, not his race, his creed, or his color . . . when racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative, but the best racial or religious partisan. Since

There is a lot in common between Marilyn's solution to the welfare problem – let them clean my bathrooms – and the employers' anger in the *Of False Teeth and Biting Critiques: Jones v. Fisher in Context*.⁸² The assault in that case is so ludicrous that it seems almost funny. Certainly the physical struggle between the employers and the worker when they tried to extract her teeth reads like a scene out of a British farce, *Fawlty Towers*. You could almost imagine John Cleese fighting with the actor who played Manuel, the bellboy/waiter, to extract his teeth.⁸³

Professor Austin reminds us of the primacy of the market model in the legal system in the United States. In this case, the behavior of the employee, good capitalist that she was, is perfectly consistent with market ideology. The anger that prompted the assault, the sense of loyalty betrayed on the part of the employers, on the other hand, is clearly irrational behavior. Professor Regina Austin's discussion of the court decision in this article nudges us past race to other systems of subordination. And, perhaps, this is the real threat posed by critical race scholarship. It has at its heart a way of looking at the world – a methodology that stands as a counterpoint to the radical individualism that informs most legal analysis.

If we are really talking about ideological differences, not a dispute about the reality of racism, what are the chances of rapprochement? Is George Will interested in reconciliation? Is Thernstrom sincere in her plea for racial harmony? Even a

the system is at war with the democratic ideal, it should find no footing here.

Shaw v. Reno, 509 U.S. 630, 648-649 (1993) (quoting Wright v. Rockefeller, 376 U.S. 52, 66-67 (1963) (Douglas, J., dissenting)).

⁸² Regina Austin, *Of False Teeth and Biting Critiques: Jones v. Fisher in Context*, 15 TOURO L. REV. -- (Winter 1999).

⁸³ In 1999, a remake of *Fawlty Towers* in the U.S. will air on CBS featuring John Larroquette in the Cleese role. The Hispanic character will be replaced with an immigrant from an imaginary country in an attempt, one assumes, to avoid criticism that result from the choice of ethnicity for this fictional character. Apparently there also has been an attempt to "tone down" the "shrewish" wife in the situation comedy as well. *Thinking Big*, TORONTO STAR, January 11, 1999.

skeptic like me has to concede that it is hard to ignore a cry to leave race alone so that we can all get along. Such arguments are like a siren's call to a nation that has been at sea on the issue of race for two centuries. But capitulating to the demands of people like Thernstrom and Will would perpetuate two fallacies. First, these critics equate the confrontation and cure of an insidious social disease with its creation. Calling racism to the attention of the nation, calling the inequities caused by racism to the attention of lawmakers and proposing legislative or administrative remedies to address these inequities, does not create a racial divide. Second, the critics are impugning the honesty of scholars while they hide or disguise the ideals that they are defending in these attacks. This is a debate about the rules that govern the distribution of resources: education, power, money. The Conflict is created by demands and resistance. Those who are included resist full participation by those who demand inclusion. The insiders don't want to share; they don't want to repay a debt so old that they forgot that it would eventually come due.⁸⁴ The critique of critical race theory is not about the irrationality of the

⁸⁴ The best example of the sense of entitlement that supports arguments that a debtor should not have to pay the debt that has come due is the litigation over land belonging to American Indians. See Ford and Rude, *supra* note 64. In New York State white citizens residing on Indian land that was not purchased but merely leased from the Indians for 99 years initially refused to sign new leases negotiated on their behalf. See, e.g., *Many yet to Sign New Leases With Seneca Indians*, UPI, February 19, 1991 (City of Salamanca residents formed the Salamanca Coalition of United Taxpayers to resist when 99 year lease with Seneca Nation expired). See also Seneca Nation Settlement Act of 1990, 25 U.S.C. 1774 (1994). One attorney for the Indians who have been negotiating with New York State over land disputes in Cayuga and Seneca counties since the 1970s described the situation succinctly: "no Indian tribes ever acquired the homes of any American citizen against their will." Jerry Zremski, *Islands of Uncertainty; History Provides Some Reassurances to Homeowners*, THE BUFFALO NEWS, August 14, 1998. In the case of Americans of African descent whose ancestors were brought to this nation against their will and forced to work as slaves, the suggestion that even an apology might be owed for slavery is an anathema to most Americans. See, e.g., *Reader Debate: Was President Clinton's Slavery Apology Appropriate?*, THE DETROIT NEWS, LETTERS TO THE EDITOR, April 4, 1998; Clarence Page, *Slavery Regret: Why the Backlash?* SACRAMENTO BEE, April 2, 1998.

scholars or their honesty or commitment to Enlightenment values⁸⁵, but the counterhegemonies conservatives fear it promotes. Critics of critical race theory are afraid, above all, of what Richard Posner calls "radical legal egalitarianism."⁸⁶

And critical race theory is very important in this debate. The experience of black people disproves a cardinal belief in American society: that the systems of inequality in the United States are fair. The racial divide is perpetuated by rhetoric that denies the existence of racism, the lived reality of many communities but especially the black community, in order to protect and preserve white privilege. The racial divide is maintained because it is crucial to social stratification in a society where no one wants to be in the lower class.⁸⁷

If people of color are paranoid, white Americans also suffer from a form of dementia. As a nation we are afflicted with a short attention span and no long-term memory. But the pronouncement that race has no salience casts doubt not just on the ability or willingness of white Americans to remember history, but also their ability to comprehend its meaning.

The George Wills of this world will not concede, even in the face of paroxysm of hatred expressed in innumerable ways, that race is still one of the basic organizing principles in this culture.⁸⁸

⁸⁵ DANIEL FARBER AND SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1998)

⁸⁶ See Posner, *supra* notes 17 and 69. For an interesting discussion of attitudes of different groups to inequality see JAMES R. KLEUGEL AND ELIOT R. SMITH, *BELIEFS ABOUT INEQUALITY: AMERICANS' VIEWS OF WHAT IS AND WHAT OUGHT TO BE* (1986). An example: "For white women and blacks, but not white men, education has a statistically significant effect on inequality; such that the higher the education the lower the level of agreement with statements supporting the necessity and the desirability of income inequality." *Id.* at 133.

⁸⁷ An interesting early discussion of the relegation of blacks to the permanent "lower class" in a social structure featuring a WASP aristocracy and an immigrant class that gained upward mobility partly because of the status of blacks, see Talcott Parsons, *Full Citizenship for the American Negro, A Sociological Problem, The Negro American*, in *DEADALUS* 1009 (Fall 1965).

⁸⁸ If I were to cite to the violence against people of color like James Byrd Jr. who was dragged to death in Jasper, Texas (and other "others" like the gay college student, Mathew Shepard, who was tied to a fence in Laramie,

But self deception, the purposeful denial of the truth, is harder to maintain when those who are affected by racism refuse to remain quiet; when they will not acquiesce in myth-making that conceals inequality, exclusion and subordination. To continue to speak in an openly hostile political environment is an act of courage. And the participants in the 3rd Annual People of Color Conference, the contributors to this symposium issue, are courageous people

Wyoming, pistol whipped and left to die.). I am sure that George Will and his colleagues would dismiss these incidents as isolated incidents. *But see* William Glaberson, *15 Hate Groups in Region, Monitoring Organization Says*, N.Y. TIMES, March 22, 1998, at 38; *Texas Case Highlights US Problem*, THE CHRISTIAN SCIENCE MONITOR, June 11, 1998 (membership in KKK shrinks from 13,000 to 5,000 while membership in other white supremacist groups may have reached two million). *See also* stories documenting the extensive political ties of the Council of Conservative Citizens, an organization that draws support from and promotes the agenda of the white supremacist group, the White Citizens Councils. The organization is concerned with the "preservation of the white race." Thomas B. Edsall, *Controversial Group Has Strong Ties to Both Parties in South*, THE WASHINGTON POST, January 13, 1999. Racism is essential in maintaining support for social stratification. During the Cold War, when concessions were made to the working class in order to combat the appeal of communism, the distinctions between classes blurred; the privileges of wealth were eroded, and the civil rights movement extracted concessions and changed public policy with respect to the inequality of the races. Since the Reagan era, when the Republican party began the process of eliminating entitlements for the working and middle class as well as the poor, class distinctions have become more pronounced. Where once the opposition to affirmative action, for instance, was grounded in a belief that the social stratification in the U.S. was a good thing, that each person had a shot of achieving success and that the rules for achievement were fair. *See generally* KLEUGEL, *supra* note 82. A decade of downsizing and "restructuring" of businesses and growth in the gap between executive and workers salaries has undermined faith in meritocracy and the potential for upward mobility. This heightened awareness of the difference between the 'haves' and the 'have nots' gave momentum to candidates like Pat Buchanan. The solution, of course, is to create diversions: sex (Clinton and Monica Lewinsky and an impeachment trial; race (the anti-affirmative action movement) and xenophobia (isolationist movements and anti-immigrant sentiment.) The Achilles' heel of populism is always racism and anti-Semitism. *See, e.g.*, Jonathan Alter and Michael Isikoff with Mark Hosenball, *The Beltway Populist*, NEWSWEEK, March 4, 1996 (describing Buchanan's strategy as a candidate for President).

without whose work the self-serving fiction that race has no salience would go uncontested.

