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Approach-Avoidance in Law School Hiring: Is the Law a Wasp Essay

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ESSAYS

APPROACH-AVOIDANCE IN LAW SCHOOL HIRING: IS THE LAW A WASP?

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I. INTRODUCTION

In two landmark articles,[1] Alan Freeman extends the critique of rights to American race reform law.[2] For Freeman, antidiscrimination law does little to restrain racist behavior,[3] unerringly takes the "perpetrator perspective,"[4] and reinforces the racial status quo by periodically proclaiming great victories,[5] which are offered as proof that our system

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1. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) [hereinafter Freeman, *Legitimizing*]; Freeman, *Antidiscrimination Law: A Critical Review*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 96 (D. Kairys ed. 1982).

2. The critique of rights has been put forward most persuasively by members of the Critical Legal Studies School (CLS). *See, e.g.*, Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); *see also* Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?* 22 HARV. C.R.-C.L. L. REV. 301, 303-07 (1987) (summarizing CLS critique of rights).

3. *See* Freeman, *Legitimizing*, *supra* note 1, at 1050; *see also* Delgado, *supra* note 2 at 303 (claiming that rights legitimize unfair power arrangements in society); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1766-74 (1976) (judicial reasoning is indeterminate).

4. *See* Freeman, *Legitimizing*, *supra* note 1, at 1052-57, 1118; *see also infra* notes 57-58 and accompanying text (explaining the term "perpetrator perspective").

5. These victories include Brown v. Board of Education, 347 U.S. 483 (1954) (segregation of children in public schools, on the basis of race, deprives them of equal opportunities, in violation of the Equal Protection Clause of the fourteenth amendment).

is fair and just.[6] Their ringing principles are later predictably cut back by narrow judicial interpretation, foot-dragging or delay.[7] Civil rights law thus serves as a type of safety valve, assuring that society has exactly the right amount of racism.[8]

These assertions, which have been echoed by other critical scholars, have until now been offered in something of an empirical vacuum. Now, a number of surveys and reports are beginning to offer support for their rather bleak conclusions.[9] In a recent article[10] and forthcoming book,[11] Professor Roy Brooks summarizes some of this evidence. Focusing on a mainstay of liberal jurisprudence, the principle of formal equal opportunity, Brooks traces in devastating detail the way that principle subordinates and injures Blacks. Formal equal opportunity does not sacrifice a few, for example the Black lower class, in return for gains for the rest. Rather, that principle harms lower, middle and upper class Blacks alike.[12]

Brooks' demonstration should come as no great surprise. Law is part of society. In a racially divided society, the legal system will not promote racial justice; indeed, it will often promote the direct opposite unless the majority sees that it is in its interest to do so. In civil rights law, formal egalitarianism subordinates Blacks in two ways.[13] Blacks

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6. *See* Freeman, *Legitimizing, supra* note 1, at 1052-57, 1118; *see also* Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?* 97 YALE L.J. 923 (1988).

7. *See* Freeman, *Legitimizing, supra* note 1, at 1051, 1097, 1118.

8. Too much racism would be destabilizing; too little would forfeit important psychic and material advantages for the dominant group. Delgado, *supra* note 2, at 303-04. *See generally* Delgado, *supra* note 6.

9. *See, e.g.*, CENTER ON BUDGET AND POLICY PRIORITIES, FALLING BEHIND: A REPORT ON HOW BLACKS HAVE FARED UNDER THE REAGAN POLICIES (1984) (Poverty and unemployment have increased significantly among blacks, in the 1980's, as a result of federal budget cuts and tax policies.); J. Smith & F. Welch, CLOSING THE GAP: FORTY YEARS OF ECONOMIC PROGRESS FOR BLACKS xxiv-xxv, 81, 101-11 (1986) (Rand Corporation report finding an increase in the number of Black families headed by a female and an increase in the number of Black males unemployed or no longer looking for jobs). Statistics and analysis show that the "racial differential" or "racial gap" stands at approximately two to one, roughly the same as it was a generation ago. *See, e.g.*, U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES SERIES P-23, No. 80, *The Social and Economic Status of the Black Population in the United States: An Historical View 1790-1978*, at 20 (1979).

10. Brooks, *Racial Subordination Through Formal Equal Opportunity*, 25 SAN DIEGO L. REV. 881 (1989).

11. An expanded version of the article will be published by the University of California Press under the title *Rethinking the American Race Problem* (1990). Professor Brooks is not a member of the CLS school.

12. *See* Brooks, *supra* note 10, at 898-928 (formal Equal Opportunity subordinates and injures Black middle class); *id.* at 928-60 (formal Equal Opportunity subordinates and injuries Black working class); *id.* at 960 (formal Equal Opportunity subordinates and injures Black underclass).

13. These are called active and passive subordination. *See* Brooks, *supra* note 10,

entered this century at a great disadvantage vis-a-vis whites because of the legacy of slavery. Formal equality perpetuates that disadvantage, ensuring that whites' head start is not easily overcome.[14] Formal equal opportunity also subordinates Blacks by enabling society to avoid guilt over the nonwhite underclass.[15] Why, in a formally just system, should a Black or Hispanic be poor, out of work, reviled, or working at an unrewarding, dead-end job? Since systemic racism has been eliminated, the only possible explanations are lack of ability or effort, or simple bad luck. The principle also reinforces white superiority. Under it, nonwhites are judged with scrupulous fairness by criteria coined by, normed on, and applied by whites.[16] Not surprisingly, the latter generally come out ahead; yet because all have had an equal chance, each person's lot must be roughly what he or she deserves.[17]

This Article is concerned with this latter, largely unconscious, form of subordination through mindset and preference. I choose an area with which most readers will be familiar—diversity hiring on law school faculties. Beginning in the early 1970s, law schools began taking measures to increase the small number of minorities of color teaching law.[18] Yet, after a few years of growth, this increase stagnated. The overall numbers remain nearly constant; most law schools have zero or one minority faculty member.[19] While the number remains the same, the turnover rate is high. Over forty-three percent of professors of color left teaching in a recent six-year period.[20] Most law faculties purport to be troubled by figures like these.[21] They would like to hire more women and minorities, yet something always seems to get in the way: The pool is so small; minority candidates are rarely available when you want

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at 894-95 (the terminology is my own).

14. *See supra* note 9 and accompanying text (racial gap is not closing).

15. *See* Freeman, *Legitimizing, supra* note 1, at 1054-55. *See generally* Delgado, *supra* note 6.

16. *See* Delgado, *supra* note 2, at 309-10 (law creates cultural myths to legitimize current arrangements).

17. *See id.; see also* Freeman, *Legitimizing, supra* note 1, at 1054-55.

18. *See, e.g., Report on Special Admissions at Boalt Hall,* 28 J. LEGAL EDUC. 363 (1976); Romero, Delgado & Reynoso, *The Legal Education of Chicano Students: A Study in Mutual Accommodation and Cultural Conflict,* 5 N.M.L. REV. 177 (1975).

19. *See, e.g.* Kaplan, *Hard Times for Minority Profs,* Nat'l L.J., Dec. 10, 1984, at 1, col. 1; Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties,* 137 U. PA. L. REV. 537, 538 (1988).

20. This rate is higher than that for whites. Open Letter to Our Colleagues of the Minority Race, Aug. 1986 (letter signed by 21 minority professors and sent to every Association of American Law Schools accredited law school, on file with author). *See generally* Delgado, *supra* note 6.

21. *See, e.g.,* Prager, *President's Message: Minority Law Teachers,* A.A.L.S. NEWSL., Nov. 1968, 1 (decrying lack of diversity in law school faculties, urging colleagues to redouble efforts).

them; they have so many opportunities elsewhere.[22] Whether these difficulties are real or mythical, grounded in self-serving and unexamined mindset, is the subject of this essay.

II. WHY MINORITIES AND WOMEN CANNOT BE HIRED AT THE GOOD LAW SCHOOLS

First—the reasons you hear.

They don't write.

They write too much.

They can't teach.

They are too immersed in teaching.

They're diamonds in the rough; we may have to wait another generation or two.

They are too assimilated—they won't relate to our minority students.

They lack the standard credentials—law review, federal clerkship, etc.

They are too standardized, too assimilated, they won't relate to our minority students.

They're uncongenial, have chips on their shoulders.

They have great interpersonal skills and charm, but lack the discipline to sit down and write.

They are too narrow and are only interested in civil rights and employment discrimination.

They spread themselves too thin—try to be all things to all people.

These reasons, which are put forward in greatest sincerity and good faith, are of course riddled with contradiction.[23] They represent a series of dualisms, each assertion paired with another stating the direct opposite. Where an area of discourse contains such inconsistencies, we should look for a deeper contradiction which runs through the area and is responsible for them.[24]

I believe I know what that deeper contradiction is: Liberal law faculty members both want, and fear, minorities and women. They realize they should have more of us, and would like to welcome us into the fold. But at the same time they fear us, and want us to keep our distance. We are unsettling—we are Other. We talk and act strangely, laugh at unexpected times. We take the wrong things seriously and

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22. *See* Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (discussing these and other myths and "stories" the dominant group tells each other to justify lack of diversity).

23. *See* Kennedy, *supra* note 3, at 1685 (role of binary oppositions in legal doctrine; oppositions depend on and yet contradict each other, producing manipulability and indeterminacy in reasoning).

24. *See* Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211-13 (1979).

don't take the right things seriously enough. It would be wonderful if there were more of us who did think and talk just like them. If so, they would hire us on the spot. But, alas, there are not. So the search continues for the perfect minority, that mythic figure who will solve the basic contradiction, who will be both Other and like us.

White male faculty members thus both want and fear minorities. This conflict is no recent development. During slavery and the Bracero era, society needed and wanted us for our labor.[25] They commodified, thingified us, and found us useful, just as women were useful for reproduction and household work.[26] But over time they noticed something curious about their subjugated groups. We were human, had feelings, dreams, would laugh and show warmth and emotion. They would begin, almost, to like us, then pull back. Attraction-repulsion, you see it even today in the earnest conversation of the dominant group on the Black problem, the Mexican problem, women, and minorities in the law school.[27]

This conflictedness explains many of the shifts and lunges of law faculties over hiring and tenuring minorities. Law faculties want us for what we can offer as role models and counselors for minority students, and public relations coups.[28] They also want us for ourselves. Their social instincts tell them white male ghettos are wrong.[29] But at the same time they fear us, our differentness, our strange ways, our kinship with that *other* other group, the students. So, they act inconsistently, now moving toward, now away from us.

Let me illustrate this unconscious dance by means of an example I observed recently. Every year, I receive a number of phone calls and letters from law schools asking about minority candidates for teaching positions. (At least, I used to get a lot of calls before writing this Essay). This year I knew of an exceptional Hispanic woman who was looking for a job. What kind of person of color do the good schools say they are looking for and would hire instantly if they could find?[30] First,

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25. *See* D. BELL, RACE, RACISM AND AMERICAN LAW 1-53 (2d ed. 1980).

26. *See id.* (slaves treated as chattels; bought and sold); *see also* Delgado, *supra* note 6 (summarizing commodification of nonwhites and women).

27. *See* Delgado, *supra* note 22, at 2418-21, 2431-35; *see also infra* notes 29-31 and accompanying text (recounting the failed effort to secure appointment for a Hispanic woman).

28. *See* Prager, *supra* note 21. These multiple duties often overburden professors of color once they are hired. *See, e.g.*, Delgado, *Minority Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349, 352-53 (1989).

29. *See, e.g.*, Prager, *supra* note 21.

30. Most candidates hired in recent years do not have these credentials. For example, A.A.L.S. profiles for all new law teachers hired in 1986 showed fewer than 10 percent were awarded Order of the Coif, fewer than 30 percent were on the law review, and fewer than 10 percent had one or more publication to their credit. Memorandum to Deans of Member Schools, from Millard H. Rudd & Noel J. Augustyn (A.A.L.S.,

the candidate would have to have gone to an excellent undergraduate school and earned good grades in a broad but intellectually rigorous course of instruction. This candidate had done so. The person also would need to have attended a first-rate law school and excelled academically. This candidate had; indeed, she had graduated in the top ten percent of her class. The candidate should have written articles in good law reviews and be an able classroom teacher. The candidate would have to be collegial, not one of those alienated, chip-on-the shoulder minorities that might call you something unpleasant over lunch in the faculty club, nor so assimilated that the minority students would declare him or her a fraud. The candidate had been performing all these juggling acts with skill and grace.

Moreover, she had personal reasons for wanting to teach at a school (school X) which I knew to have a number of openings. So I sent along her resume and a short but glowing letter. When I followed up later with a phone call, the chair of X's appointments committee said the candidate was in a small group they were considering for an international law position. Too bad she didn't teach public international law (just the private version), or the curricular fit would have been perfect. But the school had several slots to fill and if she didn't fit one she would be considered for another. Alarm bells ringing, I offered to inquire whether she would be willing to teach public international law. The chair said no, they would discuss teaching options with her later. A month or so later, I heard the school had offered the public international law position to a recent visitor. So I called to see how the Hispanic candidate was doing. The chair said she was still under consideration, and asked whether she would be willing to teach Torts.

To make a long story short, the school did not offer the job to the Hispanic woman. They decided to make their Torts position an entry-level one, and the Hispanic, who had taught a few years, did not qualify. The school had an opening in tax, but she did not teach that subject. Later in the season, the school had a visiting position to fill when a faculty member unexpectedly took leave, but by then the young woman had made other plans. The events reminded me of a shell game, played out perfectly unwittingly by the candidate and appointments committee. Each time an opportunity came up, each time a shell was turned over, the candidate happened not to be under it. Everyone who concerns himself or herself with minority hiring can tell stories of this sort. Bad luck, bad timing, poor curricular fit—things never quite work out.

III. THE WRITING-PUBLISHING REQUIREMENT

I shall now address a particular roadblock to the hiring of profes-

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Sept. 5, 1986, on file with author). Yet, with minority hiring many law schools insist on all these attributes of stardom.

sors of color, namely the writing-publishing requirement. Could it be that if the timing, credentials, and courses taught were right in the case of a given candidate of color, something about Third World scholarship puts off majority-race members of appointments committees at the good schools? Might it be that across-the-board application of neutral-seeming criteria of good scholarship has a "disparate impact" on minority candidates?[31] Does something occur at a level of mindset or second nature[32] that causes majority-race professors to look at the writing of Blacks and Hispanics and say, "That's second rate," and to prefer some other article written by an author who is white and male? This would be deselection not through conscious bigotry, but prioritization and preference for the familiar.[33]

Recent feminist writing has argued that the law is male, that its structures, mindset, presuppositions, methodology, and mental pictures are male.[34] Doctrine and legal structures are normed on a male model, and so it is not accidental that many women experience law school as alien and intimidating, that there are few women judges, law professors, and partners, and that legal rules and doctrines are skewed against women.[35] Society is patriarchal, law is patriarchal, and female subordination simply follows. It is not that lawyers, judges and legislators are consciously anti-female (most of them, at any rate), it is just that they are so steeped in anti-women values and approaches that female subordination follows ineluctably.[36]

So, if the feminists are right, as I think they are, the law is a male. Is that male also a white Anglo Saxon Protestant, WASP?[37] If so, that may well have something to do with the small number of professors of

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31. *See* Washington v. Davis, 426 U.S. 229 (1976) (job requirements disproportionately burdening Black applicants, standing alone, do not trigger the rule that racial classifications are to be subjected to strict judicial scrutiny).

32. *See* Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 566, 567-76 (1984) (discussing role of mindset and the lack of citation to works by minority scholars); *see also* Delgado, *supra* note 21 (ideology and mindset represent powerful forces shaping actions of judges, lawyers and clients).

33. *See id.*

34. *See* McIntyre, The Maleness of Law and Its Impact on Women Students (1986) (unpublished manuscript on file with author); Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERK. WOMEN'S L.J. 39, 44 (1985); Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83, 92 (1980); Polan, *Toward a Theory of Law and Patriarchy*, in THE POLITICS OF LAW 299 (D. Kairys ed. 1982); *see also* Olsen, The Sex of the Law (unpublished manuscript on file with author); Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in THE POLITICS OF LAW 117 (D. Kairys, ed. 1982).

35. *See, e.g.*, Polan, *supra* note 34; Taub & Schneider, *supra* note 34.

36. *See supra* note 35; McIntyre, *supra* note 34.

37. The acronym stands for "White Male Anglo-Saxon Protestant." *See* P. SCHRAG, THE DECLINE OF THE WASP 14-15 (1971).

color teaching at the top schools. Social scientists have been fascinated by, written volumes about, the WASP.[38] Throughout our history WASPs have been the dominant class in the United States.[39] Their principal traits are said to be: cautious, upwardly mobile,[40] objective and unemotional; social Darwinists, committed to thrift and hard work, elevation of abstract principle over personal relations and personal loyalty, incrementalists.[41]

As with the feminist argument, it seems likely that if our culture's dominant values are those of the WASP, the same will be true of law: It will be incremental rather than expansive, abstract rather than contextualized, cautious rather than utopian, etc. Those will also be the traits of "good" legal scholarship: narrowly focused, cautious, incremental, abstract, footnoted, and so on. And, of course, they are.[42] The law is not only a WASP in matters of intellectual style; it is a WASP numerically — WASPs outnumber minorities by a large factor and dominate most large firms and federal agencies.[43] In our early days, WASPs signed the Declaration of Independence[44] and framed the Constitution, providing delicately in ten places for the institution of slavery without mentioning the word.[45] No minority of color has ever served as president or, except on three occasions, in the United States Senate.[46]

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38. *See, e.g., id.;* B. SOLOMON, ANCESTORS AND IMMIGRANTS (1956); E. BALTZELL, THE PROTESTANT ESTABLISHMENT (1964); R. WILKINSON, AMERICAN THOUGHT (1984); M. HALSEY, NO LAUGHING MATTER, THE AUTOBIOGRAPHY OF A WASP (1977); C. ANDERSON, WHITE PROTESTANT AMERICANS (1970); RACE AND ETHNICITY IN MODERN AMERICA (R. Meister ed. 1974).

39. *See, e.g.,* P. SCHRAG, *supra* note 37; E. BALTZELL, *supra* note 38, at 22, 66. *But see* R. CHRISTOPHER, CRASHING THE GATES, THE DE-WASPING OF AMERICA'S POWER ELITE (1989) (White ethnics, including Irish, Italians, Catholics and Jews making inroads in WASP strongholds).

40. *See, e.g.,* C. ANDERSON, *supra* note 38, at 95-172; P. SCHRAG, *supra* note 37, at 22-28. *See generally* E. BALTZELL, *supra* note 38; H. JAMES, THE AMERICAN (1877).

41. *See id.;* E. BALTZELL, *supra* note 40, at 13, 15-17; R. WILKINSON, *supra* note 38, at 38-39, 44-45, 102.

42. *See, e.g.,* Delgado, *supra* note 2, at 307 (incremental, narrow); *see also* A UNIFORM SYSTEM OF CITATION (14th ed. 1986) (most issues of most law reviews illustrate the use of the "Blue Book").

43. *See* U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 388 (1989) (3.4 percent of lawyers and judges are Black); SYLVESTER, *Women Gaining, Blacks Fall Back,* 6 Nat'l L.J., May 21, 1984, at 1, col. 3 (2.6 percent of U.S. lawyers are Black, while Blacks made up 11.9 percent of U.S. population).

44. *See, e.g.,* Marshall, *Reflections on the Bicentennial of the United States Constitution,* 101 HARV. L. REV. 1 (1988).

45. *See* Delgado, *supra* note 6, at 933 n.2; *see also* D. BELL, *supra* note 25, at 22-23.

46. The only Black Senators have been Edward Brooke (R-Mass., 1967-79), Hiram Revels (R-Miss., 1870-71), and Blanche Bruce (R-Miss., 1875-81). *See* CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS 648 (3d ed. 1982).

Early on, Blacks were prevented from voting,[47] and even today vote at lower rates than Whites in most elections.[48] There is little mention of these matters in the law school curriculum;[49] the law addresses the concerns of WASPs and WASP clients. Even shop talk is sanitized; human factors are reduced to "fact situations."

In the debate over affirmative action, one sometimes hears it asked: Should a less qualified woman or person of color win the job over a more qualified white male? At first glance, this way of framing the issue might seem odd. White males have benefited from affirmative action, an unjustified preference in jobs, promotions and other social benefits, for over two hundred years. Opening the doors to women and minorities should mean that the quality of workers and students will go up, not down, when the unearned preference men received from the old-boy system is eliminated. But those who frame the issue this way persist even when this is pointed out; it is easy to see why. White men, who have been in charge a long time, have been able to disseminate any ideology, promulgate any standards of merit they wish. In time, they were required to give up some of the cruder means by which control was maintained, such as explicit racial subordination, spousal abuse, and so on. Yet, all the job descriptions remained in place and the game continued to be played by the same rules. Those rules, by a neat trick, define what we mean by a fair contest. And so, as one feminist puts it, law will reinforce existing distributions of power, will exclude us most when it is most lawful, most legalistic, meritocratic, and most "fair."[50]

So, the norms for good legal scholarship are: incremental, cautious, objective, rational, etc.[51] When we set Third World writing side by side with those norms, what do we find? First, we find that a good deal of Third World writing is co-authored.[52] We are not so individualistic, alienated, and lonely as our white brothers and sisters. We like working collaboratively on occasion, cooperating rather than competing, sharing rather than guarding secrets. This troubles appointments committees. When two or more persons co-author an article, how can you tell who did what? Further, much of our scholarship is utopian, not incremental, passionate, not dispassionate, and so on. WASPs are, for

47. *See* D. BELL, *supra* note 25, at 134-45 (describing the use of violence, threats, and chicanery to prevent Blacks from exercising their franchise).

48. *See id.* at 155 & n.1.

49. Slavery is generally given only cursory coverage, and few law students learn in law school about the Bracero program, Indian treaty violations, or immigration dragnets.

50. *See* McIntyre, *supra* note 34, at 9 (attributing this to Catherine MacKinnon).

51. *See supra* notes 41-42 and accompanying text.

52. For example, at a recent meeting of Latino law professors, nearly one-half of those present had co-authored an article within the past few years.

the most part, satisfied with the world; at most it needs fine tuning.[53] We want to change it.[54] Our scholarship strikes majority-race evaluators as impetuous, result-oriented. "It's a good article, but too emotional. It sounds more like a brief."

Even the form of our articles can cause consternation. When Derrick Bell was selected to write the Foreword to Harvard Law Review's Supreme Court issue, he wrote *The Civil Rights Chronicles*,[55] a series of parables, dreams, sketches, and morality tales. Brilliant, but I could almost see heads shaking around the land asking what kind of article is this? We cite peculiar sources.[56] When white people write about equality or civil rights, they generally cite each other.[57] When we write about civil rights, we cite such exotic sources as DuBois, Higginbotham, and Derrick Bell. How can one evaluate scholarship resting on such unfamiliar foundations?

Majority-race writers unerringly take the perpetrator perspective,[58] looking for a specific guilty party, such as a KKK member or vicious-willed school board member, to blame for racism, and coin elaborate rules of intent and causation to limit liability for everyone else.[59] We take the victim perspective,[60] and want to push past technical hurdles and begin discussing relief. So, when appointments committees look at our writing and make the decision whether to accept one of us, they want to determine whether they like the way we think, whether we and they are on the same wave length. And, in many ways we are not. It is not that our writing is inferior to theirs, or the other way around. It is simply different, and they have defined the difference in their favor.

Yet, I must now say that this seems to me only part of the story. For many of us are bilingual, so to speak. Some of our articles and books are in the co-authored, exuberant, passionate, etc., mode (like this one). Yet, we can speak in the other mode, as well. So, for example, Derrick Bell has written *The Civil Rights Chronicles*, heavy in myth and metaphor, but he has also written *Serving Two Masters*,[61] a

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53. *See* Delgado, *supra* note 2, at 301; *see also supra* note 51 and accompanying text.

54. *See* Delgado, *supra* note 2, at 301.

55. Bell, *The Supreme Court, 1984 Term — Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985); *see also* D. BELL, AND WE ARE NOT SAVED (1987) (expanded version of the Foreword).

56. *See* Delgado, *supra* note 32, at 576.

57. *See id.* at 561-66.

58. *See id.* at 571.

59. *See id.*; *see also* Freedman, *Legitimizing*, *supra* note 1, at 1054-55 (only "intentional" discrimination violates antidiscrimination principles).

60. *See* Delgado, *supra* note 32, at 569; Freeman, *Legitimizing*, *supra* note 1, at 1054-55.

61. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School*

classic of the cases-and-policies genre. I myself wrote *The Imperial Scholar*,[62] plus some other deviationist things here and there.[63] But, I have also written some standard pieces on cause-in-fact[64] that are probably cited in your Torts case book.[65]

So, it is not just that some of our intellectual products make appointments committee members uneasy, although they do. Many of us also write things that are right up their alley. The real, deeper reason is that they both want us and fear us; they are not comfortable with us. And the reason has nothing to do with qualifications in the usual sense, although it does have something to do with the one qualification that really matters—a white face.

IV. What Can Be Done? An "Outrageous" List

What can be done? I am pessimistic about helping members of appointments committees past their existential dilemma, their fundamental contradiction. Perhaps, however, it is possible to get them to reformulate the problem slightly, to stop thinking about it in approach-avoidance terms. One can, for example, frame the absence-of-minorities problem as an educational or psychological one: Particular students would learn law more readily if the faculty included more people of color and women. One can also link it with public relations concerns. At two major law schools, students harbored a long list of complaints ranging from too few Third World professors to inadequate public-interest placement services. So, they solicited alumni donations and held them in trust until things changed.[66]

One can try persuading the faculty that it will be better if it embraces diversity, that the school's ranking will not suffer if it has one or two Derrick Bells on hand to shake things up occasionally. One can try bargaining and lawyerly precision: If we can find a Black or Chicano who has published an article in any of the top 20 law reviews and has above average teaching evaluations at an accredited law school and is willing to come here, will you offer a year's visit?[67] Suppose the committee does carry out a vigorous search, which fails. One can try to get it to leave the position unfilled or to use a temporary visitor to fill the

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Desegregation Litigation, 85 YALE L.J. 470 (1976).

62. Delgado, *supra* note 32.

63. *See, e.g.*, Delgado, *supra* note 2; Delgado, *supra* note 6.

64. *See* Delgado, *Beyond Sindell: Relaxation of Cause-in-Fact Rules for Indeterminate Plaintiffs*, 70 CALIF. L. REV. 881 (1982).

65. *E.g.*, M. FRANKLIN & R. RABIN, TORT LAW AND ALTERNATIVES 234 (4th ed. 1987).

66. They soon did.

67. *See* Delgado, Dunn, Brown, Lee, & Hubert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (formal rules and structures tend to exclude prejudice).

slot. That way, when the visitor leaves, the position is still open, maybe to be filled by the perfect minority. If nothing else works, one can get one-third of the faculty to agree to vote against every white male candidate, no matter how simpatico or brilliantly credentialed, until the school hires X minorities and Y women.

Many of these strategies may seem harsh and extreme. As Kristin Bumiller writes, though, that is the way it is with racial wrongs. The victim feels guilty. You think *you* are the unsettling one, the person who is over-reacting, disturbing the status quo.[68] And so it is with ideology; its strength is its seeming-naturalness. We must struggle to throw off the mental chains that bind us or we will never be free.

68. *See* Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection,* 12 SIGNS: J. WOMEN CULTURE & SOC'Y 421, 425-26, 431, 437 (1987).