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When a Story is Just a Story: Does Voice Really Matter?

Richard Delgado
University of Alabama - School of Law, rdelgado@law.ua.edu

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Richard Delgado [FNa]

I. Introduction

A growing body of literature, much of it written by feminists and scholars of color, draws attention to the role of "voice" in legal scholarship. [FN1] These scholars argue that some members of marginalized groups, by virtue of their marginal status, are able to tell stories different from the ones legal scholars usually hear. [FN2] In addition, some of the scholars urge that those stories deserve to be heard—that they reveal things about the world that we ought to know. [FN3]

*96 A recent article by Professor Randall Kennedy represents the first wave of reaction to these views. [FN4] Focusing on the work of three scholars, [FN5] Kennedy argues that the most basic claims of all such scholarship are seriously flawed. There is, he claims, no such thing as a nonwhite voice; if there is, there is no reason to pay particular attention to it; and if we were to "privilege" the new voice, this would surely backfire, injuring the cause of racial justice. [FN6]

Kennedy's article is provocative, scholarly, and exhaustive. If nothing else, it will sharpen the debate about voice in legal writing. Yet, as I show in Part II of this Article, his attack rests on questionable premises and contains innumerable distortions and failures of emphaty. Kennedy and I are both scholars of color who have written about and are committed to racial justice, yet we are obviously very far apart. What accounts for the gap between us? In Part III, I put forward two explanations. First, Kennedy and I have markedly different views of legal language. Essentially, he believes that everything that needs to be said about civil rights can be said within the dominant discourse; I do not. Second, Kennedy and I differ on the nature of racism. He would define it narrowly; but I and most other Critical Race Theorists [FN7] see it as including a good deal more than does Kennedy.

These differences between Kennedy and the new Critics are magnified by ones of political orientation, discussed in Part IV. Even though Kennedy and I part company on many issues, I find his article instructive. It articulates what surely must be other major scholars' hitherto-unexpressed reservations about our views and ideas. While some in the civil rights community have found Kennedy's article bitter medicine, [FN8] and while I expect the article to encourage further hostile reaction to Critical Race Theory, I believe that by demonstrating *97 the consequences of different visions of racial justice Kennedy has benefited us all.

II. Kennedy's Critique: Responding to Particular Charges

In this Part, I discuss particular disagreements Kennedy has with Critical Race Theorists. Later, I show how most of these arise from more general differences in our views about the world and the role race and racism play in ordering it. [FN9]

A. Kennedy's Microcritique

Kennedy asserts: (1) There is no nonwhite voice; (2) if there is, it is not unfairly excluded from legal scholarship; and (3) in claiming a place for it, we are in effect privileging ourselves

over majoritarian voices that have an equal or greater claim to be heard. I deal with each of these assertions in turn.

1. No single, monolithic voice exists. Kennedy begins by identifying a group of scholars [FN10] who purport to speak for a distinct minority "voice," a claim Kennedy rejects. There is, he argues, no single nonwhite voice. There are black conservatives, black neoconservatives, black radicals, and a growing black middle class, and the same is true of other nonwhite groups. [FN11] No one, white or nonwhite, can speak for such diverse communities. [FN12]

True as far as it goes (although the same might be said about the "group" Kennedy criticizes). [FN13] But the claim of most Critical Race ***98** Theorists is not that there is a single, monolithic nonwhite voice; there are indeed many of them. [FN14] It is, rather, that all people of color speak from a base of experience that in our society is deeply structured by racism. [FN15] That structure gives their stories a commonality warranting the term "voice." Kennedy minimizes that commonality, yet it is as real as Howard Beach or the fishy eye a professor of color draws on the morning bus. [FN16] Nor is the experience of racial difference neutral. It may separate whites from blacks just as much as it separates blacks from whites— but the experience of separation is not the same for both groups. [FN17]

2. Minority writers are not excluded but are cited as frequently as one would expect. Many voice scholars maintain that the writing of people of color is unjustifiably marginalized by dominant scholars. [FN18] At one time Kennedy simply disagreed, arguing that our work is cited as often as our numbers would lead one to expect. [FN19] He now maintains that if there is exclusion there may be a good reason for it: Our work may not measure up under widely accepted standards of scholarly excellence. [FN20] In the next Part, I question whether we will ever be able to attain such standards in a volatile area like race. For now, however, we can imagine we have done so. Yet, when those criteria are applied to nonwhite authors, an interesting pattern emerges: Nonwhite scholars have much less trouble getting their work recognized ***99** outside civil rights. [FN21] The further one moves out from the theoretical core of civil rights law, where power and authority are allocated among the races, the better our prospects for recognition. [FN22] Why should nonwhites' work be good in torts, but not in core areas of race-remedies law? Kennedy is aware of this anomaly but cursorily dismisses it as unproven. [FN23]

In addition to challenging what he calls our exclusion thesis, Kennedy accuses us of making a reverse-exclusion demand, of asking others to abandon the field of civil rights. [FN24] But none of us has done so. Instead, we urge only that minority voices be permitted to be heard, rather than ignored or silenced. [FN25] To advocate the inclusion of black and brown voices is not to advocate that they be the only ones. [FN26]

3. The New Race Theorists are seeking to privilege their own positions. Professor Mari Matsuda and others argue that oppressed people have certain types of insight that others may lack. [FN27] Kennedy seizes on this as an effort to privilege our own voices. [FN28] But these writers are urging nothing more unusual than that persons who have grown up in the minority community may have information not easily ***100** accessible to others and a special stake in disseminating it. [FN29] Encouraging them to do so seems no stranger than holding that university professors should determine academic policy or that the patient in the dentist's chair is the one who knows when it hurts. To be sure, New Race Theorists point out what we believe are serious shortcomings in dominant scholarship. [FN30] But to show what one regards as error in another body of writing is scarcely to privilege one's own. [FN31]

B. Kennedy's Macrostructure: Merit and Managerialism in Civil Rights Scholarship

1. Kennedy's use of "merit." For Kennedy, legal scholarship is, and should be, a meritocratic enterprise. [FN32] This demand is potentially hostile to the idea of voice, which stands in tension with conventionally defined, monolithic principles of merit. Indeed, one of the historical functions of "merit" has been to canonize what we do best, to conceal the merely contingent connection between institutional interest and the things rated by claiming that they have timeless, universal validity. [FN33]

***101** Thus, Kennedy demands that our exclusion claim first establish that the marginalized voices have been articulating claims that deserve to be taken seriously—that the books and

articles written by Third-World writers and largely ignored by dominant scholars should have been cited. [FN34] This way of thinking implies that neutral observers may stand outside the circle of civil rights scholarship, and with the aid of neutral merit principles, look inside and decide whether what we see there constitutes a "race problem," i.e., whether equally good works by blacks are being ignored. But this standing-outside view ignores that the merit criteria we use may be responsible for the problem—that is, may belong inside, not outside, the circle. [FN35] Merit criteria may be the source of bias, rather than neutral instruments by which we determine whether or not that bias exists.

Curiously, Kennedy elsewhere has warned of the ways in which "merit" can mask prejudice. [FN36] His cautions seem equally applicable to legal scholarship: Merit is broadly defined, poorly validated, and its criteria were laid down during times of relative cultural insensitivity. [FN37] Kennedy inexplicably exempts his current project from his previous critique. [FN38]

***102** There are more affirmative reasons for distrusting the role of merit in judging race-remedies scholarship. For a key function of writing in this area is prophetic: The writer must at times let "outrage speak[ ] to outrage . . . , outrageous symbol speak[ ] to outrageous insensitivity." [FN39] Like the prophets of old, the civil rights author shows the community's infidelity to its founding vision and points the way to redemption. [FN40] Obviously, such writing will not always be met with open arms.

Kennedy not only maintains that scholarly merit is determinable, he holds that it is easily measured by a system now in place—the marketplace of scholarly citation. [FN41] But that marketplace is far from perfectly rational. Choices may sometimes be made on the basis of a work's presumed merit. But possibly just as often they are made on other grounds, such as efficiency and speed ("research assistant, find me right away something that stands for the following proposition"); safety ("find me a well-respected authority who says X"); hope of currying favor ("If I cite Y, I wonder if he will do something for me?"); or in an effort to impress law review editors ("If I cite Dworkin and Gramsci, maybe they'll accept my article."). Thus, for many reasons—speed, familiarity, need for prestige—even if we know scholarly merit when we see it, we may not cite accordingly. Merit is a group-defined term; group dynamics condition the way it is applied and distributed.

2. Civil Rights as Managerialism. Related to Kennedy's emphasis on conventionally defined merit is his managerial view of civil rights. For Kennedy, civil rights is the study of communities in conflict; its objective is the management of tension. [FN42] In this task whites will have as legitimate a place as blacks—symmetry reigns. But another view of civil rights is liberation-oriented; the objective is not so much managing the status quo as changing it. Kennedy's static approach may account for his placement of burdens of proof (always on us) [FN43] and his decrying of pointed, insistent discourse. [FN44] But if the current racial ***103** scene needs restructuring, not maintaining, we need more than efficient management; good scholarship must do more than suggest peacekeeping measures. We may need a few more "manicheans" in our department-store window. [FN45]

III. Kennedy's Critique and Those He Criticizes—Explaining the Gap

A. The First Explanation: Faith in, Versus Skepticism About, Dominant Discourse

Kennedy is a believer in what I call dominant discourse—the collection of ideas, concepts, presuppositions, and arguments that make up liberal legalism. [FN46] Dominant discourse is incremental, cautious, and footnoted. [FN47] In civil rights, it holds that slavery was a terrible evil; that this country is painfully extricating itself from its legacy; that overt discrimination is largely a matter of the past; that the rare offender can be caught and punished; and that the gap between whites and blacks is slowly but surely closing. [FN48] Patience, vigilance and measured progress are what is needed; black self-help measures should be encouraged and reverse discrimination avoided at all costs. [FN49]

The Critical Race Theorists are impatient with that discourse and the outlook associated with it. [FN50] It neither squares with our experience nor permits us to hope for the kind of future we want for ourselves and our communities. Unlike a natural language, which simply adds new

concepts and words when its speakers need them, dominant legal discourse resists expansion. Indeed, one of its principal functions is to make reform difficult to achieve or even to imagine. [FN51] Kennedy's opposition to alternative voices and insistence that we speak in ***104** the current idiom therefore is not merely about legal style or manners. It is about things that matter. In seeking to confine us to a single mode of thought and expression even in the law reviews, a traditional forum for experimenting with new ideas, he verges close to intolerance.

B. The Second Explanation: How Much Racism Is There in the World?

Racism plays a strange and powerful role in our history, taking different forms at different times. [FN52] In our early years blacks were imported for their labor, and an attitude, racism, evolved to justify their oppression. [FN53] Slavery ended, but the attitude did not—white subordination of blacks was too useful, psychically and economically, to be let go. [FN54] The dominant group occasionally did relax some of the worst features of racial exploitation and permit black advances—a landmark legal decision or a reform statute here, a softening of social attitudes there. [FN55] Derrick Bell's "interest-convergence" hypothesis, which holds that whites will support the cause of black justice only when it is in whites' interest to do so, provides a powerful tool for understanding this ebb and flow of social justice. [FN56] Yet it does not explain everything, in particular qualitative differences in the forms racial subordination takes at different times. Legal racism, broadly speaking, takes two forms, substantive and procedural. These are the poles of a continuum—many varieties fall in between. And in any era it is possible to find elements of each in the law's treatment of non-white groups. No period is "pure."

By substantive racism I mean that which treats blacks and other ***105** nonwhite persons as though they were actually inferior to whites. [FN57] Attitudes and treatment taking this form have flourished at different points in our history; to its shame, the law also fully embraced and accommodated them through such means as sterilization statutes, [FN58] Jim Crow laws, [FN59] the separate but equal doctrine, [FN60] antimiscegenation statutes, [FN61] and racist immigration laws and policies. [FN62] During periods when substantive racism is used to subjugate blacks and manage white guilt, media images like Aunt Jemima are used to satisfy whites' need to believe that blacks are happy and content to serve them. [FN63] At other times, society disseminates images of blacks as primitive and bestial, of Mexicans as lazy, happy-go-lucky, untrustworthy or unclean, of Asians as aloof and manipulative. [FN64] Although designed to serve different purposes, they all converge on the idea that nonwhites deserve inferior treatment because they are actually inferior. Our society currently appears to be moving into a phase of substantive racism.

At other times, racism takes on what I call a procedural cast. In these periods, there are fewer images, stories, and laws conveying the idea of black inferiority. That idea is banished, put underground. Instead, we promulgate narratives and rules that invalidate or handicap black claims. We erect difficult-to-satisfy standing requirements for civil rights cases, [FN65] demand proof of intent, [FN66] and insist on tight ***106** chains of causation. [FN67] We place limitations on the type and pace of relief that may be ordered. [FN68] We limit attorneys fees [FN69] and decrease funding for agencies that litigate nonwhites' cases. [FN70] We insist that remedies not endanger white well-being; "reverse discrimination" is given a wide berth. [FN71] We elevate equality of opportunity over equality of result and reject statistical proof of lack of the former. [FN72] We use the excuse of "widening the pool" to avoid hiring nonwhites now. Procedural racism puts racial-justice claims on the back burner and makes sure they stay there.

There is change from one era to another, but the net quantum of racism remains exactly the same, obeying a melancholy Law of Racial Thermodynamics: Racism is neither created nor destroyed. Realizing that racism has these different guises explains much of the gulf between Kennedy and myself, for Kennedy does not believe in procedural racism, and I do. [FN73] He is fully, indeed stirringly, sensitized to racism of the substantive variety. He detests (as do I) intentional favoritism based on race: If a white is given a benefit over an equally or more deserving black, Kennedy is quick to condemn it. [FN74] But racism taking the "procedural" form of seemingly neutral or meritocratic rules that predictably handicap blacks disturbs him relatively little. Kennedy's refusal to recognize procedural racism lies at the heart of his quarrel with the New Race Theorists.

***107** It explains, for example, Kennedy's diffidence toward questions of "standing"—of who should articulate black claims. [FN75] If one believes, with Kennedy, that substantively fair treatment is the only concern, then any intelligent, reasonably compassionate speaker should do. White progressives should be just as good at speaking on behalf of black justice as blacks. A story is just a story—if the content is the same, the storyteller's identity and voice are immaterial.

It also accounts for the preoccupation with conventionally defined merit that runs through Kennedy's article. [FN76] For Kennedy, substantive fairness is satisfied if professional recognition is parceled out in accordance with the merit principle. The silencing of nonwhite voices to which I call attention poses a problem for Kennedy. He does not believe his majority-race colleagues are conscious racists. He is accordingly left with merit as the sole possible explanation for any exclusion—nonwhite writers are treated as they are because they write badly. [FN77] Our lack of merit is not inherent—indeed, Kennedy rails against anthropologists and race-IQ theorists who propound views of black inferiority [FN78]—but rather associated with lack of effort. We shrink from difficult challenges or fritter away our time and energies on unproductive pursuits. [FN79]

There is a simpler explanation for Kennedy's difficulties with merit, one that does not require such a desperate search for the cause of our invisibility. It is that merit has a special affinity for procedural racism. Indeed, its search for universalistic principles and inability to deal with particularity, context, and voice render merit the perfect excluder of "deviant" or culturally stigmatized groups. [FN80] Kennedy's refusal to extend his critique of racism to the procedural kind blinds him to this connection. [FN81]

***108** In a curious reversal, Kennedy suggests that the dearth and invisibility of nonwhite law professors may mean that we are blessed, not cursed. The pool is small; talented nonwhite lawyers have many more remunerative opportunities outside law teaching. [FN82] This rationalization, which we are accustomed to hearing from our detractors rather than our friends, assumes that substantive racism is the only kind and overlooks the procedural version. One sensitized to the latter might offer less sanguine reasons why the pool is so small and getting smaller. [FN83] Kennedy's argument ignores painful reality. Excellent nonwhite scholars are seldom besieged with offers and other professional bouquets; even the best often find their road a rocky one. [FN84]

Kennedy's blindness to procedural racism and absorption with the substantive version also have much to do with his surprisingly relentless indictment of his own people. He argues that other nonwhites did not oppose Japanese internment; [FN85] that our suffering has not ennobled but subdued and blunted us; [FN86] that we press claims of scholarly imperialism not for the reasons we state but to seize power or to "guilt-trip" whites into giving us more recognition that we deserve. [FN87] In each of these cases and in others, Kennedy is unable to explain non-white failures as products of direct, substantive racism—bigotry of an ***109** easily recognized kind. Since he does not recognize the other kind of racism, his only response can be to blame the victim and exhort us to work harder.

His failure to acknowledge procedural racism likewise explains Kennedy's concern with neutral principles and where-it-will-all-end: Could not recognizing a special nonwhite voice in race-remedies law lead to our silencing in other areas—e.g., antitrust? [FN88] It explains his preoccupation with stigma: If misguided reformers persuade society to play by nonmerit-based rules, will not every successful nonwhite be seen as a token, his or her achievements the product of affirmative action? [FN89] Never mind that remedial measures aim to redress past failures to play by fair rules. They operate unfairly now and breach the merit principle—and that is enough for Kennedy to condemn them.

* * *

There is another view of the matter. In that view, "voice" scholarship can bring to our attention breaches of both types of equality. It can sharpen our concern, enrich our experience, and provide access to stories beyond the stock tale. Heeding new voices can stir our imaginations, and let us begin to see life through the eyes of the outsider. [FN90] Not only can it broaden our point of view; bringing to light the abuses and petty and major tyrannies that

minority communities suffer can enable us to see and correct systemic injustices that might otherwise remain invisible. [FN91] Experience tells us that reforms born of the cauldron of racial justice are often extended more broadly. Due process improvements for schoolchildren and advances in prison law and the first amendment have been made possible because, once they were seen in the harsh light of racial injustice, we were able to enact broad-based reforms that benefited everyone, not just blacks. [FN92]

On one level, Kennedy's article is a routine case of interest divergence—of a nonwhite writer aligning himself with conservative forces and against his own community. [FN93] On a deeper level, however, his ***110** attack on voice would diminish us all. It urges inattention to difference and a return to sterile canons of conventional excellence. Kennedy's fierce individualism may be a useful strategy in economics, where the market is almost always right and the failure of one may lead to a net benefit for all. But it is strikingly inapt in writing and thought, particularly that related to racial justice. Here, inclusion, texture, and diversity of perspective—in short, voice—is everything.

IV. Legal Scholarship and the Politics of "Politics"

Kennedy concludes his article with a section on the motives and politics of the writers he criticizes. [FN94] Therefore, I shall offer a few observations of my own on the implications of Kennedy's paper, particularly his charge that we are politicizing issues of racial justice.

Sociologists of knowledge know that knowledge is power, and power is something that people fight to obtain and struggle to avoid giving up. Physical scientists, for example, have strenuously resisted "paradigm changes" even in their ostensibly objective, value-free world. [FN95] Legal change comes freighted with even more meaning than the scientific version, for it often portends changes in power and well-being for specific persons or groups. It is thus not surprising that the New Race Theorists, who are raising such ideas as that civil rights doctrine perpetuates and legitimizes discrimination, meet fierce resistance. Kennedy's article is not just a collection of conventionalist arguments that, like skew lines, hardly intersect with the new body of thought; it is a thinly veiled request to return to the fold. And the request, as Kennedy himself notes, [FN96] is issued against a background of the social and racial scene of the late 1980's.

That scene is one of sharp division, in which the hard-won gains of the sixties are being rolled back. The tide is running against racial reform, yet Kennedy implies that publishing his article took great courage and exposed him to collegial and popular criticism. [FN97] He misreads the times. His article is apt to be seized on eagerly by opponents of racial reform. It will earn him widespread praise and ***111** encourage antiminority forces to speak out in full strength. It will increase hostility to new theoretical thinking about race. It will make our lives, not his, harder.

Yet, despite the charged quality of his article, Kennedy accuses us of being political. How can this be? I believe it is because the status quo comes to seem natural, "the way things are"; departures from it seem political. But the current situation is itself the product of past choices, and acquiescing in it is also a political act. Kennedy and the Critical Race Theorists are thus equally political, although in different ways. The more basic question is whose approach is best calculated to help society deal with its racial ills. No small task, this will demand the best thinking we can bring to it. The strength of Kennedy's article is that it may stimulate some of that best thinking. But I fear it may also encourage some of the worst.

[FNa] Professor of Law, University of Wisconsin. J.D. 1974, University of California, Berkeley. I am grateful to Dirk Hartog, Derrick Bell, Lisa Delgado, Amy Scarr, and Charles Church for their comments.

[FN1]. See, e.g., Delgado, The Imperial Scholar: Reflections on a Review of Civil Rights Literature, 132 U.Pa.L.Rev. 561 (1984) (arguing that there has been a systematic exclusion of minority scholarship on civil rights); Matsuda, Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground, 11 Harv. Women's L.J. 1 (1988) (arguing that persons of color possess a unique viewpoint not found in traditional legal scholarship); see also Menkel-Meadow, Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law, 42 U. Miami

L.Rev. 29 (1987) (detailing the legal profession's exclusion of feminist viewpoints). These and other scholars writing in this vein occasionally refer to themselves as the Critical Race Theory or New Race Theory group. I shall use these terms interchangeably.

Whatever label is applied to this loose coalition, its scholarship is characterized by the following themes: (1) an insistence on "naming our own reality"; (2) the belief that knowledge and ideas are powerful; (3) a readiness to question basic premises of moderate/incremental civil rights law; (4) the borrowing of insights from social science on race and racism; (5) critical examination of the myths and stories powerful groups use to justify racial subordination; (6) a more contextualized treatment of doctrine; (7) criticism of liberal legalisms; and (8) an interest in structural determinism—the ways in which legal tools and thought-structures can impede law reform. A partial bibliography of such work has been compiled by Robert Williams, Professor of Law at the University of Arizona (copy on file with the Virginia Law Review Association).

While we have no formal membership or organizational structure, in the summer of 1989 a group of scholars met for the first time in Madison, Wisconsin, as the Conference on Critical Race Theory, where I delivered an earlier version of this paper.

[FN2]. See Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 Mich.L.Rev. 2411 (1989); see also infra notes 27-31 and accompanying text. Of course, not all members of marginalized groups may wish to tell these stories. See infra note 17.

[FN3]. This normative claim is made by, e.g., Delgado, supra note 2; Matsuda, supra note 1.

[FN4]. Kennedy, Racial Critiques f Legal Academia, 102 Harv.L.Rev. 1745 (1989). For a more favorable review of the new scholarship, see Wiener, Law Profs Fight the Power, 249 The Nation 246 (Sept. 4/11, 1989).

[FN5]. The scholars are Mari Matsuda, Professor of Law, University of Hawaii; Derrick Bell, Professor of Law, Harvard University; and myself. Kennedy, supra note 4, at 1746; see also id. at 1747 n. 13 (citing additional authors).

[FN6]. Id. at 1749.

[FN7]. See supra note 1.

[FN8]. Letter from Professor Derrick Bell to Professor Randall Kennedy (Feb. 17, 1989) (copy on file with the Virginia Law Review Association); see also Kennedy, supra note 4, at 1811-12 (Kennedy reports he was pressured not to publish article).

[FN9]. My own view of race is contained in Delgado, supra note 1; Delgado, supra note 2; Delgado, Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved? (Book Review), 97 Yale L.J. 923 (1988) [hereinafter Saved?].

[FN10]. Kennedy, supra note 4, at 1746 (identifying our "tenets"); see also id. at 1747, 1785, 1807 (our "traditions," "paradigm," and "program"). As his language demonstrates, Kennedy at times ascribes to us movement-like status, likening us to Marxism, Critical Legal Studies, and Black Power. See id. at 1750-55. But see supra note 1.

[FN11]. Id. at 1782-83, 1787, 1816 (Critical Race Theorists "homogenize" nonwhites); see also id. at 1802 ("voice" claims "imperil[ ] the ideal of a cosmopolitan intellectual community").

[FN12]. Id. at 1802-03. I find it ironic that the charge of essentialism—of lumping all nonwhites together—is made only when one of us wishes to talk back in response to racism, never when others discuss us. For what is more essentialist than racism, which treats all of us alike?

[FN13]. We include nonwhite minority scholars, white male scholars, feminist scholars, and law-and- literature scholars. See, e.g., authors cited supra note 1; Symposium: Legal Storytelling,

87 Mich.L.Rev. 2073 (1989); Symposium: Excluded Voices—Realities in Law & Law Reform, 42 U. Miami L.Rev. 1 (1987); Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 Minn.L.Rev. 1049 (1978).

[FN14]. See Delgado, supra note 1, at 561-62 (black, Hispanic, and Native American law professors' civil rights scholarship all often ignored); id. at 569 ("many," but not all, minority scholars stress reparations remedies).

[FN15]. Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv.L.Rev. 1331, 1383 n. 197, 1384 (1988) (black "collectivity" continues to exist, even though a few blacks have managed to escape to question it).

[FN16]. Dalton, The Clouded Prism, 22 Harv.C.R.-C.L.L.Rev. 435, 440 (1987).

[FN17]. As Kennedy rightly points out, a person of color may choose to ignore racism and other evils afflicting his or her community—may decide to sit out the struggle for reform. Kennedy, supra note 4, at 1799-1801. But the cost of doing so is greater than for a white person; those ignored are one's kin, and the community denied may be one's only true home.

[FN18]. See sources cited supra note 1.

[FN19]. Kennedy made the no-exclusion charge in a series of talks, e.g., Address by Professor Randall Kennedy, Stanford Law School (Dec. 2, 1988), and in an earlier draft of his article (copy on file with the Virginia Law Review Association).

[FN20]. See Kennedy, supra note 4, at 1766-67, 1772-78. One might nonetheless argue that majority-race scholars have a moral obligation to assist and promote the work of nonwhite scholars, despite its alleged flaws. See Delgado, supra note 1, at 577.

[FN21]. Delgado, supra note 1, at 565; Olivas, An Elite Priesthood of White Males Dominates the Central Areas of Civil-Rights Scholarship, Chron. of Higher Educ., May 24, 1989, at B1, col. 1.

[FN22]. Nonwhites who write on nonracial subjects find their work cited appropriately. Delgado, supra note 1, at 565 & n. 19.

[FN23]. Kennedy, supra note 4, at 1776 n. 132 (calling my argument "insubstantial" because not supported by "comparative analysis").

[FN24]. Id. at 1790-91, 1795.

[FN25]. Silencing can take a number of forms: (1) taking an inattentive or hypocritical attitude toward a speaker or writer so that he or she stops voicing his or her views; (2) insisting that certain premises or styles of argument are the only legitimate ones so that one whose speech deviates from these views feels devalued; or (3) when one speaks and the speech is seen as deviant and not "heard."

[FN26]. See Delgado, supra note 1, at 565 (suggesting that citations to minority scholars be added to, not substituted for, citations to white scholars); id. at 577 ("no one could object if sensitive white scholars contribute occasional articles and useful proposals"); cf. Delgado, The Author Replies, 3 Law & Inequality 261, 264 (1985) (urging that dominant scholars "leave," but not permanently abandon, field of civil rights); Gates, Whose Canon Is It Anyway, N.Y. Times, Feb. 26, 1989, § 7 (Book Rev.), at 1, 45 (literary scholar's efforts to define a Black-American canon decried as separatist and racist).

[FN27]. E.g., Matsuda, supra note 1, at 8-9; Matsuda, Looking to the Bottom: Critical Legal

Studies and Reparations, 22 Harv.C.R.-C.L.L.Rev. 323, 326 (1987).

[FN28]. Kennedy, supra note 4, at 1801-07.

[FN29]. See Delgado, supra note 1, at 568-72; sources cited supra note 27. For example, they may know about: (1) conditions and problems besetting their community; (2) priorities that community places on programs and needs; and (3) solutions that would likely work.

[FN30]. For example, I point out that dominant scholars invariably adopt the perpetrator rather than victim perspective, forward- rather than backward-looking rationales for affirmative action, and remedies that place the costs of achieving racial justice on blacks. Delgado, supra note 1, at 569-73.

[FN31]. See generally Matsuda, supra note 1 (noting that Critical Legal Studies and minority voices are coequal parts of a dialectical conversation). One possible explanation for our argument's chilly reception is that ideology or mindset can make unfamiliar claims seem outlandish or unreasonable. See C. MacKinnon, Feminism Unmodified 45 (1986) (request to remove foot from throat can seem unreasonable to one accustomed to having it there); Delgado, supra note 2, at 2413-14. For example, Kennedy finds harsh my naming names of the scholars whose work I criticize. Kennedy, supra note 4, at 1815. Yet Kennedy himself has written a stinging attack devoted to a single scholar. Kennedy, Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt, 86 Colum.L.Rev. 1622 (1988). In his later piece, this article is curiously relabeled to exclude any mention of Professor Schmidt's name. Kennedy, supra note 4, at 1753 n. 37.

[FN32]. The idea of merit recurs throughout Kennedy's article. See Kennedy, supra note 4, at 1773, 1776-77, 1793-94, 1801, 1806.

[FN33]. In other writing, Kennedy himself has warned about the pitfalls of relying on desert and merit in debated, highly charged areas such as civil rights. Kennedy, Persuasion and Distrust: A Comment on the Affirmative Action Debate, 99 Harv.L.Rev. 1327, 1332-33 (1986) [hereinafter Persuasion and Distrust]; see infra note 36; see also Kennedy, Reconstruction and the Politics of Scholarship, 98 Yale L.J. 521 (1989) [hereinafter Reconstruction] (arguing politics inescapably affects scholarship).

[FN34]. Kennedy, supra note 4, at 1774-78.

[FN35]. See infra notes 46-50 and accompanying text; Delgado, supra note 1 (calling attention to defects in dominant scholarship in order to urge that new voices be given a hearing). It may well be that some judgments of demerit are less subjective and culture-bound than their opposites.

[FN36]. Kennedy, Persuasion and Distrust, supra note 33, at 1332 (arguing that "in many instances the idea that affirmative action represents a deviation from meritocratic standards is little more than disappointed nostalgia for a golden age that never really existed"); id. at 1333 ("the thoroughly political . . . nature of merit"); see also Kennedy, Reconstruction, supra note 33, at 537 ("politics inescapably affects scholarship"). If Kennedy had heeded his own earlier warning, he might have been less quick to allocate the burden of proof as he did.

[FN37]. See generally Henkin, The Meretriciousness of Merit: Or, Why Jewish Males Oughtn't Be So Smug, Tikkun, Jan./Feb. 1989, at 53 (arguing the concept of merit is politically laden and rarely neutral). Legal publishing lacks even the relatively more objective measures of merit employed in other fields: numbers of printings and reprintings (as in the social sciences); course adoptions (of textbooks in history and the hard sciences, for example); and numbers of volumes sold.

Because current criteria are so vague, it should come as no surprise that whites choose whites, and friends choose friends, for citation. Delgado, supra note 1, at 562-63. Kennedy concedes that black scholars are sometimes subjected to "race-related difficulties in routine encounters with white colleagues, administrators, and students." Kennedy, supra note 4, at 1767. Why, then, is he reluctant to concede that they may well face unconscious resistance in scholarly encounters?

[FN38]. Cf. Kennedy, supra note 4, at 1783-84, 1786-87 (accusing us of being too uncritical with each other and failing to take account of conservative black authors such as Thomas Sowell). Are we too uncritical of each other? See Delgado, Saved?, supra note 9 (reviewing Derrick Bell's book, And We Are Not Saved).

[FN39]. D. Maguire, The Moral Revolution 237 (1986).

[FN40]. See, e.g., D. Bell, And We Are Not Saved (1987).

[FN41]. Kennedy, supra note 4, at 1771-74.

[FN42]. Id. at 1777 (calling the field "race-relations law").

[FN43]. Id. at 1749, 1778, 1782-83, 1787, 1816; see supra notes 34-36 and accompanying text.

[FN44]. Id. at 1784; see also id. at 1787 (Matsuda guilty of (favorable!) "stereotyping").

[FN45]. Id. at 1784 (applying the term to this author).

[FN46]. E.g., Kennedy, supra note 4, at 1747-49 (deploring overstatement); id. at 1751-53, 1767 (defining the problem of racism narrowly); id. at 1807-09 (decrying our politicization of race-remedies scholarship); id. at 1775-78, 1781, 1815 (claiming that our argument is lax, incautious or utopian); id. at 1809-10 (chiding us for "crying wolf"). On dominant discourse generally, see Dalton, The Faithful Liberal and the Question of Diversity, 12 Harv. Women's L.J. 1 (1989).

[FN47]. Cf. Delgado, supra note 2, at 2412.

[FN48]. Id. at 2417.

[FN49]. Id.

[FN50]. See supra note 1.

[FN51]. Dominant discourse is but one of a group of homeostatic devices by which our culture ensures that most reform movements will last only a short time.

[FN52]. See D. Bell, supra note 40, at 3-5, 26-50; D. Bell, Race, Racism and American Law 2-51 (2d ed.1980) [hereinafter Race, Racism]; see also Kennedy, McClesky v. Kemp: Race, Capital Punishment and the Supreme Court, 101 Harv.L.Rev. 1338, 1419 (1988) (noting the "chameleonlike ability of prejudice to adapt unobtrusively to new surroundings and, further, to hide itself even from those firmly within its grip"). For an explanation of why whites often see the world as containing much less racism than blacks do, see Delgado, Critical Legal Studies and the Realities of Race—Does the Fundamental Contradiction Have a Corollary?, 23 Harv.C.R.-C.L.L.Rev. 407, 407-08 (1988).

[FN53]. D. Bell, supra note 40, at 215-35.

[FN54]. Id. at 123-30, 215-35, 248-58; Delgado, Saved?, supra note 9, at 923-24.

[FN55]. D. Bell, Race, Racism, supra note 52, at 30-44.

[FN56]. Id. at 39-44; Bell, Brown v. Board of Education and the Interest-Convergence Dilemma, 93 Harv.L.Rev. 518 (1980).

[FN57]. The content of the idea of inferiority varies from period to period and even within periods. See, e.g., Delgado, Bradley, Burkenroad, Chavez, Doering, Lardiere, Reeves, Smith & Windhausen, Can Science Be Inopportune? Constitutional Validity of Governmental Restrictions on Race-IQ Research, 31 UCLA L.Rev. 128, 194-211 (1983).

[FN58]. See Relf v. Weinberger, 372 F.Supp. 1196 (D.D.C.1974); Comment, Involuntary Sterilization: An Unconstitutional Menace to Minorities and the Poor, 4 N.Y.U.Rev.L. & Soc. Change 127 (1974).

[FN59]. See D. Bell, Race, Racism, supra note 52, at 86-90, 280-83, 381-84, 433-35.

[FN60]. See Plessy v. Ferguson, 163 U.S. 537 (1896).

[FN61]. See Loving v. Virginia, 388 U.S. 1 (1967); D. Bell, Race, Racism, supra note 52, at 53-62.

[FN62]. See Delgado, Saved?, supra note 9, at 940.

[FN63]. Periods when substantive racism was in the ascendency include the 1860's and early 1900's and, increasingly, today. See id. at 939 (slurs, epithets, demeaning skits and stereotypes, harassment, and other weapons of substantive racism increasing); Gates, supra note 26, at 1 (racial violence sweeping through traditionally liberal institutions of higher learning).

[FN64]. J. Boskin, Sambo: The Rise and Demise of an American Jester (1986); see also Gates, supra note 26, at 1 (cultural right's nostalgic return to days when blacks were voiceless servants); Steele, The Recoloring of Campus Life, Harper's, Feb. 1989, at 47, 48-49; Ethnic Notions (PBS television broadcast, 1986) (videotape on file with author).

[FN65]. Delgado, Saved?, supra note 9, at 936, 942.

[FN66]. Wards Cove Packing Co. v. Antonio, 109 S.Ct. 2115 (1989); Delgado, Saved?, supra note 9, at 936, 942.

[FN67]. City of Richmond v. J.A. Croson Co., 109 S.Ct. 706 (1989); Delgado, Saved?, supra note 9, at 936, 942.

[FN68]. Delgado, Saved?, supra note 9, at 936, 942.

[FN69]. See T. Eisenberg, Civil Rights Legislation 446-61 (2d ed.1987). But see Missouri v. Jenkins, 109 S.Ct. 2463 (1989).

[FN70]. Menkel-Meadow, Nonprofessional Advocacy: The "Paralegalization" of Legal Services for the Poor, Clearinghouse Rev., Special Issue, Summer 1985, at 403, 407 (one-third of legal services attorneys left jobs due to financial cutbacks).

[FN71]. See H. Schuman, C. Steeh & L. Bobo, Racial Attitudes in America 211-12 (1985); cf. D. Bell, supra note 40, at 72-73 (stating that saying blacks want nothing more than their rightful share of opportunity may be too comforting to whites who see black claims for justice as

unjustified).

[FN72]. For a discussion of various types of equality, see Baker, Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection, 131 U.Pa.L.Rev. 933 (1983).

[FN73]. Cf. Kennedy, supra note 4, at 1753-54 (implying that present-day racism is relatively rare).

[FN74]. E.g., id. at 1751 (calling the charge of intellectual inferiority "hurtful, corrosive"; id. at 1753 (noting intellectuals of color are often ignored); id. at 1767 (criticizing demeaning treatment of a black professor); see also Kennedy, Civil Rights vs. Supreme Court: A Now and Historic Battleground, L.A. Times, June 25, 1989, § 5, at 3, col. 3.

[FN75]. Kennedy, supra note 4, at 1788-1801.

[FN76]. See supra notes 32-41 and accompanying text.

[FN77]. Kennedy, supra note 4, at 1772-77.

[FN78]. Id. at 1751-52 & nn. 23-26.

[FN79]. Id. at 1769-70, 1808-09. Kennedy also hypothesizes that our invisibility is a product of a self-perpetuating structure of inequality, as though inequality were a perpetual motion machine existing independently of any propelling force of racism. See id. at 1768. Like Jesus, he seems resigned to having the poor with us always.

[FN80]. Again, Kennedy recognizes this elsewhere. See Kennedy, Reconstruction, supra note 33, at 530 (1989) ("masses . . . rendered invisible by elitist historical studies").

[FN81]. Kennedy might reply that he is only being "realistic" and that a cure will never be found until we first recognize how sick the patient is. See Kennedy, supra note 4, at 1770, 1809. I think, however, that the disease lies in the setting as much as in the patient.

[FN82]. Id. at 1769.

[FN83]. See, e.g., Brooks, Anti-Minority Mindset in the Law School Personnel Process: Toward an Understanding of Racial Mindsets, 5 Law & Inequality 1 (1987) (exploring some of these reasons). Even Kennedy finds that he is unable wholly to exonerate the law schools—who control the size of the pool—for the "pool problem." Kennedy, supra note 4, at 1814. For statistical analysis and an argument that the size or quality of the pool of minority teaching candidates is not the problem, see M. Olivas, Increasing the Numbers (memorandum distributed at AALS Workshop, New Voices in the Law, Washington, D.C., Sept. 9, 1989) (copy on file with the Virginia Law Review Association). Statistics compiled by Olivas show that at least for Hispanics, the pool of available candidates and professors of color is qualitatively indistinguishable from that of whites. See id.; Olivas, Latino Faculty at the Border, Change, May/June 1988, at 6, 7.

[FN84]. E.g., Bell, The Price and Pain of Racial Perspective, Stan.L.Sch.J., May 9, 1986, at 5 (describing black professor's mistreatment at the hands of colleagues); see generally Delgado, Minority Law Professors' Lives: The Bell-Delgado Survey, 24 Harv.C.R.-C.L.L.Rev. 349, 352 (1989) (Survey of minority law professors finds "[a] high percentage described their work environments as racist or subtly racist.").

[FN85]. Kennedy, supra note 4, at 1780.

[FN86]. Id. at 1780-81.

[FN87]. Id. at 1808-10. In another setting, Kennedy spoke more charitably of "playing the race game": "[P]roponents of racial justice should be wary of allowing fear of white backlash to limit the range of reforms pursued." Kennedy, Persuasion and Distrust, supra note 33, at 1330.

[FN88]. Kennedy, supra note 4, at 1795-96 (warning of a presumption of race-based incompetence in areas other than race-remedies law).

[FN89]. Id. at 1801-07, 1817-18.

[FN90]. See Delgado, supra note 2; Gates, supra note 26, at 45 (noting the centrality of voice in black scholarship).

[FN91]. D. Bell, supra note 40, at 63-69.

[FN92]. Id.

[FN93]. See Crenshaw, supra note 15, at 1379 n. 187 ("this legitimation and desertion by some Blacks has been politically damaging and may undermine future efforts to organize"); cf. Bettelheim, Individual and Mass Behavior in Extreme Situations, 38 J. Abnormal & Soc. Psychology 417 (1943) ("identification with the aggressor").

[FN94]. Kennedy, supra note 4, at 1810-19.

[FN95]. See, e.g., T. Kuhn, The Structure of Scientific Revolutions (2d ed.1970).

[FN96]. Kennedy, supra note 4, at 1811.

[FN97]. Id. at 1811-12.

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