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THE INWARD TURN IN OUTSIDER JURISPRUDENCE

RICHARD DELGADO*

I. INTRODUCTION

Over the past few years, several areas of “outsider jurisprudence”¹ have developed rapidly. Radical feminism² has transformed the way we view gender and inequality while achieving concrete reforms in such areas as the workplace,³ reproductive liberty,⁴ and regulation of pornography.⁵ A newer movement, Critical Race Theory (CRT), has attracted significant attention,⁶ although

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1. On the origin of the term, see Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989). For an overview of the new jurisprudence, see Jean Stefancic & Richard Delgado, *Outsider Jurisprudence and the Electronic Revolution: Will Technology Help or Hinder the Cause of Law Reform?*, 52 OHIO ST. L.J. 847 (1991).

2. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) [hereinafter MACKINNON, *FEMINISM UNMODIFIED*]; CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) [hereinafter MACKINNON, *FEMINIST THEORY*]; Stefancic & Delgado, *supra* note 1, at 849-50.

3. *E.g.*, CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979) (analyzing the legal questions posed when the law is used to challenge the pattern and practice of sexual harassment).

4. *See generally* *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the right to abortion is grounded in the constitutional right to privacy); SUSAN BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975) (reconstructing the history and evolution of rape, rape laws, and the social perception of rape); SUSAN ESTRICH, *REAL RAPE* (1987) (discussing the law's treatment of “Simple,” versus “Real,” rape and the need to treat them similarly); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (arguing that the dichotomy between the marketplace and family limits the effectiveness of reforms aimed at improving lives of women).

5. *See generally* *Regina v. Butler*, 89 D.L.R.4th 449 (1992) (Canadian case holding that the restrictions on freedom of expression caused by obscenity laws are justified by the avoidance of harm to society); ANDREA DWORKIN & CATHARINE A. MACKINNON, *PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY* (1988) (justifying laws against pornography and proposing an ordinance against pornography).

6. A recent bibliography of principal works lists over 200 articles and books. *See* Richard Delgado & Jean Stefancic, *Critical Race Theory: Annotated Bibliography*, 79 VA. L. REV. 461 (1993). The central tenets of Critical Race Theory have been praised—as well as condemned—in *Harvard Law Review*, the *New York Times*, and *The Nation* magazine. *See*

it has yet to produce feminism's wide-ranging reforms. This Article discusses two developments that portend far-reaching changes either in the structure of these emerging movements or in the way they are perceived. The first consists of calls for standards for evaluating examples of outsider scholarship.⁷ What is good outsider writing? How shall we appraise an article written entirely in the narrative mode, for example, or putting forward a new cultural analysis of race but citing only a handful of Supreme Court decisions? Calls for evaluative standards often originate with persons skeptical of the new scholarship.⁸ But sometimes they are put forward by sympathizers and fellow travelers concerned with the well-being and growth of such scholarship.⁹

The other development originates within the new movements themselves. Sometimes called antiessentialism,¹⁰ this concept focuses on internal differentiation within the insurgent groups. It raises such questions as whether the concerns of women of color are capable of being addressed adequately within the women's movement, or whether Hispanics and African Americans stand on

Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989); Stephanie B. Goldberg, *The Law, a New Theory Holds, Has a White Voice*, N.Y. TIMES, July 17, 1992, at A23; Jon Wiener, *Law Profs Fight the Power*, NATION, Sept. 4, 1989, at 246, 246.

7. See *infra* notes 37-94, 118-32 and accompanying text. For a more general discussion of the problem of evaluating legal scholarship, see, e.g., Stephen L. Carter, *Academic Tenure and "White Male" Standards: Some Lessons from the Patent Law*, 100 YALE L.J. 2065 (1991); Philip C. Kissam, *The Evaluation of Legal Scholarship*, 63 WASH. L. REV. 221 (1988); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988); G. Edward White, *The Text, Interpretation, and Critical Standards*, 60 TEX. L. REV. 569 (1982); see also Symposium, *Legal Scholarship: Its Nature and Purposes*, 90 YALE L.J. 955 (1981); *A Symposium on Legal Scholarship*, 63 U. COLO. L. REV. 521 (1992).

8. See *infra* notes 63-94 and accompanying text (discussing the role of Randall Kennedy, Suzanna Sherry, Toni Massaro, and Mark Tushnet).

9. See *infra* notes 39-62 and accompanying text (discussing the role of Edward Rubin and Mary Coombs).

10. For a lucid explanation of the concept, see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 584-85 (1990) (arguing that gender essentialism silences the voices of racial minorities within that gender). Essentialism is a belief either that words have core meanings or essences (compare the "nominalist fallacy" in analytic philosophy), or that essential similarities exist among things in the world—for example, chairs or women. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 3d ed. 1967) (casting serious doubt on this latter notion).

similar footings with respect to the struggle for racial equality¹¹ Are black Americans one group, or several?¹² Although the two developments differ in significant ways, each can be seen as a type of inward turn. In the call for standards, scholars in the academic mainstream urge the adoption of universal criteria under which outsider scholars will, in a sense, return to the fold—that is, agree to be judged not by their own lights but those of the mainstream academy¹³ In the other development, outsider scholars subdivide themselves, applying the method of critique to each other in hopes of finding the essential atom of community—a group so like oneself that unity and understanding will follow immediately¹⁴ This Article analyzes and compares these two trends.

Part II sets out what outsider scholarship is and explains in greater detail the two “inward turns.” Part III analyzes each turn in an effort to determine what forces create the turn to explain its emergence at this time. Part IV explores the consequences of both turns for social reform. Should progressive readers welcome, or deplore, the call for standards and the process of successive subdivision that outsider groups are currently undergoing?

II. OUTSIDER SCHOLARSHIP AND THE INWARD TURN

A. *Outsider Scholarship*

Radical feminism and Critical Race Theory are in many respects descendants of critical legal studies (CLS), a movement that sprang up in the law in the early 1970s.¹⁵ Critical thought, tracea-

11. See *infra* notes 98-117 and accompanying text. These issues are in the forefront of discussions among outsider groups. See, e.g., Final Program, 1992 Workshop on Critical Race Theory (June, 1992) (listing topics for discussion).

12. See generally STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991) (discussing the division in the black community between supporters and opponents of the contemporary civil rights movement).

13. In this sense, the turn is inward—from the perspective of those standing in the mainstream. Inward and outward are, of course, matters of viewpoint and perspective.

14. See *infra* notes 95-117 and accompanying text. On the postmodern predicament and its relation to the search for community, see ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 152-62 (1985); Jean Stefancic, *The Law Review Symposium Issue: Community of Meaning or Re-inscription of Hierarchy?*, 63 U. COLO. L. REV. 651 (1992).

15. See Symposium, *Critical Legal Studies*, 36 STAN. L. REV. 1 (1984) (providing an overview of the critical legal studies movement).

ble to the work of continental theorists such as Heidegger, Gramsci, Foucault, and Marx,¹⁶ entered the United States through the disciplines of sociology, history, anthropology, and literature.¹⁷ It did not begin to affect law in any systematic way until the 1970s when structuralism and deconstruction changed the way we understood the interpretation of texts.¹⁸ Later, critical scholars introduced indeterminacy and resumed the systematic examination of power relations and the political agenda of law that the Realists had begun several decades earlier.¹⁹

Critical legal studies heavily influenced a number of later movements, including radical feminism and Critical Race Theory. Both borrowed from CLS its skepticism of law as science,²⁰ its questioning whether text contains one right meaning,²¹ and its distrust of law's neutral and objective facade.²² Feminist legal scholars challenged law's deeply inscribed patriarchy,²³ showed that gender and sex roles are constructed, not natural,²⁴ and named and con-

16. On critical legal studies and its roots, see MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); Roberto M. Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 561 (1983).

17. See KELMAN, *supra* note 16, at 8-14; ROBERTO M. UNGER, *KNOWLEDGE & POLITICS* 5-24 (1975).

18. *E.g.*, ART BERMAN, *FROM THE NEW CRITICISM TO DECONSTRUCTION: THE RECEPTION OF STRUCTURALISM AND POST-STRUCTURALISM* (1988); STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980).

19. See K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (3d ed. 1960).

20. See Mark G. Kelman, *Trashing*, 36 *STAN. L. REV.* 293, 305-06 (1984).

21. See Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 *STAN. L. REV.* 1, 4-5 (1984); Kelman, *supra* note 20, at 305.

22. *E.g.*, Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFF. L. REV.* 205, 210 (1979) (discussing how law reflects the structure and values of Western capitalist thought).

23. See, *e.g.*, ANDREA DWORKIN, *INTERCOURSE* 147-67 (1987) (discussing society's regulation of sex through law and how it reflects male dominance); DWORKIN & MACKINNON, *supra* note 5, at 11-22 (describing the historical inequality of women under the law and challenging the patriarchy in the context of pornography laws); MACKINNON, *FEMINIST THEORY*, *supra* note 2, at 157-234 (asserting that society's laws reinforce male power over women, using as examples laws pertaining to rape, abortion, pornography, and gender discrimination); Olsen, *supra* note 4, at 1504-07 (arguing that the state's policy of "non-interference" with the family actually validates preexisting societal roles which are unfavorable to women and children).

24. See, *e.g.*, DWORKIN, *supra* note 23, at 149-51 (maintaining that male and female roles in sexual intercourse are not natural, but are affected by societal rules and laws that seek to preserve male dominance); DWORKIN & MACKINNON, *supra* note 5, at 26-28 (describing how society defines women as inferior and the role of that definition in pornography).

demned such practices as sexual harassment in the workplace,²⁵ spousal abuse,²⁶ and violent pornography.²⁷ Both feminists and Critical Race scholars have challenged law's dominant mode of detached impartiality, offering in its place scholarship that is more contextualized and based on narrative and experience.²⁸ They have also sparked a renewed interest in pedagogy, exploring such issues as whether the legal curriculum is biased and whether law school teaching silences women and minorities.²⁹

Critical Race Theory sprang up with the realization that the civil rights movement of the 1960s had stalled and needed new approaches to deal with the complex relationship among race, racism, and American law.³⁰ Derrick Bell and others began writing about liberalism's defects and the way our system of civil rights statutes and case law reinforces white-over-black domination.³¹ Many writ-

25. See generally MacKinnon, *supra* note 3 (providing an overview of sexual harassment in the workplace and arguing that it is a form of sex discrimination).

26. See *id.* at 160 (arguing that attempts to attain a legal response to the problem of domestic violence have been ineffectual and noting that within a relationship with a sexual dimension, such as marriage, "even acts that have been objectively illegal are systematically tolerated"); see also ALICE WALKER, *THE COLOR PURPLE* (1982) (telling the story of a black woman's struggle with rape and abuse at the hands of her father and her husband).

27. E.g., DWORKIN & MacKINNON, *supra* note 5.

28. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987) [hereinafter BELL, *AND WE ARE NOT SAVED*] (using ten metaphorical tales—Chronicles—to illustrate the state of race relations in the United States); Derrick Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985) [hereinafter Bell, *Chronicles*]; Martha Minow & Elizabeth Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1600-01 (1990) (describing context as an ability to "recognize patterns of differences" among people, thereby showing how supposedly neutral rules "burden or exclude anyone who does not share the characteristics of privileged, white, Christian, able-bodied, heterosexual, adult men for whom those rules were actually written").

29. See, e.g., Lam Guimer, *Of Gentlemen and Role Models*, 6 BERKELEY WOMEN'S L.J. 93, 93-99 (1991); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 50 (1985) (discussing women's role in the legal process and arguing that "even though our present legal structures may reflect elements of both [male and female] sets of values, there is a tendency for the male-dominated or male-created forms and values to control").

30. For a general description and history of the movement, see Delgado & Stefancic, *supra* note 6; Goldberg, *supra* note 6.

31. See, e.g., Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524-27 (1980) (arguing that whites viewed the *Brown* decision and an end to segregation as favorable to their economic and political interests and that this "convergence of black and white interests" has now faded, resulting in more recent court cases that make integration of education as espoused in *Brown* more difficult to achieve); Bell, *Chronicles*, *supra* note 28, at 11 (questioning why the Supreme Court heard

ers within CRT believe that a major stumbling block to racial reform is the majoritarian mindset—the group of “truths,” myths, and received wisdoms that persons in the dominant group bring to discussions about race.³² To analyze and displace these power-laden myths, CRT writers employ parables, narratives, and “counterstories.”³³ Others explore racial separatism and nationalism, questioning whether persons of color will ever obtain justice through assimilation into white society.³⁴

Both ideologies—feminism and Critical Race Theory—have generated bibliographies, criticism and self-criticism, and special issues of law reviews.³⁵ Both are now self-conscious movements with workshops, conferences, and newsletters.³⁶

B. *The Inward Turn in Outsider Jurisprudence*

Both feminism and Critical Race Theory recently have undergone, or have been urged to undergo, two types of inward turn. The first version is the call for standards; the second, the internal

no cases in its 1984 term involving major racial issues, despite the submission of 60 such cases for review); Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1050 (1978) (discussing how, in spite of the law's prohibition on racial discrimination, Supreme Court decisions have “affirmed that Black Americans can be without jobs, have their children in all-black, poorly-funded schools, have no opportunities for decent housing, and have very little political power, without any violation of antidiscrimination law”).

32. See, e.g., Bell, *Chronicles*, *supra* note 28, at 8-11 (noting the profound role of myths in guiding racial policy, both historically and in contemporary society); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989) (arguing that many minorities view their subordination in society as a product of “the prevailing *mind set* by means of which members of the dominant group justify the world as it is, with whites on top and browns and blacks at the bottom”).

33. BELL, AND WE ARE NOT SAVED, *supra* note 28; Bell, *Chronicles*, *supra* note 28; Delgado, *supra* note 32 (providing five different “stories” of a racial incident and analyzing how each advances a different version of reality).

34. See, e.g., BELL, AND WE ARE NOT SAVED, *supra* note 28; Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357, 1366-68 (1992) (discussing double and false consciousness and how people of color are affected by the culture and consciousness of the dominant group).

35. E.g., Delgado & Stefancic, *supra* note 6; Duncan Kennedy & Karl Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984); Symposium, *supra* note 15.

36. For a discussion of the origins and development of Critical Race Theory through a series of small summer workshops held at secluded locations, see Delgado & Stefancic, *supra* note 6.

splintering of the groups themselves. This section briefly describes these developments. Part III then asks how we should view them.

1. *The Call for Standards*

The call for standards comes mainly from members of the academic mainstream.³⁷ Typically, they point out that the new scholarship is nontraditional in tone and content and urge the promulgation of standards. Such standards will enable the academic community to determine the quality of examples of the new work and to make intelligent decisions regarding their authors' promotion and tenure.³⁸ These calls can be seen as a type of "inward turn" in that they aim to bring outsider scholarship within the academic mainstream by placing it within an evaluative paradigm that includes all authors, traditional and nontraditional alike. For purposes of analysis, these calls fall into two groups—those that are friendly to the newcomers, and those that are less so.

a. *Friendly Calls for Standards*

Two authors, Edward Rubin³⁹ and Mary Coombs,⁴⁰ are typical of those members of the mainstream who write from positions of sympathy. They hold that we need new criteria so the new voices will not be treated harshly by members of the academic mainstream. Evaluation, Rubin points out, serves gatekeeping and adjudicating functions.⁴¹ It is an exercise of power⁴² as well as the

37. See *infra* notes 39-94 and accompanying text (discussing the arguments for standards from authors sympathetic to outsider scholarship and those who are less sympathetic). To my knowledge, no member of the Critical Race Theory movement has echoed this call for standards.

38. See *infra* notes 41-47 and accompanying text (describing how sympathetic proponents believe standards will help ensure a fair evaluation process). It is worth noting that until the advent of the new genres, tenure and promotion decisions were made under the most informal criteria imaginable. See *infra* notes 167-71 and accompanying text (discussing the way in which most law school personnel decisions are conducted in an atmosphere of subjectivity, with few guidelines or due process controls).

39. Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889 (1992).

40. Mary Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683 (1992).

41. Rubin, *supra* note 39, at 891. Evaluation "defines the boundaries" of an academic discipline and governs debates within the discipline. *Id.*

42. *Id.* at 893.

means by which institutions define themselves.⁴³ It distributes prestige and determines whose ideas are considered valid and whose are not.⁴⁴ For these reasons, it is essential that evaluation not reflect bias, idiosyncrasy, or personal disagreement with the works and authors being evaluated.⁴⁵ A well-designed theory of evaluation can induce evaluators to suspend the instinct to judge too quickly and can encourage them to hold "in abeyance the views on which one's lifework is based."⁴⁶ It can produce a fairer result when a white is evaluating a black, a man a woman, or any time when the evaluator and the scholar being evaluated are different in attitude, background, or politics.⁴⁷

According to Rubin, scholarship generally can be evaluated under such universal criteria as clarity, persuasiveness, significance, and applicability⁴⁸ With outsider scholarship, additional criteria come into play, including the ability to produce doubt, dissonance, and anxiety—the "purposive questioning of one's own beliefs."⁴⁹ Without some such broadening, the tendency to dismiss work as impractical and intemperate is simply too great.⁵⁰ But with it, "judgment remains possible[The evaluators] are not disabled from making assessments about the quality of the work they are reading."⁵¹ Rubin's effort then is to provide for recognition of differences, yet to subsume those differences under a new "universality of the evaluative enterprise."⁵²

Coombs' article sounds some of the same themes and adds at least one new one. For Coombs, radical feminism and Critical Race Theory are defined by commitment to the interests of people of color and women, by rejection of abstraction and dispassionate 'objectivity,'⁵³ and by a preference for narrative and other new

43. *Id.*

44. *Id.*

45. *Id.* at 894-97.

46. *Id.* at 897.

47. *Id.* at 894-902.

48. *Id.* at 962.

49. *Id.* at 946.

50. *Id.* at 949-50.

51. *Id.* at 961.

52. *Id.*

53. Coombs, *supra* note 40, at 684.

modes of discourse and scholarship.⁵⁴ These qualities are apt to evoke unsympathetic responses from traditional scholars, who may dismiss the new work entirely, fail to understand the scholarship or grant it the “respect inherent in ‘sustained criticism.’”⁵⁵ The development of standards can quell some of these impulses.⁵⁶ It can also benefit the communities themselves. The search for criteria of judgment is a “means by which [such a community can] understand [its] goals and improve [its] work.”⁵⁷

In pursuit of these objectives, Coombs lays down criteria for evaluating traditional legal scholarship that sound remarkably like Rubin’s: the work should be “coherent, well-reasoned, articulate and precise.”⁵⁸ The subject matter should appear to be distinctly legal, “[t]he work analytic [and] tightly reasoned.”⁵⁹ If the work is expressly insurrectionist, further criteria would come into play. Objectivity and dispassion would not be required;⁶⁰ narratives “and other non-analytic work” would be granted status equal to that of more traditional products.⁶¹ Transformative work would be granted special praise.⁶²

b. Unfriendly Calls for Evaluative Standards

Among those who call for the development of standards for judging outsider scholarship, but from a perspective less sympathetic than that of Coombs or Rubin, the most notable are Randall Kennedy and Suzanna Sherry

1. The Universalist Critique—Randall Kennedy

In a much-cited article in the *Harvard Law Review*,⁶³ Randall Kennedy takes three central figures of the Critical Race Theory

54. *Id.* at 684-86.

55. *Id.* at 688 (quoting Martha Minow, *Beyond Universality*, 1986 U. CHI. LEGAL F 115, 116).

56. *Id.* at 703.

57. *Id.*

58. *Id.* at 706.

59. *Id.*

60. *Id.* at 713.

61. *Id.* at 714-15.

62. *Id.* at 715.

63. Kennedy, *supra* note 6.

movement⁶⁴ to task for asserting the existence of a distinctive black (or brown) "voice,"⁶⁵ elevating race to a positive credential,⁶⁶ substituting myth and narrative fiction for reality,⁶⁷ and "militarizing" the debate about race and equality⁶⁸

For Kennedy, many of these defects stem from the same source: substituting for merit the perspective or experience of an author "as a mark of achieved distinction."⁶⁹ In his opinion, race-conscious scholarship should not demand recognition or special validity merely on account of its authorship, subject, or style. Rather, it should do so by virtue of satisfying universal, agreed-upon standards of scholarly excellence.⁷⁰ The writing must not be intemperate or grandiose, its claims must be validated, its metaphors carefully chosen.⁷¹ Above all, the writer must be circumspect. A statistical disparity in the number of law professors of color, for example, is always open to more than one interpretation. The system may be racist, or there may be something about professors of color or the pool from which they are drawn that explains the disparity.⁷² Kennedy, then, urges that we evaluate critical scholarship, but under present-day, agreed-upon scholarly standards. He applies those standards to the work of Matsuda, Bell, and this author—and by implication to the work of other members of the school—and finds it wanting.⁷³

ii. *The Counternarrativity Critique: Massaro, Tushnet, and Sherry*

Randall Kennedy's voice is the starkest of those calling attention to the manner in which the new scholarship should be judged. Three additional authors address the evaluation of outsider scholarship, but from a narrower and sometimes less hostile perspective.

64. The figures are Derrick Bell, Mari Matsuda, and this author. *Id.* at 1746.

65. *Id.* at 1778-87.

66. *Id.* at 1770-78, 1788-1807.

67. *Id.* at 1760-70.

68. *Id.* at 1807-10, 1815-16.

69. *Id.* at 1805.

70. *Id.* at 1771-74, 1805.

71. *Id.* at 1760-70, 1771-78, 1805.

72. *Id.* at 1762-70.

73. *Id.* at 1760-87, 1810-19.

Suzanna Sherry,⁷⁴ Toni Massaro,⁷⁵ and Mark Tushnet⁷⁶ focus on how we should assess one type of scholarship associated with feminist and CRT writing, namely narrative scholarship. This form of scholarship, which includes chronicles, parables, counterstories, and accounts of the writer's personal experiences,⁷⁷ poses a sharp challenge to normative orthodoxy. Narrative works often advance no argument (at least of a classical, linear sort),⁷⁸ cite few cases or authorities⁷⁹ other than the author's own experience,⁸⁰ offer no balanced assessment of different "models" or approaches to a legal question.⁸¹ Typically, they aim not at changing doctrine but at changing mindset—the bundle of perceptions, intuitions, and received wisdoms that all of us bring to our experiences and that constitute the background against which legal discourse is carried out.⁸²

Can we evaluate narrative scholarship, and if so, how? Each of the scholars has his or her doubts. Toni Massaro, writing in the *Michigan Law Review Symposium on Legal Storytelling*, questions what she considers to be narrative scholarship's principal claim—that it can increase empathy between the reader and the author.⁸³ How can anyone measure this increase in empathy? And, with whom ought one empathize? Most "Crits" and feminists write as though the answer is obvious—the reader should empathize with the perspectives of women and people of color. But why with

74. Daniel Farber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993); see Goldberg, *supra* note 6, at A23 (noting Sherry's criticism of Critical Race Theory).

75. Tom M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989).

76. Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992).

77. For examples of narrative scholarship, see BELL, AND WE ARE NOT SAVED, *supra* note 28; DWORKIN, *supra* note 23; Bell, *Chronicles*, *supra* note 28; Delgado, *supra* note 32; Delgado, *supra* note 54; Guinier, *supra* note 29; Menkel-Meadow, *supra* note 29; see also PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) (detailing the author's experiences as a black female attorney and law professor).

78. *E.g.*, Delgado, *supra* note 32, at 2411-12.

79. *E.g.*, *id.*

80. *See, e.g.*, WILLIAMS, *supra* note 77.

81. Delgado, *supra* note 32, at 2411-13.

82. *Id.* at 2413; see also Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813 (1992) (holding that this level is even more causally efficacious than doctrine).

83. Massaro, *supra* note 75, at 2100-01, 2116-25.

just these, and not with munitions makers, strip-miners, or lexicographers? Empathy's indeterminacy renders its use as a criterion of merit problematic.⁸⁴ Moreover, experiential writing's emphasis on particularity seems inconsistent with the uniformity demanded by the rule of law.⁸⁵ Why should we give high marks to writing that requires us to sacrifice a principal tenet of our professional lives?

Massaro holds that narrative scholarship can nevertheless serve the more modest function of strengthening the communitarian impulse, reminding us to suspend our tendency "to treat people like ourselves better than those outside our spheres of familiarity"⁸⁶ Yet, it must also be realistic and hard-headed, allowing us to draw lines among those who would claim our sympathies. While circular or "dialogic" in structure, narrative scholarship needs to draw lines "around the circles . . . to end [or] decide a legal matter."⁸⁷ Finally, narrativity must take into account the here and now and deal with existing social and legal institutions rather than rest content with describing utopian alternatives.⁸⁸ Evaluated with these provisos in mind, narrative scholarship may provide a useful corrective or "counsel[] against complacency"⁸⁹

Two more recent writers are less charitable toward narrative scholarship and less sanguine about finding ways to bring it within the evaluative paradigm. In a recent article, Mark Tushnet argues that not all narrative writing deserves the adulation that it has received; that much of it is sloppy and impressionistic; and that some of it lacks candor and authenticity.⁹⁰ A second writer, Suzanna Sherry, is also dubious of narrative scholarship, particularly as employed by certain Critical Race theorists who assert it as a crowning accomplishment and a virtual badge of membership.⁹¹ Unlike feminism, in which Carol Gilligan provides a rationale and

84. *Id.* at 2116-25.

85. *Id.* at 2102-03, 2110-11.

86. *Id.* at 2123.

87. *Id.* at 2125.

88. *Id.* at 2122-26.

89. *Id.* at 2126.

90. See Tushnet, *supra* note 76, at 260-77, 295 (discussing stylistic flaws in certain influential narratives which undermine the format's effectiveness as legal scholarship).

91. See Goldberg, *supra* note 6, at A23.

theory for the different nature of the women's voice,⁹² there is no showing that scholars of color have any such common, distinct voice.⁹³ Some African Americans are conservative, some radical; some are comfortable members of the middle class, others live in the ghetto. To expect that such a diverse group would speak in a single voice or subscribe to a common set of narratives is simply a mistake.⁹⁴ Narrative scholarship by blacks should thus be evaluated on its own terms and afforded no greater status or presumption of authenticity than that written by a white scholar intended, for example, to illuminate the Rule Against Perpetuities. I evaluate this and other arguments against the new scholarship shortly.

2. *The Inward Turn in Outsider Scholarship*

A second form of inward turn is taking place within outsider jurisprudence. This development consists of subdivision within outsider groups that at one time saw themselves as unitary. Within feminism, for example, women of color are beginning to question whether the agenda of a white, middle-class-dominated woman's movement speaks adequately to their concerns.⁹⁵ Gays and lesbians of color are demanding recognition of their unique needs and experiences, as are black women vis-à-vis black men.⁹⁶ Recent conferences have focused on "intersectionality"—the way in which race, sex, class, and sexual orientation combine.⁹⁷ Commentators have even questioned the stability of these categorizations themselves, asking whether there is such a thing as a characteristic black, straight, or female point of view.⁹⁸ As one can imagine, these

92. CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982) (describing the bases for the general perspective of women in contrast to other groups).

93. Goldberg, *supra* note 6, at A23 (noting Sherry's argument that "the assertion of a separate minority voice is dubious").

94. *Id.*

95. Harris, *supra* note 10, at 585-86.

96. See BELL HOOKS, *AIN'T I A WOMAN?* (1981); AUDRE LORDE, *Age, Race, Sex, and Class, Women Redefining Difference*, in *SISTER OUTSIDER* 114, 120 (1984); Marlon Riggs, *Tongues Untied* (PBS television documentary, July 19, 1991).

97. See *supra* notes 10-14 and accompanying text.

98. CARTER, *supra* note 12, at 1-8; HOOKS, *supra* note 96, at 159-96; LORDE, *supra* note 96, at 114, 116-23; HARRIS, *supra* note 10, at 583-85, 588-89, 595-97; RIGGS, *supra* note 96; see *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* 61-101 (Cherrie Moraga & Gloria Anzaldúa eds., 2d ed. 1983) (containing writings that emphasize the dis-

developments have proven controversial. Three scholars with relatively polar positions illustrate the range of possibilities.

a. *Advocating Differentiation: Angela Harris and Kimberlé Crenshaw*

Illustrative of the differentiation ("antiessentialist") position are two black women, Angela Harris of UC-Berkeley,⁹⁹ and Kimberlé Crenshaw of UCLA.¹⁰⁰ Both write about the relationship between women of color and women in the broader feminist mainstream, although many of the arguments they raise reappear in exchanges between straight and gay reformers, working- and professional-class minorities, neoconservative and movement blacks, and so on.

A principal theme for both writers is relative disempowerment. Harris writes of the way in which white feminists, although "powerful and brilliant in many ways, rel[y] on gender essentialism"¹⁰¹—the idea that women's experiences can be captured in general terms, without regard to such differentiating features as race or class.¹⁰² This approach marginalizes and silences those within the group who are different from the norm.¹⁰³ Harris argues that creating and addressing the situation of such an "essential woman" tends to leave out black, working-class, and gay women.¹⁰⁴ Feminist legal theory of the sort that Harris and Crenshaw criticize not only marginalizes, it is ineffective in creating a more just society. It falls prey to the abstraction trap when feminist methodology should emphasize particularity; it verges on violence; and it

tinct identities of black women as compared to black men, and black feminists as compared to white feminists).

99. See generally Harris, *supra* note 10 (arguing that gender essentialism omits the viewpoints of minority women).

100. See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F 139 (arguing that antidiscrimination laws make provisions only for discrimination pertaining to individual minority characteristics and therefore cannot recognize the peculiar plight of a minority woman).

101. Harris, *supra* note 10, at 585.

102. *Id.*

103. *Id.*

104. See *id.* at 589.

promotes hierarchy and silencing, the very evils feminist theory should seek to subvert.¹⁰⁵

Crenshaw echoes many of these points, but adds the additional dimension of racial essentialism. Focusing, like Harris, on the plight of black women, Crenshaw notes that women of color are uniquely disadvantaged under current antidiscrimination law.¹⁰⁶ When a black woman experiences job discrimination on account of her black womanhood, current doctrine provides two avenues of recourse. The plaintiff may designate her claim as one for sexual discrimination, in which case she is lumped into a category—women—dominated by white women.¹⁰⁷ Or, she can sue for discrimination on grounds of race, in which event she places herself in a remedial category dominated by black men.¹⁰⁸ Thus, she is treated as though she were either a white woman or a black man, even though she is less powerful than either.¹⁰⁹ Crenshaw's analysis demonstrates how essentialist thinking disadvantages those who are at the margins of any group. Although Harris argues that "issues of race, class, and sexual orientation can[not] be safely ignored,"¹¹⁰ Crenshaw illustrates concretely why this is so.

b. Opposing Differentiation: Martha Fineman

Harris' principal opponent in the essentialism debate has been Martha Fineman.¹¹¹ She takes Harris and other antiessentialists to task for their excessive preoccupation with differences and for contributing to a "disunity" that impedes women's ability "to push back the barriers excluding most of [them] and [their] experiences."¹¹²

Not only does this focus weaken the group's voice, argues Fineman, it threatens to reduce the sum of power it wields: "The competition should not be with each other but with the pow-

105. See *id.* at 585-86; Crenshaw, *supra* note 100, at 139-40.

106. Crenshaw, *supra* note 100, at 140.

107. *Id.* at 141-46.

108. *Id.* at 146-48.

109. *Id.* at 150-52.

110. Harris, *supra* note 10, at 591-92.

111. See Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 39-41 (1990).

112. *Id.* at 40.

erful, dominant main structures whose visions and versions of reality are reflected in society's institutions."¹¹³ For Fineman, "feminists of all races, classes, characteristics, and orientations [must] find common ground" in their struggle against male tyranny.¹¹⁴ Emphasizing minute differences among the experiences of different groups—old/young, white/black, gay/straight—verges on self-indulgence because it reinforces "the idea that the individual is the agent of social action and change"¹¹⁵ and results in tokenism.¹¹⁶ Fineman concludes that "focusing on the differences among women, while of theoretical significance, can and will be used politically to continue to justify exclusion."¹¹⁷

III. EXPLAINING AND EVALUATING THE INWARD TURNS IN OUTSIDER JURISPRUDENCE: POWER MOVES AND PARADIGM FEAR

How are we to see the two inward turns? To this point, I have been concerned with explaining and placing in context the call for standards and the antiessentialist movement. Moving beyond description, this section attempts to understand and evaluate the twin developments—to learn what drives them and what they harbor for the cause of social reform.

A. *Understanding the Two Developments*

I think both developments are linked, and can be understood as responses to power shifts or the prospect of paradigm change.

1. *The Call for Standards*

a. *Power Moves and Countermoves*

One way of understanding both the call for standards and internal fractioning within radical groups is in terms of power shifts. Power has been shifting both globally and within the United

113. *Id.*

114. *Id.*

115. *Id.* at 41.

116. *Id.* at 42.

117. *Id.* at 43.

States;¹¹⁸ old regimes are fading, hegemonies thought invulnerable showing signs of strain.¹¹⁹ The same is true in the law and legal scholarship, as law schools and the legal profession adapt and accommodate to new constituencies and voices in a cycle of change that promises to continue well into the future.¹²⁰

I believe the call for standards, at one level, is a response to the need to share power and influence. Outsider scholars have been writing—often provocatively and brilliantly—but with subject matters, styles, formats, and agendas different from those of conventional scholars. Mainstream writers may well ask themselves: How shall we see this writing? Will I have to welcome its authors into the academy on an equal basis with me and my friends? Will I myself have to change? Will I need to read and absorb a whole host of obscure European authors or learn a new way of writing?

These prospects discomfit—they threaten to inconvenience individuals who have made a satisfactory adjustment to the existing regime.¹²¹ To be sure, some mainstream writers have welcomed the new voices and have included them in their own scholarship as coequals.¹²² Others have not.¹²³ An intermediate group, exemplified by Randall Kennedy, takes the new entrants seriously, but demands that they be judged according to prevailing standards.¹²⁴ This group demands that the new voices assimilate—in some respects the most basic power move of all.

Rubin's and Coombs' versions of the call for standards are milder, but still, in my view, animated by power concerns. Rubin fears his colleagues will misapply power to injure the prospects of

118. See Delgado, *supra* note 34, at 1366-74, app. A at 1381.

119. *Id.* at 1366-74, app. A at 1381-83, app. B at 1383.

120. *Id.* at 1365-67; see Stefancic & Delgado, *supra* note 1, at 853-57; Kimberlé W. Crenshaw, *Foreword: Toward a Race Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 12-14 (1989).

121. See Pierre Schlag, *Pre-Figuration and Evaluation*, 80 CAL. L. REV. 965, 971, 977 (1992).

122. See Richard Delgado, *The Imperial Scholar Revisited: How To Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349, 1360-61 (1992) (mentioning Kenneth Karst and Alan Freeman, among others, as examples of authors who treat outsider scholarship thoughtfully and appropriately).

123. *Id.* at 1358-60, 1362-68 (citing numerous civil rights scholars and their various methods of treating outsider scholarship in a dismissive or cursory fashion).

124. Kennedy, *supra* note 6, at 1771-74, 1805; see *supra* text accompanying notes 69-70.

outsider scholars.¹²⁵ To temper the impulse to judge harshly, Rubin offers criteria that scholars must consider when evaluating outsider writing.¹²⁶ His approach at least gives the newcomers the security that mainstream power will not be applied against them arbitrarily, but it still places the power to judge in those who already have that power.¹²⁷

Coombs' version is also aimed at curbing arbitrary power. She wishes to "insulate" outsider scholarship from unsympathetic treatment.¹²⁸ At times, Coombs seems to urge that outsiders should play a part in deciding what the revised evaluation criteria should be,¹²⁹ yet she retreats from this position by proffering her own set of standards.¹³⁰ Furthermore, like Rubin, she makes clear which outsider authors and works deserve praise.¹³¹ Both authors, then, although more solicitous of the new movements than Kennedy, strike me as unwilling simply to let them be. Both are prepared to apply "outside" judgment to the movements—judgment that will sometimes fall harshly on the authors and works concerned.¹³²

b. Anxiety over Paradigm Changes

A second reason why writers may be calling for renewed attention to evaluation of faculty scholarship is anxiety over the changing scholarly paradigm.¹³³ This paradigm has been in rapid transi-

125. Rubin, *supra* note 39, at 893-99.

126. *Id.* at 891, 962-63.

127. *Id.* at 892-93, 962-63.

128. Coombs, *supra* note 40, at 703, 709.

129. *Id.* at 710.

130. *Id.* at 712-15 (stating that the standards of judgment should take into account the work's suitability for its chosen audience, the work's ability to advance the interests of the outsider community, the narrative and personalized style of the work, and the clarity, originality, and ambition of the work).

131. *Id.* at 712 (citing several authors that deserve "high marks" for transforming the way people think about law and legal culture); *see also* Rubin, *supra* note 39, at 954-61 (discussing various works of critical legal scholarship).

132. The consequences include: nonhiring, nonpromotion, and nontenure, as well as a host of less serious consequences of a negative evaluation, such as failure to be included in a conference or panel. *See infra* notes 145, 171-73 and accompanying text.

133. Schlag, *supra* note 121, at 972, 974, 977. For further discussion of the dominant paradigm and its role in resisting transformative thought, *see* Delgado, *supra* note 34 (discussing Northern European thought and its rise and possible impending decline because of the dominant group's general resistance to change); Delgado, *supra* note 32 (discussing the dominant group and its members' view that its own superior position is natural, its refusal

tion over the past decade.¹³⁴ Nearly gone is the 100-page densely footnoted, case-crunching article of the 1950s and early 1960s, replaced by a host of new forms.¹³⁵ Scholars are writing about storytelling in the law, employing or analyzing “voice” and narrative, treating law as stories and trials as theater.¹³⁶ Feminists are writing about changing the terms of discourse, putting women at the center.¹³⁷ Even mainstream scholars are beginning to move beyond doctrinal analysis to political theory, interdisciplinary studies, and legal history.¹³⁸

Sociologists of knowledge have discussed the tendency of the dominant group in a discipline to resist change as long as possible.¹³⁹ It seems likely that the new focus on evaluation is in part a response to legal scholarship’s unsettled condition.¹⁴⁰ The new genres place in question much that was taken for granted—indeed,

to recognize its oppressive role, and its resistance to racial reform by refusing to listen to nondominant views).

134. Schlag, *supra* note 121, at 977; *see* Delgado, *supra* note 34, at 1365-68.

135. *See* Delgado, *supra* note 122; Delgado, *supra* note 34; Alex M. Johnson, Jr., *The New Voice of Color*, 100 *YALE L.J.* 2007 (1991); Schlag, *supra* note 121.

136. *See* Delgado, *supra* note 32, at 2411-16. *See generally* Symposium, *Excluded Voices: Realities in Law and Law Reform*, 42 *U. MIAMI L. REV.* 1 (1987) [hereinafter Symposium, *Excluded Voices*] (containing nontraditional legal scholarship on reforming law through demonstrating differences in opinion and language); Symposium, *Legal Storytelling*, 87 *MICH. L. REV.* 2073 (1989) (containing articles by Milner S. Ball, Derrick Bell, Mari J. Matsuda, Steven L. Winter, and others on the use of stories and narratives to disrupt the dominant paradigm).

137. *See, e.g.*, MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 2 (asserting that for women to live in society, there is a need for change and unqualified feminism); Symposium, *Excluded Voices*, *supra* note 136 (containing articles by Carrie Menkel-Meadow, Isabel Marcus, Kristen Bumiller, and others on the female position in society and the feminist attempt to reform the law).

138. My own brief (and admittedly unsystematic) perusal of a selection of recent top-tier law reviews disclosed *no* articles of the doctrinal case-analysis genre. Fully half dealt with political theory, philosophy of law, interdisciplinary analysis, or legal history.

139. *E.g.*, THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970) (observing that most new scientific theories and equations were and are always resisted because they reconstruct prior theory and force reevaluation of prior fact, thereby undermining past efforts); Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 *STAN. L. REV.* 207, 216-22 (1989) (stating that the current legal system facilitates self-replicating traditional legal thought and constrains novel approaches to the law).

140. *See, e.g.*, Rubin, *supra* note 39, at 889-91 (discussing the importance of developing evaluation criteria to address new areas of scholarship such as critical legal scholarship and the field of law and economics).

put in doubt whether there is any such single, unitary field as legal scholarship.¹⁴¹ By promulgating uniform standards of evaluation, we may enable ourselves to believe a little longer that such a settled, manageable, and familiar notion of legal scholarship exists. For example, Kennedy emphasizes the continuity of race-critical scholarship with earlier writing in the black tradition.¹⁴² Critical Race scholarship is not so new, he seems to be saying; we can lay it side by side with a masterwork by W.E.B. DuBois and decide whether it has the same degree of merit.¹⁴³ When we do, the standards will be the familiar ones of rhetorical excellence, attention to detail, originality, and documentation of claims.¹⁴⁴

Coombs and Rubin also betray traces of paradigm anxiety. Coombs, for example, writes of the "somewhat hostile" relationship the oppositionists settled into with the scholarly establishment and of the resulting risks of misperception on both sides.¹⁴⁵ Given this charged atmosphere, "[t]he work of feminist and critical race scholars will often fail to meet the existing, under-articulated standards, especially insofar as they are a test of familiarity [Much of] [t]his scholarship has different goals, different forms, different audiences" from what came before.¹⁴⁶ It thus behooves us to find ways to incorporate it under new criteria of broad applicability.¹⁴⁷ And, as we have seen, Coombs' criteria seem designed, in part, to reduce the apparent distance between mainstream and insurgent work.¹⁴⁸

2. *The Inward Turn Within Outsider Groups*

Subdivision among outsider groups, in which members of various ages, colors, sexes, socioeconomic strata, and sexual orientations

141. See Johnson, *supra* note 135, at 2020; Schlag, *supra* note 121, at 971-77. See generally Stefancic, *supra* note 14 (discussing the felt need for symposia to impose order, agreement, and communities of meaning on the shifting and changing nature of legal scholarship).

142. Kennedy, *supra* note 6, at 1749-60.

143. See *id.* at 1783 n.173.

144. See *supra* notes 69-73 and accompanying text.

145. Coombs, *supra* note 40, at 688.

146. *Id.* at 707.

147. *Id.* at 707-08. Coombs states, "The misapplication of inappropriate, vague criteria to the work of outsider scholars creates problems" *Id.* at 708.

148. See *supra* notes 55-62, 145-46 and accompanying text.

split off,¹⁴⁹ may also be seen as a response to power. Like black women who are asserting their differences vis-à-vis white women and black men, many of these other groups may be doing so out of a felt need for security and solidarity. Life in the larger group can be frustrating. One feels disempowered, sometimes ignored. The agenda is not what one would wish.¹⁵⁰ Moreover, the response from the larger group may be couched in not-so-veiled power terms: remain with us; only here will you find safety from our common oppressor.¹⁵¹

In so appealing to Harris—and through her to other black women—Martha Fineman avoids what I might call “first generation,” or ordinary essentialism. That is, she avoids asserting that all women share a unitary, indivisible nature or essence. Rather, she invokes a more subtle form, which I call “relational” (or second-generation) essentialism. This variety asserts that A and B, although perhaps not exactly alike in every respect, nevertheless stand on the same footing vis-à-vis C, usually a common enemy of some sort. Thus, when Fineman calls for black women to put aside their differences with white women in the interest of presenting a united front against patriarchy and male domination,¹⁵² she invokes relational essentialism. Vis-à-vis those evils, all women are similarly situated, standing essentially in the same place.¹⁵³

Harris’ answer, of course, replicates Fineman’s argument back to her: true, but a white woman like you looks empowered to me—likely to erase my identity, likely to neglect or suppress me in much the same manner as males threaten both of us.¹⁵⁴ The argument could, of course, continue indefinitely. One could imagine Angela Harris confronting a lesbian custodial worker or a disabled black professional and finding the same arguments used against her. The cycle of differentiation—what I have called the “inward turn”—continues potentially endlessly. The search is for safety, for a group of persons who are so much like oneself that there can be

149. See *supra* notes 95-117 and accompanying text for a description of this trend.

150. *E.g.*, Harris, *supra* note 10, at 585, 588-90, 593.

151. See Fineman, *supra* note 111, at 40-42.

152. *Id.*

153. That is, both black and white women have a united interest in combatting the forces of patriarchy and male domination.

154. Harris, *supra* note 10, at 585, 588-89, 609-10.

no possible threat, among whom one may act and feel oneself. Particularly in troubled times we want a twin—someone who will be like us, who will share power with and never hurt us. Such an individual will understand us empathically and immediately, will never ignore or power-trip us, will never undergo a paradigm shift that we do not go through at the same time. With such a person we will have complete safety and understanding—or such is the hope.

B. *Evaluating the Two Developments*

1. *Internal Subdivision*

I believe that the second type of inward turn—subdivision within outsider groups—is natural and not to be feared or resisted. The first type, however—the call for uniform standards of scholarship—is more problematic.

Critique, especially on the part of outsider groups, is useful and natural.¹⁵⁵ It aims to understand knowledge/power.¹⁵⁶ Because one experiences knowledge and power even with one's coreligionists, one eventually will apply critique to one's situation within the movement. The end result is likely to be a complex vision of reality in which the same person looks empowered to some and disempowered to others in a nontransitive chain extending in as many directions as there are possible axes of power and influence. None of this, in my opinion, is to be deplored.

2. *Calls for Evaluative Criteria*

The other response—the call for standards—is different. It threatens to impose an artificial similarity, to paper over and conceal differences that are real. It promises fairness.¹⁵⁷ But its appeal fades upon the realization that dissimilarities will remain even after new standards are in place. Knowledge, power, and validity will

155. See, e.g., Milner S. Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855 (1990); see also Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990) (suggesting changes for the approach of critical legal scholars).

156. See, e.g., Ball, *supra* note 155; Cook, *supra* note 155. See generally MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS* (1980) (examining each of the author's theories on the nature of power in society).

157. See *supra* part II.B.1.a.

be bestowed and denied just as before, only now we will tell ourselves that those we judged received "due process."

Because majority scholars are likely to greet the call for standards enthusiastically, I devote particular attention to why I find it troublesome. First is what I call the incommensurability problem, which casts doubt on the possibility of meaningful standards for oppositional scholarship. Second, the judgment required for making evaluations under the new standards will prove almost impossible. And third, academic settings are likely to resist the sort of due process such standards hope to achieve.

a. The Incommensurability Problem

Evaluation entails taming something—reducing it to its essentials.¹⁵⁸ It means developing a yardstick, submitting scholarship to some form of measure. It has overtones of formalism, the notion that law can be precise—a science—and that every legal question has one right answer.¹⁵⁹ Most of the new writers question this premise. For them, truth is contingent and contextual: what appears orderly, fair, and neutral to a man looks patriarchal, unfair, an exercise of power to a woman.¹⁶⁰ A rule or institution that seems unproblematic to a white may seem deeply racist to a black,¹⁶¹ and so on. The new writers reject the ideals of uniformity, objectivity, necessity, and order. One might nevertheless hold that a body of writing that disavows yardsticks ought to be evaluated anyway, and in the same way as traditional scholarship. But incommensurability between the enterprise—measuring—and the thing measured should give us pause.

158. See Schlag, *supra* note 121, at 976-77 (arguing that the evaluation frenzy is a reaction to the untamed quality of recent scholarship). On the pitfalls of normative judgment, see generally Symposium, *The Critique of Normativity*, 139 U. PA. L. REV. 801 (1991) (containing articles by Schlag, Winter, Schauer, and this author).

159. For a discussion of formalism, see Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). On the critique of formalism and its current parallel, normativity, see Symposium, *supra* note 158.

160. See, e.g., MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 2, at 32-45.

161. See, e.g., BELL, *AND WE ARE NOT SAVED*, *supra* note 28, at 51-74, 88-92, 102-07.

b. *The Judgment Problem*

A second reason for caution stems from the gap between those who will be doing the evaluating—mainstream scholars, tenure committees, and so on—and those who will be put under the microscope. As with many expression-based tasks, evaluating outsider scholarship will require an act of identification, of suspension of judgment. Recent works cast doubt on how successfully we can do this;¹⁶² indeed, Jean Stefancic and I have labeled the belief that we can surmount our own limitations of experience and perspective the *empathic fallacy*.¹⁶³ Inevitably, those charged with making judgments will evaluate new stories in terms of the old and in terms of scholarship that makes sense to them and is relied upon by them to construct and order reality. If new perspectives deviate too markedly from the old, the arbiters will pronounce them extreme, irresponsible, political, or bad.¹⁶⁴

Laying down checklists can be seen as our effort to force ourselves to take outsiders seriously. It is like those lists of tasks that we make when we really want to get something done but fear we might become distracted and forget. Yet, we all know how resolve can vanish in the face of an unforeseen or tempting intrusion. Lists and criteria help only so far. Like words generally, they are issued against a background of values, interpretations, and unstated presuppositions that guide and influence decisions at least as much as the guidelines themselves.¹⁶⁵ For example, uniform sentencing rules, enacted with the hope of closing the race-based gap in sen-

162. See, e.g., Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1284-91 (1992) [hereinafter Delgado & Stefancic, *Images*]; Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929 (1991) [hereinafter Delgado & Stefancic, *Norms and Narratives*].

163. Delgado & Stefancic, *Images*, *supra* note 162, at 1281.

164. See *id.* at 1279; Delgado & Stefancic, *Norms and Narratives*, *supra* note 162, at 1952-57.

165. For similar arguments, see Delgado, *supra* note 82, at 814-21; Delgado, *supra* note 32, at 2411-18, 2435-41; see also Delgado & Stefancic, *Images*, *supra* note 162, at 1275-84 (explaining that racial and ethnic prejudices and preconceptions permeate speech and culture); Delgado & Stefancic, *Norms and Narratives*, *supra* note 162, at 1929-52 (detailing the impact of prejudicial social values and norms upon judicial decisions).

tencing, mainly produced uniformly harsh treatment for blacks.¹⁶⁶ There is little reason to think evaluation of insurgent scholarship will prove much different.

c. *The Setting in Which Judgments Would Be Made*

A final concern over uniform standards regards the setting in which evaluation would take place. All speech-acts are paradigm-dependent; that is why communication is possible.¹⁶⁷ And, evaluation is one of the most paradigm-dependent activities.¹⁶⁸ Unfortunately, in the academic setting, arbitrariness and bias are inscribed even more deeply than in the culture at large; I get to judge my colleague's paper without having to defend my judgment.¹⁶⁹ We even give this an honorific title—academic freedom.

In a few settings, such as adjudication, where there *is* a preexisting norm of fairness, adopting formal rules and procedures can sometimes reduce the worst types of bias and prejudice.¹⁷⁰ In academia, however, no such norm exists. Formal criteria are likely to do little good and may well serve to legitimate an unfair and biased system.¹⁷¹

166. See David Margolick, *Justice by the Numbers: A Special Report; Full Spectrum of Judicial Critics Assail Prison Sentencing Guides*, N.Y. TIMES, Apr. 12, 1992, at 1.

167. See, e.g., Delgado & Stefancic, *Images*, *supra* note 162, at 1280 (noting that speech and the ideas it represents are not external but actual internal reflections of society); Steven L. Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 963 (1991) (arguing that communication requires shared internal views or models of the world between the communicants).

168. That is, normative judgments are not easily dislodged by pointing out extrinsic reasons for holding them false, as judgments in physics are, for example. See Delgado & Stefancic, *Images*, *supra* note 162, at 1281. On the view that even opinion in the physical sciences changes slowly and resists new theories, see KUHN, *supra* note 139.

169. Confidentiality, informal "old boy" networks, and the difficulty of obtaining judicial review are some of the main mechanisms.

170. See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1367-75. For the view that even adjudication sometimes resists this approach, see Richard Delgado, *ADR and the Dispossessed: Recent Books About the Deformalization Movement*, 13 LAW & SOC. INQUIRY 145, 149-54 (1988).

171. For a discussion of the way in which formal rules may conceal unfairness, see Freeman, *supra* note 31.

d. *Instrumental Reasons for Introducing Evaluative Criteria*

Even if there are reasons to doubt that introducing criteria for outsider scholarship will assure complete fairness, one might nevertheless argue that the effort should be made to do so. Outsider scholars are currently at risk of harsh treatment. Is not anything better than the current unbridled discretion; would not *any* criteria at least focus attention on the need for fairness?

I question whether this is so. As mentioned earlier, it seems more likely that criteria will merely introduce uniformly bad treatment for outsiders.¹⁷² Further, the very idea of criteria *for outsiders* has a disconcertingly assimilationist ring. Outsiders will be expected to meet these criteria; mainstream scholars will not be expected to do anything different.¹⁷³ We, not they, will be the ones who will have to assimilate.

Finally, there is the curious timing, especially with regard to Critical Race Theory, a movement that sprang up only a few years ago.¹⁷⁴ Still in its infancy, CRT boasts only about two hundred articles and four or five books.¹⁷⁵ Yet, a number of authors, including ones on the moderate left, wish to rush to establish criteria to evaluate the scholarship. Why? It seems to me that there are many things one might wish to do with an infant: get to know it; nurture it; interact with it; see if it needs anything. But evaluate it—ask how its teeth, hair, eyes, and brain measure up? Why? It is too early to do this, if it is ever a good idea. Evaluative criteria grow out of an activity, rather than the other way around. Evaluation is the wrong critical judgment. CRT should devote its effort to critiquing social institutions, legal doctrine, and the culture of racism—not itself or its own members.

172. See *supra* text accompanying notes 165-66.

173. See *supra* notes 156-58, 165-66 and accompanying text. On the one-sidedness of majoritarian legal principles generally, see Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 383-86 (1991); Freeman, *supra* note 31, at 1052-57; Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 123-25 (1974).

174. As a self-conscious movement, Critical Race Theory came into existence through a summer, 1989 workshop held in a small seminary outside Madison, Wisconsin.

175. See Delgado & Stefancic, *supra* note 6.

IV CONCLUSION

For these reasons, the search for fair criteria is likely to prove vain.¹⁷⁶ Criteria will provide little protection while concealing bias, making the system appear more legitimate than it is.¹⁷⁷

What, then, should we do? One option is to do nothing. There is little evidence that "race-Crits," at least, are suffering inordinately under the current system. To be sure, the life of a professor of color is often a lonely and stress-filled one,¹⁷⁸ but there is little reason to think that minority professors contributing to Critical Race Theory are faring worse than those who are not. Many of them are publishing, some in the top journals,¹⁷⁹ and are experiencing the enjoyment that comes with being at the forefront of a social or legal movement.¹⁸⁰ Rather than rushing in with a solution to a problem that does not seem to be acute, there may be a case for simply letting the kettle boil a little longer.¹⁸¹

If this situation were to change, other measures would assure the safety of the new voices more effectively than rushing into place criteria with which to judge them. We could, for example, empower them—give them a voice strong enough that all could hear.¹⁸² We could expose ourselves to them and hire and tenure them in sufficient numbers to assure a critical mass.¹⁸³ We could put them on

176. See *supra* text accompanying notes 158-71 (discussing theory-based reasons to avoid evaluative standards); *supra* text accompanying notes 172-73 (discussing instrumental reasons).

177. See *supra* text accompanying notes 170-71.

178. See Richard Delgado & Derrick Bell, *Minority Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349, 355-59 (1989).

179. See Delgado, *supra* note 122, at 1350, 1352 n.15 (pointing out that feminist and CRT authors have compiled outstanding publication records in the past five years).

180. For example, I am aware of two who are visiting at Columbia, one at N.Y.U., and one at Texas. One recently visited at Harvard.

181. The situation may well be otherwise with other contemporary legal movements. See, e.g., Coombs, *supra* note 40 (detailing the difficulties some feminist legal scholars are facing).

182. For a similar suggestion, see Delgado, *Images*, *supra* note 162, at 1288-89 (suggesting that expression is of little value for achieving rapid social transformation, but that empowering outsiders' voices would be a start).

183. The term "critical mass" means a number sufficient to enable the newcomers to offer each other psychological support and avoid being engulfed by demands such as tutoring and counseling. For the view that most white-dominated law faculty will not tolerate such a mass, see BELL, AND WE ARE NOT SAVED, *supra* note 28, at 140-61 (chronicling the failure of the "Seventh Candidate").

tenure committees and invite them to judge traditional scholarship. We could throw open for discussion the issue of how all faculty scholarship, including ours, is to be judged—and give the outsiders an equal voice in making this determination.

We could remain open to the idea that it is we who need to move in their direction, that we should change our practice and thought at least as much as they—and that doing so will redound to our benefit. Paradigms—comfortable, familiar ways of doing things—seldom change quickly and easily.¹⁸⁴ But trying to deal with anxiety by promulgating universal standards entails real costs, places these costs on those least able to incur them, and distances us from those who may well prove to be the agents of a much-needed transformation.¹⁸⁵

184. See Schlag, *supra* note 121, at 971-77 (noting that calls for evaluation of faculty scholarship are a response to denial, caused by a fear of paradigm change).

185. I argue elsewhere that this transformation can prove an inestimable benefit. See Delgado, *supra* note 34 (arguing through a fictional encounter with an exemplary future candidate for professorship that deserving, qualified minority candidates slip through the cracks of criteria, thereby distancing their voices from the ears of students).