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SUPPORTING MATERIALS

YOUNG LAWYERS BREAKFAST

- Robert Lande, *Private Enforcement of Antirust Law in the United States: A Handbook, Introductory Chapter*, Edward Elgar (2012).
- Stephanie A. Scharf & Roberta D. Liebenberg, *First Chairs at Trial - More Women Need Seats at the Table: A Research Report on the Participation of Women Lawyers as Lead Counsel and Trial Counsel in Litigation*, American Bar Association (2015).
- Kennedy, A Cultural Pluralist Case for Affirmative Action in Legal Academia, 1990 Duke L.J. 705.
- *Kevin Woodson, Race and Rapport: Homophily and Racial Disadvantage in Large Law Firms, 83 Fordham L. Rev. 2557 (2015).*

Introduction: Benefits of private enforcement[1]

Robert H. Lande[2]

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Many commentators, especially members of the defense bar, have criticized the existing United States system of private antitrust litigation. Some assert that private actions all too often result in remedies that provide lucrative fees for plaintiffs' lawyers but secure no significant benefits for overcharged victims.[3] Others suggest that private litigation merely follows an easy trail blazed by government enforcers and adds little of public benefit to government sanctions.[4] Yet others contend that, in light of government enforcement,

[1] This chapter is a condensation and revision of two articles by Robert H. Lande & Joshua P. Davis: *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 USF. L. Rev. 879 (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090661 [hereinafter *Benefits: An Analysis*], and *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust laws*, 2010 BYU L. Rev. 315 (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1565693 [hereinafter *Comparative Deterrence*]. For summaries of the individual case studies analyzed in this article, see *Benefits from Antitrust Private Antitrust Enforcement: Forty Individual Case Studies*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105523 [hereinafter *Benefits: Individual Case Studies*].

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[3] Professor Cavanagh ably summarized this belief: "Many class action suits generate substantial fees for counsel but produce little, if any, benefit to the alleged victims of the wrongdoing. Coupon settlements, wherein plaintiffs settle for 'cents off' coupons while their attorneys are paid their full fees in cash . . . are of dubious value to the victims of antitrust violations . . . [and] defendants are not forced to disgorge their ill gotten gains when coupons are not redeemed." Edward Cavanagh, *Antitrust Remedies Revisited*, 84 Or. L. Rev. 147, 214 (2005) (footnote omitted). However, Professor Cavanagh provides only an anecdote to support these conclusions. He offers no data to show the type of antitrust settlements he describes as typical or to demonstrate how often they result in useless coupons.

[4] John C. Coffee, Jr. at one point subscribed to this view, but later concluded the evidence was to the contrary. John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 681 n.36 (1986) ("Although the conventional wisdom has long been that class actions tend to 'tag along' on the heels of governmentally initiated suits, a recent study of antitrust litigation by Professors Kauper and Snyder has placed this figure at '[l]ess than 20 percent of private antitrust actions filed between 1976 and 1983.'") (citation omitted).

private cases lead to excessive deterrence.[5]

One common criticism of private actions in general – and of class actions in particular – is that they are a form of legalized blackmail or extortion, one in which plaintiffs' attorneys coerce defendants into settlements based not on meritorious claims, but rather on the cost of litigation or fear of an erroneous and catastrophic judgment.[6] These actions also are said to discourage legitimate competitive behavior.[7] For these and related reasons, many members of the antitrust community call for the curtailment of private enforcement;[8] some even call for its abolition.[9]

Although these criticisms are widespread, they have been made without any systematic empirical evidence.[10] Those who point to the alleged flaws of our system of private antitrust enforcement support their arguments only with anecdotes, many of which are self-serving or questionable. These arguments have never been supported with reliable data.

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[5] As the Antitrust Modernization Commission noted: "[S]ome have argued that treble damages, along with other remedies, can overdeter some conduct that may not be anticompetitive and result in duplicative recovery. No actual cases or evidence of systematic overdeterrence were presented to the Commission, however." Antitrust Modernization Comm'n, Report and Recommendations 247 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (footnotes omitted). For reasons why "treble damages" do not lead to excessive deterrence but on the contrary should be increased, see Robert H. Lande, *Five Myths about Antitrust Damages*, 40 USF. L. Rev. 651 (2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1263478.

[6] *See* John H. Beisner & Charles E. Borden, *Expanding Private Causes of Action: Lessons from the U.S. Litigation Experience*, U.S. Chamber Institute for Legal Reform, www.instituteforlegalreform.com/get_ilr_doc.php?id=1034. However, Beisner and Borden and others who embrace this view provide no systematic empirical basis for its factual predicates.

[7] AMC Commissioner Cannon once wrote:

> Private plaintiffs are very often competitors of the firms they accuse of antitrust violations, and have every incentive to challenge and thus deter hard competition that they cannot or will not meet. . . . [L]itigation is expensive and courts and juries may erroneously conclude that procompetitive or competitively neutral conduct violates the antitrust laws. . . . [P]otential defendants . . . will refrain from engaging in some forms of potentially procompetitive conduct in order to avoid the cost and risk of litigation.

W. Stephen Cannon, *A Reassessment of Antitrust Remedies: The Administration's Antitrust Remedies Reform Proposal: Its Derivation and Implications*, 55 Antitrust L.J. 103, 106 (1986).

[8] Herbert Hovenkamp, The Antitrust Enterprise: Principle and Execution 59 (Cambridge: Harvard Univ. Press 2005).

[9] *See* William Breit & Kenneth G. Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J.L. & Econ. 405, 440 (1985).

[10] One prominent critic, former ABA Antitrust Section Chair Janet McDavid, candidly admitted this: "[The] issue [of class action abuse] was never directly presented in these cases, but many of these issues arise in the context of class actions in which the potential for abusive litigation is really pretty extraordinary." C. Scott Hemphill, Janet L. McDavid, Andrew J. Pincus & Ronald A. Stern, panelists, *Roundtable Discussion – Mark D. Whitener and Andrew I. Gavil, Moderators*, 22 Antitrust 8, 12–13 (Fall 2007). When asked by Professor Andrew Gavil about empirical evidence, McDavid said: "I'm not aware of empirical data on any of those issues. My empirical data are derived from cases in which I am involved." *Id.*

Some critics' anecdotes surely are true. Private antitrust enforcement, which constitutes in most years more than 90 percent of antitrust cases in the United States,[11] certainly is imperfect.[12] However, objective observers should not confuse anecdotes with data. A balanced view would also consider the systematic benefits of private actions in terms of both compensating victimized consumers and businesses, and deterring future anticompetitive conduct.

The purpose and design of the AAI private enforcement study

This chapter discusses a study that serves as a first step towards providing the empirical data necessary to assess the benefits of private antitrust enforcement. With the support of the American Antitrust Institute and a variety of research assistants, the authors of the study analyzed the compensation and deterrence effects from a group of 40 recent, successful, large-scale private antitrust cases. Among other things, the authors examined the amount of money recovered for victims, what proportion of the money was recovered from foreign entities, whether the private litigation was preceded by government action, and on whose behalf money was recovered (direct purchasers, indirect purchasers, or a competitor). To our knowledge, no similar study has ever been undertaken.

It is important to note that this study does not purport to be comprehensive or in any way definitive. It does not analyze every recent significant private antitrust case, assess a random sample of cases, or even include all of the largest or "most important" ones.[13] The authors simply tried to assemble and evaluate 40 of the largest and most successful cases that concluded between 1990 and 2007.[14]

The study was not intended to demonstrate that private litigation often has established important legal precedents: other studies have done this convincingly.[15] The "first cut," instead, was to look for recent private cases that were final, including appeals, and that recovered at least $50 million in cash for victims of anticompetitive behavior. The

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[11] *See* Sourcebook of Criminal Justice Statistics Online, Table 5.41, http://www.albany.edu/sourcebook/pdf/t5412004.pdf (Antitrust Cases filed in U.S. District Courts, by type of case, 1975–2004).

[12] Government enforcement also is imperfect.

[13] For example, we were not able to include an analysis of the consumer class action suits against Microsoft, even though a highly respected journalist reported that together these cases recovered more than $1.5 billion for victims. *See* Todd Bishop, *Microsoft antitrust payouts, the grand total*, The Microsoft Blog (July 7, 2006, 6:50 AM), http://blog.seattlepi.com/microsoft/2006/07/07/microsoft-antitrust-payouts-the-grand-total/.

[14] In one case, the final settlement was approved within this time frame, but the final award of fees and costs to the attorneys did not occur until January 2008. *See In re* Auto. Refinishing Paint Antitrust Litig., 2008 U.S. Dist. LEXIS 569 (E.D. Pa. Jan. 3, 2008).

[15] For an excellent analysis, see Stephen Calkins, *Coming to Praise Criminal Antitrust Enforcement*, European University Institute 11th EU Competition Law and Policy Workshop (Florence, Italy, June 2–3, 2006), *available at* http://www.eui.eu/RSCAS/Research/Competition/2006%28pdf%29/200610-COMPed-Calkins.pdf. Professor Calkins found that, of leading antitrust cases decided before 1977, 12 were private and 27 were government. Of the leading cases decided in 1977 or later, however, he found that 30 were private cases and only 15 were government cases. *Id*. at 17.

authors included only the recovery of money in their results; awards of products, services, discounts, coupons, and injunctive relief were not treated as "benefits."[16]

Results of the study: Compensation

The 40 cases (or groups of cases)[17] analyzed in the study provided U.S. consumers and businesses a cumulative recovery in the range of at least $18.006 to $19.639 billion in allegedly[18] illegally acquired wealth.[19] (Expressed in 2010 dollars, the corresponding range would be $21.887 to $23.862 billion.[20]) Of this, more than $5.706 to $7.056 billion came from 18 cases involving foreign companies that allegedly violated U.S. antitrust laws. In other words, without private enforcement of the antitrust laws, this money would have remained with foreign alleged lawbreakers instead of being returned to U.S. consumers and businesses.[21]

Interestingly, a large proportion of the total amount recovered – at least 42 to 46 percent or $7.631 to $8.981 billion – came from the 15 cases that did not follow publicly disclosed U.S. or EU government enforcement actions.[22] In all such cases, private plaintiffs apparently uncovered the alleged violations and initiated and pursued the litigation, with the government following the private plaintiffs' lead or playing no role at all. Another $4.212 billion came from cases with a mixed private/public origin.[23] Only about a third of the total private recovery – $6.163 to $6.446 billion – came from cases that were purely public in origin.

Still other private cases followed a government investigation but provided significantly greater relief than the government action (if, indeed, the government brought an action). Some cases also expanded the scope of inquiry into the challenged conduct and the claims against the defendant, or they helped plaintiffs to obtain relief from parties not included

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[16] Securities were counted in one case because they had a readily ascertainable market value.

[17] To arrive at this number we counted related cases as being a single "case." For example, there have been many separate legal actions involving vitamins cartels. However, this report analyzes and counts them all together as one "case."

[18] For simplicity we are calling all of the charges "allegations," even the ones proven in court.

[19] All figures include the awarded attorneys' fees. Although a federal court verdict would produce treble damages for victims, almost all of our cases involved settlements, and in no case did a court determine the percentage overcharge. We know of no way to determine whether any of the settlements exceeded single damages.

[20] *See Comparative Deterrence*, *supra* note 1, at Table 14.

[21] Cases were not selected for this project on the basis of whether a foreign defendant was likely to be involved.

[22] When conduct gave rise to both government and private litigation, we tried to ascertain who first uncovered the antitrust violation. However, because government records are confidential and the enforcers usually do not reveal or discuss their investigations, we could not always make definitive classifications. Because we had access only to publicly available information, some of our classifications could be mistaken. For further discussion of the interplay between public and private enforcement, see Chapter 11 of this Handbook.

[23] For example, *In re Polypropylene Carpet Antitrust Litig*., 93 F. Supp. 2d 1348 (N.D. Ga. 2000), started as a result of a different private antitrust suit, which led to a government investigation in the polypropylene carpet market, that in turn led to the private litigation analyzed in this report. *See Benefits: An Analysis*, *supra* note 1, Table 5, for other examples.

in the government actions. The high proportion of private actions that supplanted, co-originated with, or enhanced government enforcement is perhaps surprising. There were still other instances where the authors of the study were not able to ascertain the origin of a case.[24]

The authors documented a total of $18.006 to $19.639 billion (using nominal dollars) in recoveries by direct purchasers, indirect purchasers, or competitors.[25] Direct purchasers, in 32 cases, recovered $12.088 to $13.438 billion (67 to 68 percent of the total). Indirect purchasers, in six cases, recovered $1.815 billion. Competitors, in six cases, recovered $4.028 to $4.311 billion. All but six of the cases were class actions.

Some of the cases analyzed also involved substantial non-monetary relief. For example, one case generated coupons, fully redeemable in cash if not used for five years. Another case resulted in a $125 million energy rate reduction for consumers. To be very conservative, the authors did not count any part of the coupons[26] or the rate reduction[27] in the study's "cash" recovery totals. Some cases also yielded extremely useful cy pres grants,[28] which likewise were left out of results.

Many other cases led to the restructuring of industries in ways that, according to the judge presiding over the litigation, provided improvements for competition even more beneficial than the monetary relief conferred on the victims. For example, the *Visa/MasterCard* case was settled in April 2003 for "$3,383,400,000 in compensatory relief, plus additional injunctive relief valued at $25 to $87 billion or more."[29] Similarly, the *NASDAQ* case decreased the spreads received by market makers, the *Insurance* litigation

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[24] *See*, *e.g.*, *Benefits: Individual Case Studies*, *supra* note 1, at 77–87 (*El Paso* case summary).

[25] Direct purchasers are customers who bought a good or service directly from a defendant, and indirect purchasers are customers who purchased a good or service further down the chain of distribution. In the U.S., in general only direct purchasers and competitors can bring claims for damages under federal law, and indirect purchasers can bring claims for damages only under state law (most, but not all, U.S. states allow indirect purchaser actions). For further discussion of direct and indirect purchaser claims, see Chapter 3 of this Handbook.

[26] *See Benefits: Individual Case Studies*, *supra* note 1, at 13–18 (*Auction House* case summaries). These coupons traded for a value that reflected their discounted present value. They also comprised 20 percent of the legal fees paid to prevailing attorneys, who said they will redeem them for cash after the expiration of the mandatory five-year waiting period.

[27] *See id.* at 77–87 (*El Paso* case summary).

[28] *See*, *e.g.*, *id.* at 110–113 (*Insurance* case summary). This case resulted in a cash settlement with a creative remedy that: (1) funded the development of a public entity that provides risk management education and technical services to small businesses, public entities, and non-profits; and (2) provided funding to states to develop a risk database for municipalities and local governments. *Id.*

Cy pres is a type of remedy that is available in some class actions where there are funds left over after the class members have been compensated, or the funds are insufficient to distribute to the class members in an economically efficient manner. The court has discretion to award these funds to the "next best" usage consistent with the purposes of the case. *See* Albert A. Foer, *Enhancing Competition Through the Cy Pres Remedy: Suggested Best Practices* (American Antitrust Institute, Working Paper No. 07-11, 2007), *available at* http://www.antitrustinstitute.org (search "Working Paper No. 07-11"). For further discussion of cy pres remedies, see Chapter 14 of this Handbook.

[29] Wal-Mart Stores, Inc. v. Visa USA & MasterCard Int'l, 396 F.3d 96, 111 (2d Cir. 2005). The case is described in detail by the lead attorney for the plaintiffs, Lloyd Constantine, in Priceless (Kaplan Publishing 2009).

eliminated restrictions on insurance policies, and the *NCAA* case eliminated caps on pay to college coaches.[30] The generic drug cases – *Buspirone, Cardizem, Oncology (Taxol), Relafen, Remeron,* and *Terazosin* – collectively discouraged collusion between brand name and generic drug manufacturers, saving consumers many hundreds of millions of dollars in drug costs.[31]

Results of the study: Deterrence

In addition to its important role in compensating victims of past antitrust violations, private enforcement also helps deter future antitrust violations. The study therefore assesses the deterrence effects of private antitrust enforcement. Although to some degree the deterrence value of private recoveries can be measured by reference to the very same compensation figures discussed earlier in this chapter, the authors sought to contextualize these figures by comparing the deterrence value of private recoveries to the deterrence value of what is widely viewed as the gold standard for antitrust or competition law enforcement worldwide: the DOJ anti-cartel enforcement program. This includes individual fines, corporate fines, and even hard-to-value prison time and house arrest secured by DOJ enforcers.

Although EU cartel enforcement has become increasingly successful in recent years,[32] DOJ enforcement against horizontal collusion is roundly lauded as perhaps the premier enforcement program of its kind in the world. In the United States, even among critics who believe that monopolization and vertical restraints never should be challenged, unkind words for the DOJ's anti-cartel program are rare and relatively minor. This lavish praise, which, it should be noted, is exceptionally well deserved, stands in sharp contrast to the harsh criticism of private enforcement presented at the beginning of this chapter.[33] An objective observer might therefore be surprised to discover that private enforcement probably deters more anticompetitive conduct than the widely praised DOJ anti-cartel program. Indeed, the study suggests that this may well be true despite the DOJ's ability to bring cases that result in prison sentences, house arrest, and individual as well as corporate fines![34]

Before concluding that private enforcement almost deserves the same, nearly ubiquitous praise typically reserved for the DOJ anti-cartel program, one might well ask an additional important question. We are confident that federal anti-cartel prosecutions indeed

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[30] *See Benefits: Individual Case Studies*, *supra* note 1, at 135–39; Arthur R. Kaplan, *Antitrust as a Public-Private Partnership: A Case Study of the NASDAQ Litigation*, 52 Case W. Res. L. Rev. 111 (2001) (describing the *NASDAQ* case).

[31] *See Benefits: Individual Case Studies*, *supra* note 1, at 135–39.

[32] For an analysis of EU anti-cartel enforcement generally, see John M. Connor & Robert H. Lande, *The Size of Cartel Overcharges: Implications for U.S. and EU Fining Policies*, 51 Antitrust Bull. (in S.C.) 983, 993–1003 (2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?a bstract_id=988722.

[33] *See supra* notes 3–10 and accompanying text.

[34] U.S. Dep't of Justice Antitrust Div., Antitrust Division Mission, *available at* http://www.justice.gov/atr/about/mission.html (last visited Sept. 29, 2011). The Antitrust Division also can secure disgorgement of cartel overcharges, but this remedy is rare. *See e.g.*, U.S. v. Keyspan, 763 F. Supp. 2d 633 (S.D.N.Y. 2011).

target anticompetitive conduct, but can we be confident that private cases do the same? Defendants often characterize these cases as non-meritorious and against the public interest, and such cases almost always end in settlement rather than a decision by a judge, jury, or the Federal Trade Commission.[35] The question of whether private cases actually target anticompetitive conduct will be addressed near the end of this chapter.

1. Deterrence from the DOJ criminal anti-cartel enforcement program

The total amount of criminal corporate fines imposed in DOJ anti-cartel cases from 1990 to 2007 was approximately $4.2 billion.[36] There is no way to measure how many cartels were never formed due to the deterrence effects of these fines. Surely, however, $4.2 billion in fines was enough to deter a large amount of anticompetitive conduct. During this same period, these same cases also resulted in individual fines that totalled $67 million,[37] and defendants were required to return another $118 million to overcharged government entities in the form of restitution payments.[38]

DOJ prosecutions resulting in prison sentences and house arrests also significantly deter illegal activity. Criminal antitrust prosecutions from 1990–2007 resulted in 520 prison sentences totalling roughly 330 years,[39] and another 97 years of "house arrest or confinement to a halfway house."[40]

In attempting to compare the deterrence value of private enforcement to the deterrence value of DOJ criminal enforcement, the authors of the study faced the vexing task of setting a value – or a disvalue, cost, or disincentive effect – on prison time and house arrest. To the extent that prison time is incomparable to anything that can be valued monetarily, the task may be impossible. But the authors of the study at least attempted to make a rough approximation.

As a starting point, it is clear that prison time should not be valued – or disvalued – infinitely. Cartelists do not act as if they infinitely fear prison time because they often decide to form cartels and risk that outcome. Rather, potential offenders appear to calculate, at least to some very uncertain degree, their chances of getting caught and the prison sentences and fines they are likely to face.[41] They balance this, in some extremely rough way that only they know, against cartel rewards. Because it is common knowledge that people often go to prison for fixing prices, and yet corporate officials continue attempting to form new cartels, the deterrence effects of prison time must be less than infinite.

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[35] *Comparative Deterrence, supra* note 1, at 3.

[36] U.S. Dep't of Justice, Antitrust Div. Workload Statistics FY 1990–1999 12, *available at* http://www.justice.gov/atr/public/246419.pdf; U.S. Dep't of Justice, Antitrust Div. Workload Statistics FY 2000–2009 14, *available at* http://www.justice.gov/atr/public/256139.pdf.

[37] Workload Statistics FY 1990–1999, *supra* note 36, at 12; Workload Statistics FY 2000–2009, *supra* note 36, at 14.

[38] Workload Statistics FY 1990–1999, *supra* note 36, at 12; Workload Statistics FY 2000–2009, *supra* note 36, at 14.

[39] Workload Statistics FY 1990–1999, *supra* note 36, at 13; Workload Statistics FY 2000–2009, *supra* note 36, at 15.

[40] Workload Statistics FY 1990–1999, *supra* note 36, at 13; Workload Statistics FY 2000–2009, *supra* note 36, at 15; *Comparative Deterrence*, *supra* note 1, at app. 1, table 5.

[41] *See supra* notes 38–40.

The authors of the study identified five possible approaches to valuing prison time. All five approaches were incorporated into the study in the hope that doing so would increase the reliability of results. The approaches include: (1) the valuations for lives and years of life that are used for various regulatory and public policy purposes; (2) tort awards for loss of a life in wrongful death cases; (3) awards made by the September 11th Victim Compensation Fund to victims' families; (4) the compensation provided to people who have been wrongly imprisoned; and (5) similar estimates by scholars in the field.[42]

The five approaches yielded estimates that are broadly consistent with one another.[43] To be conservative, the authors of the study took the highest of these estimates for the disvalue or deterrence equivalent of a year in prison, $1,500,000 per year, and increased it to $2 million.[44] They used $1 million for the disvalue or deterrence equivalent of a year of house arrest.

Although it is frequently assumed that corporations always engage in profit maximizing behavior, the authors of the study also allowed that executives might care much more about personal consequences than consequences to their corporations. This is in keeping with other common exceptions to profit maximization assumptions, such as the effects of agent/principal relationships. Although it is not possible to correct for these problems precisely, the authors took the arbitrary step of tripling the deterrence effects of all individual sanctions relative to corporate sanctions. As a result, a year of prison time was valued – or disvalued – at $6 million[45] rather than $2 million, and a year of house arrest at $3 million rather than $1 million. The authors also tripled the individual fine figures.[46]

Using these estimates and simple arithmetic, the deterrence value of the 330 years of prison time, $4.2 billion in corporate fines, $67 million in individual fines (artificially trebled), and $118 million in restitution imposed for cartel offences, for the entirety of the DOJ anti-cartel program from 1990–2007, is approximately $6.8 billion. Although it is impossible to know how many cartels were deterred by the equivalent of $6.8 billion in sanctions, surely the number must be substantial.

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[42] *See* Lande & Davis, *Comparative Deterrence, supra* note 1.

[43] *Id.*

[44] Two million dollars is probably significantly more than the true cost or deterrence value of a year in prison, but this figure was used in order to take a conservative and relatively non-controversial approach.

[45] Valuing a year's worth of life at $6 million would mean that a 20-year prison sentence would be valued at $120 million, a figure far in excess of the amount that society places on an individual's life.

[46] This assumes that the individuals actually pay their own fines. It is, however, difficult to determine whether the antitrust fines imposed on corporate employees are ultimately paid by the employees, or are often or usually directly or indirectly paid by their employers. This area of law is exceedingly complex, and, of course, even if indemnification is illegal, this does not mean that it does not occur regularly. *See* 1 Roger Magnuson, Shareholder Litigation § 9:37 (West 2009); Pamela H. Bucey, *Corporate Executives Who Have Been Convicted of Crimes: An Assessment and Proposal*, 24 Ind. L. Rev. 279 (1991); Note, *Indemnification of Directors: The Problems Posed By Federal Securities and Antitrust Legislation*, 76 Harv. L. Rev. 1403 (1963).

2. Deterrence from private antitrust litigation

As discussed earlier in this chapter, empirical research into the deterrence value of private antitrust litigation, during any period, is virtually nonexistent. However, the 40 cases that concluded between 1990 and 2007, which formed the basis for the study, can provide an extremely low floor on this amount. The study documented between $18.006 billion and $19.639 billion in cash paid by defendants in these 40 private U.S. antitrust cases alone (in nominal dollars).[47]

In other words, the deterrence effects from just the cash awards from these 40 private cases nearly tripled the estimated total deterrence value of the DOJ anti-cartel program, a figure that includes the deterrence effects of corporate fines, individual fines (artificially trebled), restitution, prison time valued at $6 million per year, and house arrest valued at $3 million per year. Note that this is not a comparison of the full deterrence effects from these 40 private cases to the full deterrence effects secured by the DOJ in the same 40 cases. This is a comparison of only the cash-based deterrence effects from just 40 private cases to the full estimated deterrence effects from every DOJ cartel case filed during the same 17-year period.

It is true that not all of these 40 cases were against cartels; some were against monopolies and other arrangements. The 25 collusion cases in the study secured a total of $9.200 to $10.600 billion.[48] Comparing this amount to the DOJ total of $6.800 billion shows that even these 25 private collusion cases alone probably deterred more anticompetitive behavior than the entire DOJ anti-cartel enforcement program. Moreover, because this study surveyed only 40 private cases, it significantly underestimates the deterrence effects of all private enforcement during the same period. Also recall that the study conservatively valued coupons, discounts, products and injunctive relief as being worth nothing.

One important complication with these results is worth noting, however: Many of these private cases were follow-ups to government prosecutions.[49] As a result, some of the credit for the deterrence caused by these private recoveries should go to the government enforcers for uncovering and prosecuting the violations. But even where the government discovered the cartels, private cases ultimately secured the damages. Private plaintiffs therefore should get much of the credit for the resulting deterrence in these cases, though the credit should be shared with the government enforcers.

Were the private actions good cases?

It is very difficult for critics of private enforcement to make a credible case that the combination of public and private enforcement in the United States has caused over-deterrence. The area of antitrust most affected by private enforcement is horizontal collusion, and responsible analysts believe that only approximately 25 percent of cartels are even detected.[50] Critics argue that despite this general under-deterrence of cartels,

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47 *See supra* notes 19–21 and accompanying text.

48 *See* Lande & Davis, *Comparative Deterrence*, *supra* note 1, at 23.

49 *Id.* at 29.

50 Judge Ginsburg & Professor Wright recently analyzed the empirical literature on cartel detection and concluded that only 25 percent of cartels currently are detected, in both the EU and the

most private actions are not good cases because, for example, private plaintiffs miss cartels and instead sue firms that have done nothing wrong. If this were true, not only would private enforcement fail to discourage illegal behavior, it would even discourage beneficial conduct. However, there are many reasons to believe that most, if not all, of the 40 private cases in the study were meritorious cases. And there are no valid reasons to conclude the reverse.

First, every one of the settlements among the 40 cases was approved as being in the public interest by a federal judge.[51] Of the 45 judges who presided over part or all these settlements, 27 were appointed by Republican presidents.[52] Second, most were at least partially validated through various means other than settlement. For example, in 13 of the 40 cases, defendants also received a criminal penalty for the same conduct.[53] Where a criminal penalty was imposed, it is hard to believe that defendants did nothing wrong. In 12 cases, government enforcers obtained a civil victory.[54] In nine cases, defendants lost at trial in the private litigation or in a very closely related private case.[55] In nine cases, plaintiffs survived or prevailed on a motion for summary judgment, most of which were argued almost as rigorously as a trial on the merits.[56] In at least three cases, plaintiffs survived a motion to dismiss.[57]

In sum, 34 of the 40 cases – 31 if you do not include the motions to dismiss – had at least one indicator that plaintiffs' case was probably meritorious. (The number of cases with indicators does not add up to 34 (or 31) because eight cases had more than one indicator.) All told, it is much more likely that most if not all of the recoveries reflect defendants' perceptions that they could well lose on the merits, not only at trial but also on appeal. How likely is a firm that did nothing wrong to nevertheless pay $50 million or even $500 million in settlement? While this could happen on occasion, the argument loses credibility as settlements get higher.

At the same time, objective observers should ask to see evidence that most private cases lack merit, as critics suggest. Scant such evidence exists. Defendants' self-serving anecdotes, assertions, and protestations should carry no more weight than those of their plaintiff counterparts.

Conclusions

This chapter has not attempted to perform an overall cost/benefit analysis of U.S. private antitrust enforcement. To be sure, private enforcement has many flaws and problems, and many private actions have not been in the public interest. However, the debate over private enforcement should have balance, and it should be grounded in empiricism. The study discussed in this chapter suggests that the flaws of U.S. private antitrust enforcement have

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United States. See Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6 Competition Pol'y Int'l 3, 8 (2010).

51 *See* Lande & Davis, *Comparative Deterrence*, *supra* note 1, at 25.

52 *Id.*

53 *Id.* at 23.

54 *Id.* at 27.

55 *Id.*

56 *Id.*

57 *Id.*

been greatly exaggerated, on the basis of no evidence except the self-serving anecdotes of parties who frequently have an interest in restricting it.

Private enforcement is virtually the only way to compensate the victims of conduct that violates the antitrust laws. It is responsible for the recovery of billions of dollars that otherwise would have remained with companies that violated the antitrust laws. Many of these lawbreakers were foreign companies. Government enforcement is wonderful, but it rarely helps victims recover the amount taken from them by practices that violate the antitrust laws. The billions of dollars defendants pay in private cases also help to deter future anticompetitive conduct. In fact, in the United States, private enforcement might well deter even more anticompetitive conduct than the DOJ criminal antitrust enforcement program.

As to the possibility that U.S. private enforcement could lead to over-deterrence, it is important to remember that, for practical purposes, victims have only a nominal right to recover "treble damages." In reality, various constraints on recovery mean that, even after trebling of a judgment at trial, plaintiffs likely recover less than single actual damages.[58] To get closer to a full recovery, for example, these settlements would have to compensate victims for unawarded prejudgment interest.[59] They also should compensate victims for difficult-to-quantify and unawarded damages items such as the allocative inefficiency effects of market power,[60] and the value of victims' time expended pursuing litigation.[61]

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[58] To the extent the purpose of the remedy is compensation, the "damages" caused by an antitrust violation should consist of the sum of all relatively predictable harms caused by that violation affecting anyone other than the defendants. Damages should include the wealth transferred from consumers to the violator(s), as well as the allocative inefficiency effects felt by society, whether caused directly, or indirectly via "umbrella" effects. Plaintiffs' attorneys' fees, the value of plaintiffs' time spent pursuing the case, and the cost to the American taxpayer of administering the judicial system should also be included. When all these adjustments are made it is likely that the United States "treble" damages remedy actually is less than single damages. *See* Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 Ohio St. L.J. 115, 122–24, 158–68 (1993), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134822.

[59] In the United States, interest is only awarded from the time of a judicial decision and the rate is usually quite low. *Id*. at 130.

[60] For an explanation of the allocative inefficiency effects of market power, see *id*. at 119–21, 152–54. Allocative inefficiency is another name for the suboptimal use of societal resources that results from anticompetitive pricing:

> To raise prices a monopoly reduces output from the competitive level. The goods no longer sold are worth more to would-be purchasers than they would cost society to produce. This foregone production of goods worth more than their cost is pure social loss and constitutes the "allocative inefficiency" of monopoly. For example, suppose that widgets cost $1.00 in a competitive market (their cost of production plus a competitive profit). Suppose a monopolist would sell them for $2.00. A potential purchaser who would have been willing to pay up to $1.50 will not purchase at the $2.00 level. Since a competitive market would have sold those widgets for less than they were worth to him, the monopolist's reduced production has decreased the consumer's satisfaction without producing any countervailing benefits for anyone. This pure loss is termed "allocative inefficiency."

Robert H. Lande, *The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust*, 33 Antitrust Bull. 429, 433–34 n.17 (1988); *see also* Edwin Mansfield, Microeconomics: Theory and Applications 277–92 (W.W. Norton & Co., Inc., 4th ed. 1982) (1970).

[61] *See* Lande, *supra* note 58, at 130–36. As the Antitrust Modernization Commission noted: "Indeed, in light of the fact that some damages may not be recoverable (e.g., compensation for

Over-deterrence seems implausible when you consider that victims are unlikely even to be made fully whole. So called treble damages awards not only fail to cross any theoretical over-deterrence threshold that exists beyond victim compensation, they almost never even reach the starting point.

Further, antitrust verdicts producing even nominal treble damages are rare,[62] and it is likely that few of the overwhelming majority of antitrust cases that settle do so for more than single actual damages.[63] Especially in light of estimates that only 25 percent of cartels are even detected,[64] over-deterrence remains, as the Antitrust Modernization Commission noted, only an unproven assertion.[65] On the contrary, in the United States, anticompetitive conduct occurs far too frequently, despite the deterrence effects of our present system of private litigation.

Another benefit from private cases is that they have saved taxpayers a significant amount of money in foregone enforcement costs. Although government enforcers often will be best suited to uncover and win particular cases, sometimes government enforcers will lack the necessary resources. Sometimes, due to their relatively low salaries, high turnover involving the very best government lawyers may harm the government's chances of victory. Sometimes government enforcers lack the industry expertise of private attorneys and their clients. Sometimes government enforcers may have a political agenda that leads them not to bring or settle a case on easy terms. Sometimes government enforcement efforts will be unduly affected by budgetary constraints[66] and undue fear of losing cases.[67]

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interest prior to judgment, or because of the statute of limitations and the inability to recover 'speculative' damages) treble damages help ensure that victims will recover at least their actual damages." Antitrust Modernization Comm'n, Report and Recommendations, *supra* note 5, at 246 (footnote omitted).

[62] For a list of antitrust verdicts that calculated damages amounts, see John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 Tul. L. Rev. 513, app. at 565 (2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=787907.

[63] This is especially true when inflation is considered. For an analysis of this issue, see Robert H. Lande, *Why Antitrust Damage Levels Should Be Raised*, 16 Loy. Consumer L. Rev. 329 (2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1118902.

[64] *See* Ginsburg & Wright, *supra* note 50.

[65] Recall the Conclusion of the U.S. Antitrust Modernization Commission: "No actual cases or evidence of systematic over deterrence were presented to the Commission . . . ." Antitrust Modernization Comm'n, Report and Recommendations, *supra* note 5, at 247 (2007) (citation omitted).

[66] This is especially true in the current climate of tight federal budgets.

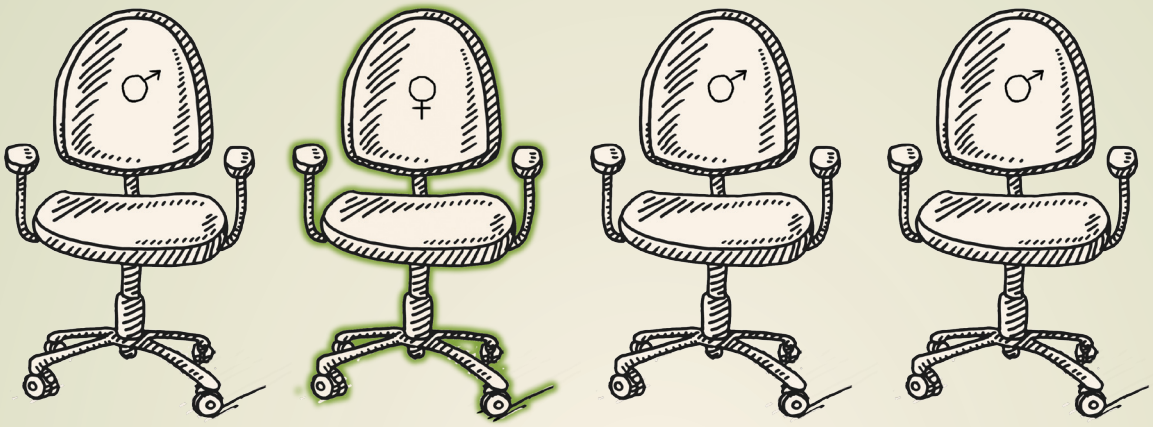
[67] Professor Calkins notes:

> Governmental agencies also hesitate to litigate because of fear of defeat. Courtroom setbacks can demoralize agency staff, raise questions in the eyes of observers, and impose political costs. Few agency annual reports boast about the well-fought loss, and, in an era in which governmental accountability is fashionable, it is challenging to characterize losses as accomplishments. All too often, agencies worry about their win rates. . . . [A]nd general counsels who are nominated for higher office like to claim that their agency won a high percentage of its cases. Everyone wants a good batting average. Unfortunately, a single loss can ruin a good batting average compiled with few at-bats.

Stephen Calkins, *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 St. John's L. Rev. 1 (1998) (citations omitted).

Not surprisingly, a vigorous private antitrust regime is likely to confer significant benefits over and above those conferred by a system reliant solely upon government enforcement. The United States' distinctive system of private antitrust enforcement is substantially underappreciated. It has produced tremendous benefits for the U.S. economy – for consumers and for businesses of all sizes. It has enabled U.S. businesses and consumers to protect themselves from economic exploitation, both by those who subvert the free market in general and by foreign cartels in particular.[68] Although negative assertions about the efficacy of private U.S. antitrust litigation have been very well publicized, this might well be due less to the merits of these allegations than to the power of the economic interests that stand to benefit from a curtailment of private enforcement.

[68] *See* John M. Connor & Robert H. Lande, *The Size of Cartel Overcharges: Implications for U.S. and EU Fining Policies*, 51 Antitrust Bull. 983 (2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=988722. Historically, depending upon the data set used and the methodology employed, cartels in the United States have overcharged an average of 18 percent to 37 percent. By contrast, the overcharges of European cartels averaged in the 28 percent to 54 percent range, and cartel overcharges within a single European country averaged 16 percent to 48 percent. *Id.*



First Chairs at Trial

More Women Need Seats at the Table

A Research Report on the Participation of Women Lawyers as Lead Counsel and Trial Counsel in Litigation

ABF American Bar Foundation
EXPANDING KNOWLEDGE • ADVANCING JUSTICE

Commission on Women in the Profession
American Bar Association

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A Note from the Authors

Achieving greater gender diversity in the legal profession in general, and in lead trial roles in particular, has been an incremental, evolutionary process that we have witnessed firsthand ever since we graduated from law school. Bobbi became a lawyer in 1975, when women comprised only 20% of law students. Just ten years later, when Stephanie finished law school, that figure had doubled to 40%, and women were moving into the associate ranks of law firms at almost the same rate as men.

As young lawyers, we anticipated that many women would achieve successful legal careers, becoming partners, practice group leaders, and lead counsel on major matters in litigation and in corporate deals. We thought—along with many others—that the well-stocked pipeline of women lawyers beginning their careers would surely result in a substantial pool of women at the top of their profession.

We now know that relying on an entry-level pipeline to drive gender diversity is not enough. While women lawyers have been entering the profession in large numbers for three decades, they have not advanced at nearly the same rate as men. And the gender gap is larger with each step up the ladder, as shown by such studies as the NAWL Annual Surveys of law firms, the annual survey of *Fortune* 1000 chief legal officers conducted by the Minority Corporate Counsel Association, and NALP annual data about law firm associates and partners.

Our own experiences and observations as we progressed in our litigation careers have driven home the day-to-day meaning of these statistics. We have each practiced in national firms as associates and partners and also in boutique firms with a mixture of women and men at senior levels. We have appeared in hundreds of cases and in dozens of courtrooms across the country. In all of those matters and jurisdictions, we have too often found ourselves to be the only woman (or one of very few) to appear as trial counsel or lead counsel.

Some may ask, why does it matter if relatively few women are in lead roles? We believe that one could just as well ask, why does it matter if there is a small or large pool of talent in the legal profession? Women lawyers make up at least 36% of the legal profession. To the extent that women are hampered in obtaining lead roles, not only do their own careers suffer, so too does the profession, as there is less diversity of thinking, less effectiveness in front of a broad range of judges and jurors, and less creative energy brought to bear on client matters.

No one seriously contends that women have less ability than men. Instead, commentators point to myriad social and structural factors to explain the slow progress of women lawyers. These include, among others, the impact of children and other family responsibilities on women's careers; bias, whether implicit or explicit; male-centered social norms and expectations about how to progress; outdated law firm cultures, policies, and structures that hinder the development of talent from diverse lawyers; the short-term busi-

ness focus of many firms; and social norms among men versus women with respect to rainmaking and client development. It is hard to know the relative impact of these factors in everyday practice, in part because the legal profession has virtually no systematic data about who receives first-line responsibility in major litigation and major deals—and how men and women come to play those roles.

First Chairs at Trial: More Women Need Seats at the Table is a first-of-its-kind empirical study of the participation of women and men as lead counsel and trial attorneys in civil and criminal litigation. Our goal was to understand the parameters of the gender gap in the ranks of lead trial lawyers, so that we in the legal profession will know how and where to seek changes. Using a random sample of all cases filed in 2013 in the United States District Court for the Northern District of Illinois, this report provides data concerning the level of participation by men and women in civil and criminal litigation and identifies characteristics of cases, law firms, and clients that impact the extent to which men and women serve in lead counsel roles.

As revealed in this study, women are consistently underrepresented in lead counsel positions and in the role of trial attorney for all but a few types of cases. In civil cases, men are three times more likely than women to appear as lead counsel and to appear as trial attorneys. That substantial gender gap is a marked departure from what we expected based on the distribution of men and women appearing generally in the federal cases we examined (a roughly 2 to 1 ratio) and the distribution of men and women in the legal profession generally (again, a roughly 2 to 1 ratio). We found that type of case, nature of the parties, and type of legal employer affect gender disparities. Criminal cases also showed a pattern based on gender. Men are nearly four times more likely than women to appear as trial attorneys. Type of client makes a difference, as the majority of male lead counsel (66%) in criminal cases appeared for defendants, while the majority of women lead counsel (69%) appeared for the government.

In making recommendations for closing the gap, we set forth a number of best practices and strategies that can be implemented by law schools, law firms, courts, clients, and women lawyers themselves to increase the ranks of women lead counsel. We encourage others to use this study as a research template for examining the representation of women in leadership roles in litigation in other jurisdictions. It is time for more women to find their seats at the table as first chairs at trial—and this report is our contribution toward achieving that goal.

Stephanie A. Scharf

Roberta D. Liebenberg

Thank You

For decades, women and men have graduated from law school in roughly equal numbers. Yet, women have not maintained parity with their male counterparts as they progress in their careers. Stephanie Scharf and Roberta ("Bobbi") Liebenberg have witnessed this phenomenon firsthand as trial lawyers. On far too many occasions, they often found themselves "the only woman in the room" when they appeared in court as lead counsel. Indeed, their experiences served as the impetus to determine if what they were seeing was the exception or the rule . . . and why.

We were excited when they approached us with their idea for this study because we recognized immediately the importance of such empirical research and the broader application of the data collection process to other courts throughout the country. The result is *First Chairs at Trial: More Women Need Seats at the Table*, a joint project of the American Bar Foundation and the American Bar Association Commission on Women in the Profession.

Our thanks to Stephanie and Bobbi for their tireless efforts in spearheading the research and crafting a compelling final report. In *First Chairs at Trial*, they have made the case and offered strategies for increasing the number of women as lead trial counsel. They have given clients, law firms, courts, law schools, and women litigators the additional steps needed to close this gender gap.

Robert L. Nelson
Director and MacCrate Research Chair, American Bar Foundation

Michele Coleman Mayes
Chair, American Bar Association Commission on Women in the Profession

FIRST CHAIRS AT TRIAL

More Women Need Seats at the Table

A Research Report on the Participation of Women Lawyers as Lead Counsel and Trial Counsel in Litigation

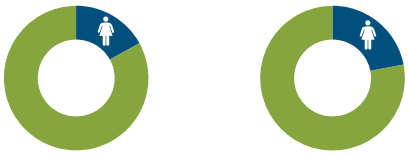
STEPHANIE A. SCHARF AND ROBERTA D. LIEBENBERG[1]

This report and the research underlying it were inspired by our everyday experiences as trial lawyers. We have represented clients in lead roles in many different matters and in many federal and state court jurisdictions. Yet, far too often, when we enter a courtroom filled with lawyers on a range of cases, each of us is either the only woman lead counsel or, at best, one of only a few women taking the lead in court or in major parts of litigation.

Women have been attending law school and entering the legal profession in substantial numbers for the past 30 years.[2] When we began practicing law, we assumed, along with many others, that as the number of women lawyers increased, so too would the number of women in leadership roles. But women have not advanced into the highest levels of private practice or of corporate law departments at anywhere near the same rate as men. Today, for example, only 17% of equity partners in big firms and 22% of general counsel in the *Fortune* 500 are women.[3]

Beyond some basic data about job categories at senior levels, the legal profession has almost no systematic data about men and women in their everyday practice, including whether and how they obtain the necessary skills and experience to advance into lead roles. The NAWL Annual Surveys have filled some data gaps by providing a longitudinal view of the retention and advancement of women lawyers in big firm practice.[4] But we are not aware of any study that has systematically examined, based on representative data, the specific roles that women and men play on client matters, such as whether women are equally likely as men to be lead trial lawyer or lead deal lawyer.

WOMEN IN THE PROFESSION



17%: EQUITY PARTNERS IN BIG FIRMS

22%: GENERAL COUNSEL OF FORTUNE 500 COMPANIES

This study is the first of its kind to provide an empirical snapshot of the participation of women and men as lead counsel and trial attorneys in civil and criminal litigation. In addition, the study examines various objective factors that may help explain why women occupy leadership positions in certain types of cases for certain types of clients. It is our hope that this study will lead to the development and implementation of specific policies and best practices to enhance the opportunities for women to take the lead

in the courtroom and be involved in the critical phases of cases.

Bearing those goals in mind, and with a focus on using readily available empirical data with the expectation that the research can be replicated in various jurisdictions and over time, we aimed to:

a. obtain benchmark statistics about the role of women in litigation;
b. identify characteristics of cases, law firms, and clients that may affect the roles played by women and men in litigation;
c. provide insights into what firms, law schools, clients, judges, and individual lawyers can do to enhance the prospects for women to serve as lead counsel; and
d. provide a research template for use in multiple jurisdictions in order to understand on a more comprehensive basis the factors for advancing women into lead counsel roles.

Several organizations and individuals were seminal to the research. The American Bar Association's Commission on Women in the Profession and the American Bar Foundation provided financial support and a welcome intellectual context for conducting the research. The Honorable Ruben Castillo, chief judge of the United States District Court for the Northern District of Illinois, encouraged the research and provided thoughtful views about addressing the results. Robert Nelson, director of the American Bar Foundation and professor of sociology, Northwestern University, was an early advocate for the research and provided thorough and valuable comments about the results. Jennifer Woodward conducted the random sample and much of the data coding. Jill May conducted additional data coding and patiently completed the many detailed data analyses. Jill was generous with her time and with her intellectual enthusiasm. Michele Coleman Mayes, current chair of the Commission on Women, has championed the study with gusto. Barbara Leff, communications and publications manager of the Commission on Women, reviewed multiple drafts without complaint and with a thoroughly professional eye to editing. Melissa Wood, director of the Commission on Women, provided just the right administrative advice. We are grateful for all of their support.

STUDY DESIGN AND METHODOLOGY

Federal courts require a relatively detailed intake form for all filed cases as well as individual attorney appearance forms. All of that information is available through Public Access to Court Electronic Records (PACER), the public access service that allows users to obtain case and docket information online from federal courts. The required information provides the basis here for analyzing the level of participation of women as lead counsel and as trial attorney.

To perform the research, we took a random sample of all of the cases filed in 2013 in the United States District Court for the Northern District of Illinois. We chose the Northern District of Illinois for four principal reasons:

1. The Northern District of Illinois is a large and diverse locale. No single type of case dominates the docket.
2. As a group, the firms located in the geographic locale of the Northern District of Illinois are diverse with respect to size, employment of men and women, and types of cases and clients.
3. As with other federal courts, there is robust information about each filed case as reflected in the required Civil Cover Sheet for each newly filed lawsuit.
4. There is information in the lawyer appearance form showing by self-designation whether a lawyer is "lead counsel" and/or "trial attorney" or not. The Northern District classifies lawyers as members of its Trial Bar based on certain experience in the courtroom.[5] Only members of the Trial Bar can appear as trial attorney in a given case.

Using the PACER system, we randomly selected 558 civil cases filed in 2013.[6] There were 2,076 lawyers appearing in those 558 cases. In addition, we sampled 50 criminal cases, in which 135 lawyers appeared.[7] We then created a database that coded characteristics

of cases as well as characteristics of lawyers in those cases. The coded case characteristics were:

a. Whether the case is civil or criminal.
b. The subject matter of the suit (for civil suits). The categories listed on the Civil Cover Sheet include contract, real property, torts, civil rights, prisoner rights, forfeiture/penalty, labor, immigration, bankruptcy, intellectual property, Social Security, federal tax suits, and other statutes.[8]
c. Whether the suit is a class action.

The coded characteristics of lawyers appearing in those cases were:

a. The nature of the party the lawyer represents: individual, business, United States, state or local government, or nonprofit.
b. The side for which the attorney appeared, plaintiff or defendant.
c. The attorney's practice setting: solo practice, small private firm, AmLaw 200 firm, AmLaw 100 firm, government (United States, Illinois, municipal), and some other categories.[9]
d. Whether the lawyer appeared as "lead counsel" and/or as "trial attorney."
e. Gender of the lawyer. If there was any confusion from the attorney's name as to gender, the attorney's name and photo were checked on his/her firm's public website.
f. Whether the lawyer was retained by his/her client or appointed by the court.[10]

We would also have liked to study minority status and minority status interacting with gender. However, neither the Civil Cover Sheet nor the appearance form contains information that allowed us to determine the minority status of lawyers, and, therefore, we could not perform those analyses.

In conducting our data analyses, we sometimes used the lawyer as the unit of analysis and sometimes used the case as the unit of analysis, depending on the perspective and nature of the research question at hand. We analyzed criminal and civil cases separately.

The types of questions we sought to answer included these:

1. Do women and men occupy lead roles in litigation matters in equal numbers, as shown by their self-designated individual appearance as "lead counsel" or "trial attorney"?
2. Are there certain types of cases more likely to have men or women appear as lead counsel?
3. Are there certain types of clients (individuals, corporations, government entities, client opposing *pro se* parties) or sides (plaintiff versus defendant) that are more likely to retain men or women as lead counsel?
4. Are there certain types of practice settings in which men or women lead counsel are more likely to practice?

By answering such questions, we expect to have a better understanding of the roles played by men and women in the courtroom, whether there is a gender gap, and areas of focus for change.

I. IN CIVIL CASES, WOMEN APPEAR LESS OFTEN THAN MEN AND ARE FAR LESS LIKELY TO DESIGNATE THEIR ROLE AS LEAD COUNSEL OR TRIAL ATTORNEY

Roughly two-thirds of all attorneys appearing in civil cases—whether as lead counsel or trial attorney—are men. Thus, 68% of all lawyers who appeared in civil cases were men and 32% were women.[11] Of those attorneys appearing, a little more than half (54%) appeared as "lead counsel."[12]

ALL LAWYERS APPEARING IN CIVIL CASES

68% MEN
32% WOMEN

However, just as women and men did not appear generally at the same rate, men and women do not appear in lead roles in civil cases at the same rate

LAWYERS APPEARING AS LEAD COUNSEL

76% MEN
24% WOMEN

either. Among lawyers appearing as lead counsel, only 24% were women and 76% were men. In essence, a man is three times more likely to play the role of lead counsel on a civil case than a woman.

A similar pattern exists for men and women who entered their appearances as "trial attorney," with 63% of all lawyers identifying themselves as a trial attorney on the case. The percentage of women serving as trial attorneys in civil cases was slightly higher than the percentage of women serving as lead counsel. But of those lawyers identifying themselves as trial attorneys, nearly three-quarters are men (73%) and slightly more than a quarter are women (27%).

LAWYERS ENTERING APPEARANCE AS TRIAL ATTORNEY

73% MEN
27% WOMEN

What these numbers show is that the steps to the role of lead counsel and trial attorney are much steeper for women than men. Women are significantly less likely to appear in courtrooms—although it could be argued that the gender difference roughly mirrors the difference between the proportion of men and women generally in the legal profession. On top of that gap, however, and more troubling, is the fact that when women do appear, they are significantly less likely than men to occupy the lead roles.

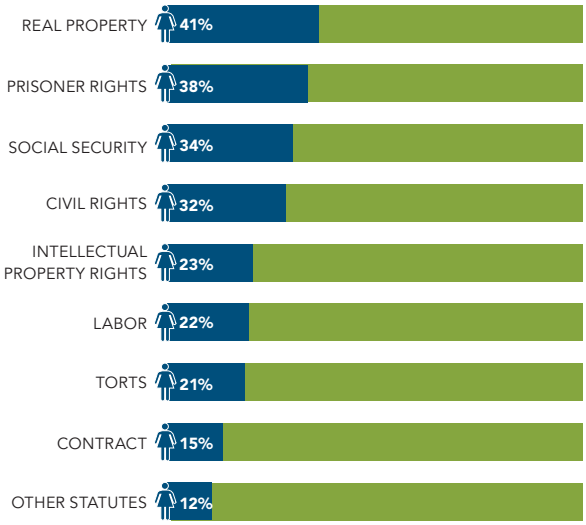
We also observed a marked gender gap when the unit of analysis is cases. Some 59% of civil cases had only men appearing as lead counsel; similarly, 58% of civil cases had only men appearing as trial attorney. In contrast, just 13% of civil cases had only women appearing as lead counsel, and 21% had only women appearing in the role of trial attorney.[13]

II. DOES THE TYPE OF CASE, TYPE OF PRACTICE SETTING, AND TYPE OF CLIENT AFFECT THE PARTICIPATION OF WOMEN IN LEAD COUNSEL OR TRIAL ATTORNEY ROLES?

We performed a number of analyses looking at factors that could affect whether a man or woman appears as lead counsel or as trial attorney in civil cases.

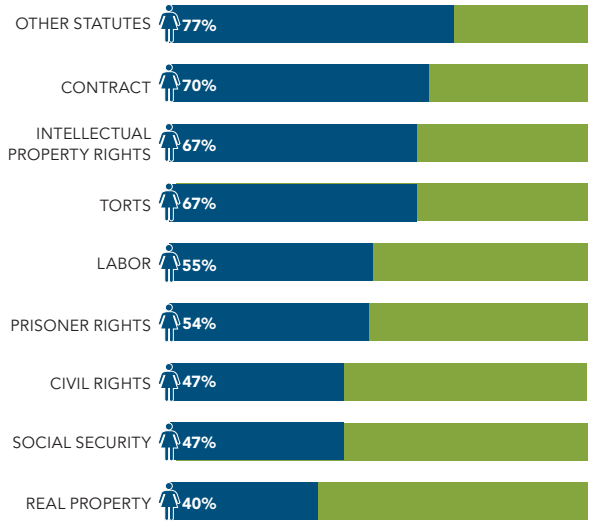
First, type of case shows a gender effect. For certain types of civil cases, lead counsel are predominantly male, including in "other statutory" cases (88% of lead counsel are male), contract cases (85% of lead counsel are male), torts (79% of lead counsel are male), labor (78% of lead counsel are male), and intellectual property rights (77% of lead counsel are male). On the other hand, there is no type of case in which women are more likely than men to be lead counsel—i.e., where the majority of persons who appeared as lead counsel were women. A similar pattern exists in the data for trial attorney.

PERCENTAGE OF WOMEN APPEARING AS LEAD COUNSEL



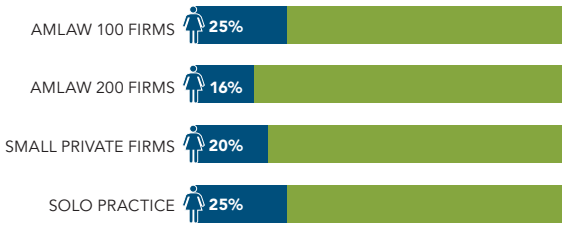
In the same vein, certain types of civil cases exhibited a greater gender gap than others, as shown by whether there were any women appearing at all as lead counsel. The following shows the results when we measured cases as a whole:

PERCENTAGE OF CASES WITH NO WOMEN APPEARING AS LEAD COUNSEL



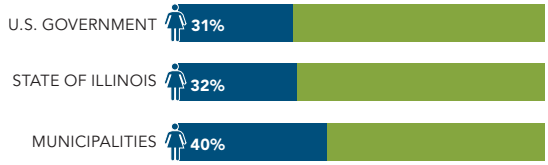
With respect to practice setting, gender differences among lead counsel from private firms follow a 1 to 3 female/male gender ratio—or worse. In terms of the size of firms from which lawyers appear (AmLaw 100 firms, AmLaw 200 firms, small private firms, and solo practice), the percentage of women appearing as lead counsel is 25%, 16%, 20%, and 25%, respectively. [14]

PERCENTAGE OF WOMEN AS LEAD COUNSEL BY SIZE OF FIRM



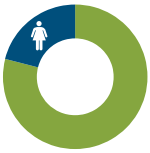
It is noteworthy that there is a greater likelihood of women being lead counsel in civil cases involving the U.S. government, the state of Illinois, and municipalities. Lead lawyers for the U.S. government, state of Illinois, and municipalities are, respectively, 31%, 32%, and 40% female.

PERCENTAGE OF WOMEN AS LEAD COUNSEL IN CIVIL CASES INVOLVING THE GOVERNMENT



By contrast, individual litigants and businesses are overwhelmingly represented by male lead counsel. Close to 80% of all lead counsel who represent businesses are male (79% male vs. 21% female), and the same percentage breakdown is found with respect to lead counsel who represent individuals.

LEAD COUNSEL REPRESENTING BUSINESSES AND INDIVIDUALS



79% MEN
21% WOMEN

Whether a party is plaintiff or defendant also affects whether their lead counsel is male or female. Among all women who are lead counsel in civil cases, 40% represent plaintiffs and 60% represent defendants. A more equal distribution between representation of plaintiffs and defendants is found for men appearing as lead counsel. Among all men appearing as lead counsel, 45% represent plaintiffs and 55% represent defendants.

That said, and consistent with the data in Section I, the majority of all attorneys appearing as lead counsel for plaintiffs or defendants are men (for plaintiffs, 78% of lead counsel are men; for defendants, 74% of lead counsel are men). For those appearing as trial attorneys, among plaintiffs' counsel 75% are men and among defense counsel 70% are men.

LAWYERS APPEARING AS LEAD COUNSEL BY PARTY

We also examined the subset of cases that were filed as putative class actions. There were 48 such cases in our sample, and 246 attorneys appeared in them. Looking at all attorneys who appeared in class actions, 68% are male and 32% are female—a 2/3 versus 1/3 ratio, which is not unlike the data for women appearing in civil cases. However, there is a marked gender gap when it comes to appearing as lead counsel. Among men appearing in class actions, 55% appeared as lead counsel. In contrast, only 18% of women who appeared in class actions filed their appearances as lead counsel.[15] Looking at these data another way, of all of the lawyers who designated themselves as lead counsel in class actions, 87% were male.

LAWYERS APPEARING IN CLASS ACTIONS

68% MEN
32% WOMEN

LAWYERS APPEARING AS LEAD COUNSEL IN CLASS ACTIONS

87% MEN
13% WOMEN

Looking at all cases filed as class actions, we observed a similar gender gap in lead counsel roles. Of the 48 class action cases, 71% (34 cases) had only men appearing as lead counsel. Just one case (2.1% of cases) had only women appearing as lead counsel. In other words, 98% of class actions had at least one man as lead counsel but only 29% of class actions had any women as lead counsel.

We also reviewed data concerning civil cases in which the plaintiffs appeared *pro se*. We note that cases with *pro se* plaintiffs are often viewed as less complex, unlikely to go to trial, or have less at stake than cases where the plaintiff is represented by counsel. In this sample, there were 81 cases with *pro se* plaintiffs, in which 111 lawyers appeared for defendants. Of those 111 lawyers, 64% were men and 36% were women. The gender breakdown of lead counsel opposing a *pro se* plaintiff was similar: 65% men and 35% women. Thus, women appeared as lead counsel at the same rate they appeared generally in cases against *pro se* plaintiffs, a noticeable difference compared to other civil cases (except civil cases in which the client is a governmental party). Even so, in cases with *pro se* plaintiffs, women did not approach the number of men who appeared and were designated as lead counsel.

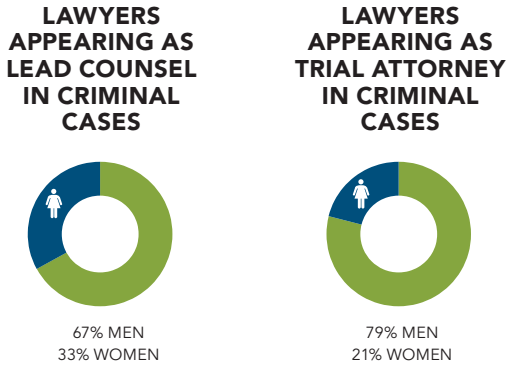
DEFENSE LAWYERS APPEARING AS LEAD COUNSEL IN PRO SE CASES

65% MEN
35% WOMEN

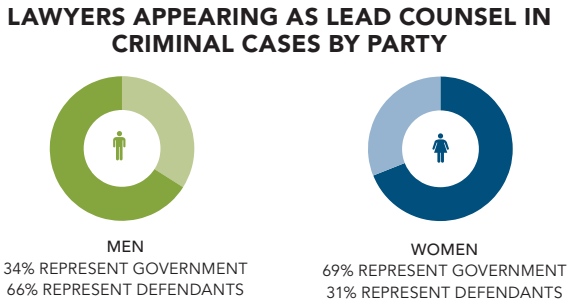
III. CRIMINAL CASES SHOW A MIXED PATTERN FOR WOMEN

We looked separately at the sample of 50 criminal cases under the theory that criminal cases and clients could well show a different gender dynamic. Among men and women attorneys who appeared in criminal cases, the vast majority filed their appearances as lead counsel (88% of all men appearing and 89% of all women appearing).[16] The result is not surprising, as criminal cases tend not to be layered with different levels of associates and partners. However, there

is a gender gap when it comes to appearances generally in criminal cases and therefore in the percentage of women versus men who play lead roles. Among all attorneys appearing in criminal cases, 67% are men. Among attorneys appearing as lead counsel, 67% are men (33% are women), and among attorneys appearing as trial attorney, 79% are men (21% are women).



For criminal cases, there is also a gender impact by type of client. Of men appearing as lead counsel in criminal cases, 34% appear for the government and 66% appear for defendants. Of women appearing as lead counsel in criminal cases, the ratio is reversed: 69% appear for the government and 31% appear for defendants. In other words, women who are government prosecutors—compared to women in all other practice settings and client representations—have the greatest chance of appearing in a case as lead counsel.



Federal criminal prosecutions are important and powerful roles for any trial lawyer. The lower percentage of women lead counsel representing parties in civil litigation or representing criminal defendants suggests to us that a number of social factors are impeding the retention of women as lead counsel, as explained below.

IV. SUMMARY OF THE FINDINGS

It is evident that women are consistently underrepresented in lead counsel roles in all but a few settings and for all but a few types of cases. In civil cases, men are three times more likely to appear in lead roles than women, which is a marked departure from what we expected based on the distribution of men and women appearing generally in federal litigation (a roughly 2 to 1 ratio) and the distribution of men and women in the legal profession (again, a roughly 2 to 1 ratio). In private practice settings, the gender gap is greatest in AmLaw 200 firms, compared to AmLaw 100 firms and other smaller firms not on the AmLaw lists. In addition, women are more likely to be lead counsel representing civil defendants rather than civil plaintiffs. On the other hand, men appearing as lead counsel in civil cases are somewhat more evenly distributed between representing plaintiffs and defendants.

Moreover, in the majority of civil cases (59%), lead counsel are all men, even though it is typical for more than one lawyer to enter an appearance in a civil case. A much smaller proportion of civil cases (13%) have all women as lead counsel. The findings show more gender segregation in civil cases than we would have predicted. In essence, more than 70% of cases are defined by lead counsel of one gender or the other, not a mix of male and female lead counsel.

If we were to extrapolate these statistics to the almost 11,000 civil cases filed in the Northern District in 2013,[17] we would see that approximately 6,490 cases had no women appearing as lead counsel, and about 1,400 cases had no men appearing as lead counsel.

Women representing the government had better odds of appearing as lead counsel, at roughly the same rate as women generally appeared (a 2 to 1 male-to-female ratio) and at roughly the same rate as their distribution in the legal profession. Without putting too fine a point on the results, we certainly observed a private vs. public sector gender gap for women in lead roles.

The results in criminal cases—where one side is the government and the other a private party, albeit a

criminal defendant—show a pattern consistent with the private vs. public sector gender gap we observed in civil cases. Women lead counsel in criminal cases represent the government more than twice as often as they represent criminal defendants. For men, the ratio is reversed: men appear as lead counsel for private defendants twice as often as they appear for the government.

Even so, only a minority of attorneys appearing in criminal cases are women. Those women who appear, however, almost always file their appearances as lead counsel and in about the same ratio as men. Overall, and looking across all practice settings, women in the public sector and women in criminal matters have a substantially greater chance of playing lead counsel roles than those in the private sector working on civil cases.

We also note that class actions—considered by many to be both high-stakes and complex litigation—are dominated by male lead counsel. Indeed, the grouping of lead counsel in class actions is about as close to gender segregation as we can imagine. Although we did not look at the role of men versus women as lead counsel in multidistrict litigation—another type of litigation considered complex and high-stakes—our personal experience has been that it is rare for women to be appointed by judges as lead or liaison counsel.[18] On the opposite side of the spectrum are cases with *pro se* plaintiffs, which are more likely to have women as lead counsel than the typical civil case (except for cases where counsel represent government entities).

V. BEST PRACTICES FOR LAW SCHOOLS, LAW FIRMS, CLIENTS, JUDGES, AND WOMEN LAWYERS

Men and women have been graduating from law school and entering private firms at about the same rate for many years,[19] and on a clean slate we would expect men and women to progress at about the same rate into lead counsel roles. But as our research shows, the trial bar continues to have a substantial gender gap.

The gender disparity we observed may reflect the overall career arc for women in private practice. As shown by the NAWL Surveys, men are less likely than women to leave private practice, men are more likely than women to advance beyond the associate ranks and become partners, and men earn more than women. Such disparities in advancement and compensation can stem from factors outside the control of women (such as implicit bias), affecting the types of assignments women receive, performance evaluations, and even an ability to meet billable-hour requirements.[20] The result will be a cumulative negative impact on the ability of women litigators to receive increasingly better assignments and greater opportunities to serve in lead roles in the courtroom.

Other social factors may impinge, as well, on opportunities for women lawyers. As one example, lawyers who have taken time out of the labor force to attend to family responsibilities are less likely to become partners and earn less if they do become partners, and that phenomenon disproportionately affects women.[21] Additional reasons are more closely linked to the dynamics of becoming lead counsel. There may be bias (sometimes implicit, sometimes not) by senior partners or clients who choose their first-chair lawyers; the impact from judges or opposing counsel who make inappropriate or stereotypical comments and act accordingly; and the increased scrutiny and double standards that women experience in the courtroom.

Research by the ABA Commission on Women in the Profession and other organizations has shown that implicit bias hinders the progress of women lawyers, and this also can also apply to women litigators.[22] Senior lawyers who choose their co-counsel in courtrooms are overwhelmingly male, and they may automatically choose someone like themselves—i.e., another male. Certainly, implicit biases play a role, such as the belief that a woman lawyer will express too much emotion. Ironically, male litigators who display the same level of emotion are considered "deeply passionate" about the case. When a woman litigator raises her voice to make a point or argues forcefully, she may be viewed as being overly aggressive. A male litigator acting in the same way is typically viewed favorably for zealously representing his client. Thus, women lawyers often have to demonstrate greater levels of competence and proficiency and are held to higher standards than their male colleagues.

Women trial lawyers must also occasionally deal with opposing counsel and judges who make inappropriate or stereotypical comments. Many women have reported being patronized and called "honey" or "dear" or referred to by their first name in the courtroom. Indeed, a Defense Research Institute survey found that 70% of women attorneys experienced gender bias in the courtroom.[23]

The underrepresentation of women among lead lawyers may also stem from certain client preferences, as some clients prefer a male lawyer to represent them in court.[24] In addition, women may too often be relegated by their law firms to second-chair positions, even though they have the talent and experience to serve as first chairs. The denial of these significant opportunities adversely affects the ability of women to advance in their firms.[25]

All of these issues apply with even greater force to women trial attorneys of color, who face the double bind of gender and race. We have no doubt that had we been able to measure the impact of gender and minority status, the results would show an even more difficult road for women lawyers of color—as has been shown repeatedly in other studies on gender and race.[26]

The lack of women as lead counsel is not explained by a disparity in talent or ability between male and female trial lawyers. To the contrary, women can be highly effective courtroom advocates.[27] Jurors are receptive to women attorneys,[28] and many commentators have observed the potential benefits of representation by women lawyers in litigation and at trial.[29]

The overwhelming view today is that being an effective trial lawyer is not a matter of gender. As well-known litigator Elizabeth Cabraser put it, "There are as many ways to be a good, effective lawyer as there are people who want to be a good, effective lawyer."[30] And while not giving wholesale credit to gender stereotypes, Cabraser also recognized that gender stereotypes have play in courtroom effectiveness: "If you go by stereotyping, women have a great advantage because women have had to learn to listen—listening to judges is more important than talking to judges; listening to what the witnesses are saying is more important than saying what you've already decided you want to say. . . . Women have had to learn to do that."

We believe it is imperative that actions be taken to address and remedy the continuing gender imbalance in the courtroom. The result will be a much deeper pool of skilled attorneys available to represent clients in the courtroom and a cadre of trial lawyers who more closely reflect the diversity of our society, litigants, judges, and jurors.

The ABA Commission on Women in the Profession is planning to work with law schools, law firms, corporations, judges, and individual women lawyers around the country to identify the steps that can be taken so that women receive the training and courtroom experience needed to become skilled trial lawyers. We hope that state and local bar associations, trial lawyer groups, and women's bar organizations will shine a spotlight on the need to increase the number of women serving in lead counsel positions and hold programs focusing on best practices, such as those suggested here, to accomplish that goal.

A. LAW SCHOOLS

Law schools can play a major role in training women to serve as effective trial lawyers. Women law students should be encouraged to become trial lawyers and receive training and mentoring by trial attorneys to perfect their skills in moot court, legal aid clinics, and trial competitions. Teaching tools should be specifically designed to help women law students navigate the implicit biases they may face in the courtroom. Also, in light of the results of our study, law schools should advise women law students who want to become trial lawyers that, at the current time, government litigation positions will enhance their opportunity to play a lead role and gain first-chair experience.

B. LAW FIRMS

Law firms should focus on specific training for women litigators, recognizing that traditional means of obtaining trial experience may no longer suffice. Since certain large law firms or clients prefer that important depositions be taken only by partners or senior associates, and first-chair trial lawyers are overwhelmingly men, firms must be even more resourceful to ensure that all of their litigators, and particularly

their women litigators, are getting the experience that will allow them to be successful and confident in the courtroom.

Law firms should also encourage women lawyers to take *pro bono* cases or secundments in district attorney or public defender offices so that they will have the opportunity to get into court and hone their trial skills. Depositions of less important witnesses and custodians of records can also provide needed experience. Similarly, oral argument experience can be obtained in discovery disputes and less central motions in state and federal matters.

In addition, women lawyers should be strongly encouraged to participate in trial training and advocacy programs, those conducted both in-house or by outside organizations, such as the National Institute of Trial Advocacy (NITA) and bar association groups.

It is also important that law firms use metrics to track the professional development of their associates, so they receive the appropriate amount and level of trial experience, and take action to remedy any deficiencies.

Finally, we recommend that law firms avail themselves of the ABA Commission on Women's Grit Project Toolkit,[31] which provides training concerning "grit" and "growth mindset." These important traits, which can be learned, entail perseverance and resiliency and can be enhanced through deliberate practice. As one experienced trial judge has sagely observed, these traits are essential to becoming a great trial lawyer and enable litigators to learn and develop even from setbacks and defeats that they experience in the courtroom.[32]

C. CLIENTS

Clients can also play an important role in increasing the gender diversity of the trial bar. First, clients can be proactive in retaining women litigators to be their lead trial lawyer in their cases. In addition, clients can use their considerable economic clout with their law firms to insist that women be given prominent positions and significant responsibility in trial teams assembled by the firm for the client's matters. [33]

Clients can also keep track of the names of women attorneys in trial court opinions issued in the subject areas of importance to the client. This data can then serve as the basis for compiling names of experienced, successful women litigators, thus expanding the pool of "go-to" lawyers used by the company. Likewise, general counsel or senior in-house counsel can recommend women litigators they have retained to other in-house colleagues. In addition, companies can provide women litigators with specific training concerning the particular subject areas in which the company has most of its litigation.

Finally, clients can require firms to maintain metrics on how their company's cases are being staffed and the roles women lawyers are playing in their cases, with an eye toward ensuring an increase in the ranks of women trial lawyers.[34]

D. JUDGES

Judges are also integral to the efforts to increase the number of female first-chair trial lawyers. Judges can be mindful of appointing experienced, qualified women lawyers as lead counsel, liaison counsel, or members of the steering committee in MDL class action cases.[35] Judicial appointments of women litigators as special discovery or bankruptcy masters, trustees, or guardians ad litem can help increase the visibility and credibility of women lawyers, which will help them advance to equity partnership and develop as rainmakers.[36]

In addition, a number of judges have sought to incentivize law firms to provide greater opportunities for courtroom experience to their women and minority associates. For example, certain judges around the country have made it a practice of allowing argument on motions that would otherwise not be heard, as long as the advocate will be the associate working on the case, rather than the partner.

E. INDIVIDUAL WOMEN LAWYERS

Individual women lawyers need to take the initiative to develop the skills, tools, and expertise necessary to be an effective trial lawyer. Women lawyers can and should affirmatively reach out to seek assignment to cases where they will get to play an active role in the litigation and obtain trial experience. It is a given, of course, to learn the substantive law involved in the case

and master the rules of evidence and the rules of civil procedure. But there is more.

It is also important to be aware of gender dynamics in the courtroom and take steps to deal with or overcome them. Body language is critical, including maintaining an outward appearance of calm, even in moments of stress and pressure. Women need to "own" the courtroom with their presence and also with their voices. Soft voices of either gender can be distracting or ineffective at trial, but some women naturally have softer voices. Thus, they will need to adjust their volume so as to take full command of the courtroom. Moreover, women trial lawyers need to be mindful that their appearance is often carefully scrutinized by others in the courtroom. Like it or not, one's hairdo, shoes, and even the decision to wear slacks instead of a skirt can often engender comments.[37]

Women should seek opportunities to be courtroom-ready by taking trial advocacy classes and taking on *pro bono* matters where they are in the lead. Small cases are good for learning all of the key aspects of litigation and can give women the courtroom confidence that is so much a part of being an effective advocate. And we advise women never to turn down the opportunity to be part of a trial team. There are so many upsides to saying "yes" and enough downsides to saying "no" that, to our minds, the only right answer is "yes."

As discussed above, women lawyers have many advantages in the courtroom—they connect well with jurors, particularly with women jurors, who often comprise half or more of the jury pool; are viewed as more credible and trustworthy; and are in many instances overprepared rather than underprepared. Women litigators have ample reason to be confident in their effectiveness as trial counsel.

CONCLUSION

Fostering the success of women litigators redounds to the benefit of clients, who obtain top-notch representation in their cases; to law firms, which have made a substantial investment in hiring and training their women litigators; and to women lawyers themselves, who are able to realize their full potential and advance in their careers. We believe it is imperative for all concerned that women are encouraged and supported in their pursuit of a career in the courtroom and the role of lead counsel at trial.

We hope that this study will heighten awareness about the existence of significant gender disparities in the ranks of lead trial lawyers. We want to spur a dialogue that will result in concrete and effective actions to increase the numbers of women lead trial counsel. These recommended best practices will help women litigators develop their skills and obtain the same opportunities for leadership roles and success in the courtroom as their male colleagues.

Endnotes

1. Stephanie Scharf heads the Litigation Practice at Scharf Banks Marmor LLC, a nationally prominent women-owned law firm. She represents corporations in business litigation, class actions, product liability, and complex tort defense. Currently a commissioner of the ABA Commission on Women in the Profession, she is a former president of the National Association of Women Lawyers. Stephanie founded, designed, and directed from 2006 through 2013 the *NAWL Annual Survey of Retention and Promotion of Women in Law Firms*. She also designed and conducted the only national survey of women's initiatives in law firms, under the auspices of the NAWL Foundation. Stephanie received a JD and PhD in Behavioral Sciences from the University of Chicago and was Senior Study Director, NORC, before practicing law. Her email contact is **SScharf@scharfbanks.com**.

   Roberta ("Bobbi") Liebenberg is a senior partner at Fine, Kaplan and Black in Philadelphia, where she focuses her practice on class actions, antitrust, and complex commercial litigation. She served as past chair of the American Bar Association Commission on Women in the Profession from 2008 to 2011 and 2013 to 2014. She also served as chair of the ABA Task Force on Gender Equity. She is a founder and now chair of DirectWomen, the only organization whose mission is to increase the representation of women attorneys on corporate boards. She has been named by the *National Law Journal* as one of its "50 Most Influential Women Lawyers in America" (2007) and as one of the country's 75 most "Outstanding Women Lawyers" (2015). Her email is **rliebenberg@ finekaplan.com.**

2. *See* American Bar Association statistics, showing that in 1985 women accounted for about 40% of first-year law students and that percentage increased in subsequent years, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf.

3. See data from Minority Corporate Counsel Association about the percentage of women general counsel in the *Fortune* 500 and data reported by the NAWL Foundation and the National Association of Women Lawyers about the percentage of women equity partners, http://www.diversityandthebardigital.com/datb/november december 2014#pg20; NAWL Annual Surveys from 2006 to 2013, posted at www.nawl.org (http://www.nawl.org/p/cm/ld/fid=82). In contrast, women have fared substantially better in the judiciary than in private settings. For example, women comprise 35% of federal appellate judges and 32% of federal district court judges, as well as 34% of state appeals judges and 29% of all state judges, http://www.nawj.org/us_state_court_statistics_2014.asp; http://www.nwlc.org/resource/women-federal-judiciary-still-long-way-go-1.

4. The first eight NAWL surveys were designed, implemented, and largely reported by Stephanie A. Scharf. The eighth survey report was largely co-authored by Ms. Scharf and Ms. Liebenberg.

5. *See* criteria for Trial Bar Membership at https://www.ilnd.uscourts.gov/home/_assets/_documents/Trial%20Bar%20Instructions.pdf.

6. Before finalizing the sample, we eliminated (1) any case that was filed but then transferred out of the Northern District; (2) cases that were part of the 17 MDL cases filed in the Northern District in 2013; (3) cases where attorney appearance forms were not filed for both sides or were missing a Civil Cover Sheet, unless that information was available from other documents filed with the court; (4) cases that were *pro se* on both sides; (5) cases where all attorneys on one side withdrew; (6) cases involving foreign nations; and (7) any attorney who withdrew from the case.

7. Before finalizing the sample of criminal cases, we eliminated cases without attorneys appearing on both sides, prisoner transfers, and "suppressed" cases.

8. "Other statutes" are a wide-ranging collection of 17 types of actions not covered by other substantive legal categories on the federal Cover Sheet. The "other statutes" category includes such areas as false claims, antitrust, banks and banking, deportation, racketeer influenced and corrupt organizations (RICO), consumer credit, agriculture, and freedom of information, among others.

9. For other categories, such as nonprofit and corporate in-house attorney, the number of lawyers appearing was too small to analyze.

10. While we coded this variable, there were too few cases for a reliable analysis.

11. At first blush, this male/female ratio appears to be roughly consistent with the distribution of men and women in the legal profession; the American Bar Association reports that 36% of the legal profession are women. *See* American Bar Association Market Research Department, February, 2015. In the same vein, as of October, 2014, it is reported that 38% of Illinois attorneys were women. *See* http://www.iardc.org/2014_Annual Report_Highlights.pdf. However, it is unclear how much weight to give these estimates because of several unknown factors. First, the ABA had data on lawyers in 43 states, representing only 59% of the lawyer population. We do not know how the unreported population differs—with more or less women—than the reported population. Second, we suspect that the statistics about total lawyers include those who have been practicing for more than 40 years, which could lead to two countervailing trends: on the one hand, the older segment of the bar is overwhelmingly male (because of the demographics of law school graduates 40-plus years ago), while on the other hand, the older segment may be less actively engaged in litigation because they are either working part-time or are fully retired. *See, e.g.,* "Lawyer Retirement Policy and Opinion Explored in New Survey," http://www.altmanweil.com/index.cfm/fa/r.resource_detail/oid/51df5c74-cd4f-404a-b24e-5729df0c7092/resource/Lawyer_Retirement_Policy_and_Opinion_Explored_in_New_Survey.cfm. Third, current surveys show that women lawyers leave the private practice of law in greater numbers than men. *See* note 3, above. As a result of these and other factors, we do not believe there are fully reliable data about how many men and women nationally or in Illinois are active in a litigation practice. Short of better data, however, for purposes of this report we extrapolate from the reported data and assume that a little more than one-third of practicing litigation lawyers are women.

12. This analysis includes all cases where there were lawyers appearing on both sides and excludes the relatively few cases where one side appeared *pro se*. We note that in any given case, more than one attorney can designate himself or herself as lead counsel for the same client on the matter. Also, more than one attorney can designate himself or herself as trial attorney for the same client.

13. By inference, 28% of civil cases had both men and women appearing as lead counsel, and 21% of civil cases had both men and women appearing as trial attorneys.

14. We note that the majority of lawyers appearing as lead counsel come from small private firms (60%)—those not in the AmLaw 200 and also not solo practitioners. AmLaw 100 and 200 firms—the nation's top 200 firms by gross revenue—account for 15% of lawyers appearing as lead counsel; solo practitioners account for 9% of lead counsel; government lawyers account for 14% of lead counsel; and there is a sprinkling of lead lawyers from other settings.

15. The trial attorney designation shows a similar pattern for class actions.

16. Of the 135 lawyers who entered appearances in criminal cases, 119 appeared as lead counsel.

17. *See* Federal Judicial Caseload Statistics 2014 at http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/C00Mar14.pdf.

18. Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U.L. Rev 71, 93 n. 102, 120 n. 251, Table 1 at 139-40 (April 2015) (presenting empirical study of repeat players in MDLs and noting gender gap within repeat players); Jaime Dodge, *Facilitative Judging: Organizational Design in Mass Tort Multidistrict Litigation*, 64 Emory L.J. 329, 363–67 (2014) (presenting empirical data on the significant gender gap in plaintiffs' executive and steering committee and defense side appointments).

19. EEOC, Diversity in Law Firms, http://www.eeoc.gov/eeoc/statistics/reports/diversitylaw/lawfirms.pdf. More recently, in 2009 through 2014, for example, approximately 45% of associates in law firms were women. *See* NALP publication, "Diversity Numbers at Law Firms Eke Out Small Gains: Numbers for Women Associates Edge Up After Four Years of Decline" at Table 1, http://www.nalp.org/lawfirmdiversity_feb2015#table1.

20. *See, e.g.,* Roberta Liebenberg, "Plugging the 'Leaky Pipeline' of Women Attorney Attrition," ABA The Young Lawyer Vol. 15 No. 9 (July/Aug. 2011); Roberta Liebenberg, "Has Women Lawyers Progress Stalled?", Legal Intelligencer, May 28, 2013.

21. *See, e.g.,* M. C. Noonan and M. E. Corcoran, "The Mommy Track and Partnership: Temporary Delay or Dead End?" *Annals of the American Academy of Political and Social Science*, Nov. 2004, vol. 596, no. 1, 130–150.

22. Implicit biases are unconscious biases that everyone has, both men and women, and that affect what we notice about people, what we remember about them, how we interpret their behavior, and the actions we take in relation to them.

23. "A Career in the Courtroom: A Different Model for the Success of Women Who Try Cases," *DRI—The Voice of the Defense Bar*, 2004, at pp. 11, 58.

24. *Id.* at p.11;"Women in the Courtroom: Best Practices Guide," DRI, 2007, at p.6, http://www.google.com/url?sa= t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCAQFjAA&url=http%3A%2F%2Fwww.dri.org%2Fdri%2Fwebdocs%2Fwomen_in_the_courtroom_best_practices_guide.pdf&ei=i2tqVMrHAtCkyASv0ILYBA&usg=AFQjCNGKG2u8yW5-cU0IRf5d_63bXlKUkQ&sig2=rPrkNLznu_-qyj-Edj2JUQ&bvm=bv.79908130,d.aWw.

25. *Id.*

26. *See, e.g.,* National Association of Women Lawyers Annual Survey of Retention and Promotion of Women Lawyers, for the years 2008 and 2013, http://www.nawl.org/p/cm/ld/fid=82#surveys; "Visible Invisibility: Women of Color in Fortune 500 Legal Departments," American Bar Association Commission on Women in the Profession, 2012; "Visible Invisibility: Women of Color in Law Firms," American Bar Association Commission on Women, 2006.

27. Lynne Bratcher, "Women Trial Lawyers—As Good or Better Than Men," Nov. 2009, http://uncommoncourage.blogspot.com/2009/11/women-trial-lawyers-as-good-or-better.html.

28. *See, e.g.,* Victoria Pynchon, "Juror Attitudes to Women in the Courtroom," Feb. 2012, http://www.forbes.com/sites/shenegotiates/2012/02/15/juror-attitudes-to-women-in-the-courtroom; Bratcher, "Women Trial Lawyers—As Good or Better Than Men," *id.* at note 27; Jan Nielsen Little, "Ten Reasons Why Women Make Great Trial Lawyers," June 2006, http://www.kvn.com/templates/media/files/pdfs/Jan_Column_June2006.pdf.

29. *Id.* at notes 27 and 28; *see also* L. Spano and J. L. Meihls, "You Go Girl! How Women Can Gain an Advantage in the Courtroom," Trial Partners, Inc., http://www.trial-partners.com/images/yougogirl.pdf.

30. Founder of Lieff, Cabraser, Heimann & Bernstein LLP, quoted in H. Hayes, "Women Winners of the Plaintiffs' Bar," http://www.americanbar.org/content/dam/aba/publishing/perspectives_magazine/women_perspectives_womenwinners.authcheckdam.pdf.

31. *See* ABA Commission on Women, www.ambar.org/grit.

32. *See* Judge Mark Bennett, "Eight Traits of Great Trial Lawyers: A Federal Judge's View on How to Shed the Moniker, 'I Am a Litigator,'" *The Review of Litigation*, Winter 2013, Vol. 33, No. 1; "Grit, Growth Mindset, and Being a Great Trial Lawyer," *Woman Advocate*, Section of Litigation, March 9, 2015; http://apps.americanbar.org/litigation/committees/womanadvocate/articles/winter2015-0315-grit-growth-mindset.html.

33. *See* "Power of the Purse: How General Counsel Can Impact Pay Equity for Women Lawyers," ABA Task Force on Gender Equity, www.americanbar.org/GenderEquity.

34. *Id.*

35. *See* "Standards and Best Practices for Large and Mass-Tort MDLs," at *Best Practice* 4E, pp. 58–60 ("The transferee judge should take into account whether the leadership team adequately reflects the diversity of legal talent available and the requirements for the case."), Dec. 2014, http://law.duke.edu/judicialstudies/research.

36. *See* Roberta Liebenberg, "The Importance of Diversity in a Court's Exercise of Its Appointment Powers," *Counterbalance*, Fall 2011, at 36, http://www.nawj.org/files/counterbaIance/cb31 2.pdf.

37. Karen L. Hirschman and Dr. Ann T. Greeley, "Trial Teams and the Power of Diversity," DecisionQuest ("Jurors more often make comments about the dress and physical appearance of women lawyers.") *See* http://www.decisionquest.com/utility/showArticle/?objectID=1678.

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A CULTURAL PLURALIST CASE FOR AFFIRMATIVE ACTION IN LEGAL ACADEMIA

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This Article is about affirmative action in legal academia. It argues for a large expansion of our current commitment to cultural diversity on the ground that law schools are political institutions. For that reason, they should abide by the general democratic principle that people should be represented in institutions that have power over their lives. Further, large scale affirmative action would improve the quality and increase the value of legal scholarship.

My goal is to develop in the specific context of law school affirmative action the conception of "race consciousness" that Gary Peller describes and advocates in his essay in this issue of the *Duke Law Journal*.[1] We need to be able to talk about the political and cultural relations of the various groups that compose our society without falling into racialism, essentialism, or a concept of the "nation" tied to the idea of sovereignty. We need to conceptualize groups in a "post-modern" way,[2] recognizing their reality in our lives without losing sight of the partial, unstable, contradictory character of group existence.

I present my argument in the form of a dialogue with our society's dominant way of understanding race and merit in academia, which I call "colorblind meritocratic fundamentalism." I use Randall Kennedy's ar-

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* Professor of Law, Harvard Law School. I would like to thank Fran Ansley, Kyra Armstrong, Regina Austin, Ed Baker, Robin Barnes, Derek Bell, Marjorie Benson, Jamie Boyle, Kim Crenshaw, Richard Delgado, Karen Engle, Neil Gotanda, Randy Kennedy, Larry Kolodney, Martha Minow, Gary Peller, Merle Weiner, and David Wilkins. Special thanks to Peter Gabel.

1. Peller, *Race Consciousness*, 1990 DUKE L.J. 758. Two other articles that strongly influenced this one are Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law*, 62 MINN. L. REV. 1049 (1978) [hereinafter Freeman, *Legitimizing Racial Discrimination*], and Freeman, *Racism, Rights and the Quest for Equality of Opportunity: a Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295 (1988) [hereinafter Freeman, *Racism*].

2. *See (very) generally* J.-F. LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (G. Bennington & B. Massumi trans. 1984); J. GALLOP, THINKING THROUGH THE BODY (1988). The writer who has most influenced my thinking about race is Harold Cruse. *See* H. CRUSE, THE CRISIS OF THE NEGRO INTELLECTUAL (1967); H. CRUSE, REBELLION OR REVOLUTION? (1968).

ticle, *Racial Critiques of Legal Academia*[3] as principal representative of this point of view. Throughout, I will be responding to Kennedy's general understanding of how we should organize legal academic life in a situation of racial and cultural division, rather than to his specific attacks on works of race-conscious scholarship.

I think the articles Kennedy discusses[4] and the others in the genre of Critical Race Theory,[5] represent the most exciting recent development in American legal scholarship. On some issues, I agree with Kennedy's criticisms.[6] But overall I see the articles as developing positions that I share, and I don't find his article convincing as a refutation of them.[7] I

3. R. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989). For other responses to Randall Kennedy's article, see *Colloquy: Responses to Randall Kennedy's* Racial Critiques of Legal Academia, 103 HARV. L. REV. 1844 (1990) (responses by Brewer, Ball, Barnes, Delgado, and Espinoza); Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990).

4. Bell, Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 1 (1979) [hereinafter Bell, *Minority Admissions*]; D. BELL, *The Unspoken Limit of Affirmative Action: The Chronicle of the DeVine Gift*, in AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 140 (1987) [hereinafter D. DELL, AND WE ARE NOT SAVED]; Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984) Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1 (1988) [hereinafter Matsuda, *Affirmative Action*]; Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) [hereinafter Matsuda, *Looking to the Bottom*].

5. Critical Race Theory is an "emergent" phenomenon, and it may turn out that these articles do not have as much in common as they appear to me to do. This list is illustrative only. I am not familiar with the entire literature. This list is not an attempt to establish a canon. Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539; Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201 (1982); Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990); Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Kenyatta, *Critical Footnotes to Parker's "Constitutional Theory,"* HARV. BLACKLETTER J., Spring 1985, at 49; Lâm, *The Kuleana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land*, 64 WASH. L. REV. 233 (1989); Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324 (1987); Lopez, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305 (1989); McDougall, *The New Property vs. the New Community*, 24 U.S.F. L. REV. 399 (1990); Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 SAN DIEGO L. REV. 1043 (1988); Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987). *See generally* Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993 (1989).

6. Like Randall Kennedy, I see it as a weakness of current attempts at radical politics in the United States that we tend to sentimentalize all "victims of oppression." Another weakness is a tendency to exaggerate the relative importance of current racism in explaining racially unjust outcomes, and, by contrast, to underestimate the relative importance of past racism, and non-race economic and institutional factors.

7. With Derrick Bell, I regard race, a proxy for connection to a subordinated cultural community, as an intellectual credential in hiring and promotion decisions. *See infra* Part II. A. I agree with Mari Matsuda, as paraphrased by Kennedy, that "by the exclusions imposed by existing prac-

think it's best to leave it to the authors to debate him point by point. I am more interested in working out a left wing (white ruling class male academic) take on the underlying questions than I am in discussing whether his article is "fair."

Part I presents colorblind meritocratic fundamentalism, a system of ideas about race, merit and the proper organization of academic institutions. Fundamentalism is a critique of race-conscious decisionmaking in academia. Part II presents what I call the political and cultural cases for large-scale affirmative action. The political case is based on the idea that the intelligentsias of subordinated cultural communities should have access to the resources that are necessary for groups to exercise effective political power. The cultural case is based on the idea that a large increase in the number of minority legal scholars would improve the quality and increase the social value of legal scholarship, without being unfair to those displaced.

Part III presents a "cultural pluralist" understanding of American life, one which recognizes that there are dominant and subordinate communities competing in markets and bureaucracies. It proposes that the political and cultural good effect to be anticipated from affirmative action is the development within legal scholarship of the ideological debates that minority intelligentsias have pursued in other fields. Part IV takes up the question whether race-conscious legal academic decisionmaking "derogates from the individuality" of minority scholars. It concludes that we can judge scholarship without regard to culture and ideology only if we are willing to use criteria of judgment that leave out the most important aspects of legal academic accomplishment. Part V is a brief conclusion.

I. COLORBLIND MERITOCRATIC FUNDAMENTALISM

My attitude toward meritocracy grows from my experience as a white male ruling class child who got good grades, gained admission to one elite institution after another, and then landed a job and eventually tenure at Harvard Law School. I belong to a group (only partly generationally defined) that since some point in childhood has felt alienated within this lived experience of working for success according to the criteria of merit that these elite institutions administer.

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tices, legal academia loses the sensibilities, insights, and ideas that are the products of racial oppression." R. Kennedy, *supra* note 3, at 1778. *See infra* Part III. B. And I agree with Richard Delgado that we are entitled to judge with suspicion the work produced in a field like constitutional law on the basis of the "status," i.e., the cultural community, of the authors. *See infra* Part IV. C.

This alienation had and has two facets. First is a pervasive scepticism about the "standards" according to which we have achieved success. Always subject to the charge that we are simultaneously biting the hand that feeds us and soiling the nest, we just don't believe that it is real "merit" that institutions measure, anywhere in the system; success is a function of particular knacks, some socially desirable (being "smart") and some not (sucking up)—and of nothing more grandiose. This is not rejection of the idea that some work is better than other work. It is rejection of the institutional mechanisms that currently produce such judgments, of the individuals who manage the institutions, and of the substantive outcomes.

The second facet is a sense of shame and guilt at living in unjust, segregated racial privilege, combined with a sense of loss from the way we have been diminished by isolation from what the subordinated cultural communities of the U.S. might have contributed to our lives, intellectual, political and personal. I might add that the members of this wholly hypothetical group have not done much (but not nothing, either) about the situation.

These attitudes were held by a scattering of people within elite institutions, and we had little contact with people outside that milieu. The experience on which the reaction was and is based is limited. It's hard to know whether the attitudes are really right. It's hard to know whether there is any alternative to the actual system that would work.

During the 1960s, these attitudes fed into the much larger complex of the New Left, the Movement and the Women's Movement. The participants came from many different sectors of society. They were male and female, white and black, upper middle, middle, and—to a limited extent—working class. The whole thing was over before the deep differences among them were worked into anything like coherence. It remains an open question just how the anti-meritocratic alienation I have described dovetails or doesn't with the attitudes of people who come from disadvantaged or non-elite backgrounds.

When political alliance and real communication between black and white and male and female radicals fell apart in the 1970s, the project of working out a critique of meritocracy split apart too. But before that happened, there was a counterattack, associated with the general reaction against 1960s militancy and specifically addressed to the various contradictory radical critiques that had gained some currency. This reaction, which I call fundamentalism, won the day. It became one of the ideological legitimaters of society's retreat from messing around with established institutions.

Colorblind meritocratic fundamentalism is a set of ideas about race and merit. Like other substructures within the consciousness of a time, it is no more than one of many fragments out of which people construct their personal philosophies. It is intrinsically neither right nor left, male nor female, black nor white. Fundamentalism has a long history within American liberalism, and within orthodox Marxism, as well as within the conservative tradition.

A. *Fundamentalism as a System of Ideas*

Fundamentalism consists of a set of tenets.[8] Each is a slogan with appeal of its own. They are rarely presented all together. Believers deploy them one by one as the argument may require. Some tenets are about knowledge and others about the social value of individuals and their work.

1(a.) Knowledge:
- i. Attributes of the product rather than of the producer determine the value of purported contributions to knowledge.
- ii. In judging the value of a product, the race, sex, class, and indeed all the other personal attributes of the producer are irrelevant (derived from (i)).

Kennedy identifies these tenets with "the ethos of modern science."[9] The scientific ideal is linked to an image of how intellectual work is done.

1(b.) The production of knowledge:
- i. We produce work by individual application of talent to inert matter.
- ii. The value of the work is a function of the quality of the individual talent that produced it rather than of the inert matter of experience out of which the individual formed it (derived from (i)).

Fundamentalism includes the complex of liberal attitudes toward race that Peller calls integrationism,[10] but which seems to me better called colorblindness.[11] Kennedy's article displays better than any recent document I know of the way meritocracy and colorblindness can be made mutually supportive.[12]

For our purposes here, the important tenets of colorblindness are as follows:

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8. This Section is indebted to Peller, *supra* note 1 and to Freeman, *Racism, supra* note 1.

9. R. Kennedy, *supra* note 3, at 1772-73.

10. Peller, *supra* note 1, at 767-71.

11. *See* N. Gotanda, A Critique of "Our Constitution is Colorblind": Racial Categories and White Supremacy (1990) (unpublished manuscript) (available from the author).

12. I do not mean to reify either. One might be a meritocrat and also a nationalist, in Peller's terminology, or a person indifferent to the racial consequences of meritocratic processes. Likewise, one might favor colorblindness and still believe wholeheartedly in the critique of meritocracy.

2(a.) "Prejudice" and "discrimination" are defined in opposition to "assessment of individuals on their merits":

i. Merit is a matter of individual traits or products.

ii. People are treated irrationally and unjustly, in short they are discriminated against, when their merit is assessed according to their status rather than according to the value of their traits or products (derived from (i)).

2(b.) Racial discrimination as stereotyping:

i. There is no reason to believe that race in any of its various socially constructed meanings is an attribute biologically linked to any particular meritorious or discreditable intellectual, psychological or social traits of any kind.

ii. Racial discrimination is irrational and unjust because it denies the individual what is due him or her under the society's agreed standards of merit (derived from (i)).

From these two sets of tenets, the fundamentalist moves easily to propositions about the proper institutional organization of academic (and other) rewards and opportunities.

3. The institutional organization of the production of knowledge:

i. Academic institutions should strive to maximize the production of valuable knowledge and also to reward and empower individual merit.

ii. Institutions distributing honor and opportunity should therefore do so according to criteria blind to race, sex, class, and all other particularities of the individual except the one particularity of having produced work of value (derived from (i) plus 1 and 2).

B. *Colorblind Meritocracy and Affirmative Action*

Fundamentalism does not preclude adopting affirmative action programs so long as we recognize that they conflict with meritocratic allocation, and that the sacrifice of meritocratic to race-based outcomes is a social cost or loss. But, in this view, versions of affirmative action that obscure the cost by distorting standards in favor of minorities end up compounding it. They go beyond departure from merit in particular cases to endanger the integrity of the general system of unbiased judgment of value.

The political and cultural arguments for affirmative action I put forward in the next section are consistent with fundamentalism in that they openly abandon the use of colorblind criteria, rather than distorting them in order to achieve desirable results. They do not treat race as an index of merit in the sense of making it a source of honor in and of itself, nor

presume that minority scholars are, just by virtue of their skin color, "better" scholars.[13]

There remains an important area of disagreement. Fundamentalism treats a colorblind meritocratic system as the ideal. Kennedy's article, for example, concedes (even affirms) that our actual system departs very far from the ideal,[14] but urges that we should therefore redouble our commitment to purifying it:

> It is true . . . that there are many nonracial and ameritocratic considerations that frequently enter into evaluations of a scholar's work. The proper response to that reality, however, is not to scrap the meritocratic ideal. The proper response is to abjure *all* practices that exploit the trappings of meritocracy to advance interests . . . that have nothing to do with the intellectual characteristics of the subject being judged.[15]

If the concern is with racial justice, then loyalty to meritocracy suggests two paths. First, according to Kennedy, "there is nothing necessarily wrong with race-conscious affirmative action"[16] if one has a good reason for it, but the reasons he imagines include neither cultural diversity as an *intellectual* desideratum nor the recognition of the cultural and ideological relativity of the standards that faculty members apply in distributing jobs and honors.

> [O]ne might fear that without a sufficient number of minority professors a school will be beset by an intolerable degree of discord or believe that an institution ought to make amends for its past wrongs or insist upon taking extraordinary measures in order to integrate all socially significant institutions in American life.[17]

Second, Kennedy favors attacking the underlying social conditions, particularly the class stratification, that reduce the pool of minority applicants.[18]

The point about affirmative action seen as peace making, reparations or integration for its own sake, and also about increasing the pool of minority applicants, is that all of them allow us to preserve a sharp boundary between meritocratic decision and race-based decision:

> I simply do not want race-conscious decisionmaking to be naturalized into our general pattern of academic evaluation. I do not want race-conscious decisionmaking to lose its status as a deviant mode of judg-

13. None of the authors Kennedy criticizes take this position either.

14. R. Kennedy, *supra* note 3, at 1806.

15. *Id.* at 1807.

16. *Id.*

17. *Id.*

18. *Id.* at 1768, 1770, 1814 n.296.

> ing people or the work they produce. I do not want race-conscious decisionmaking to be assimilated into our conception of meritocracy.[19]

The political and cultural cases for affirmative action propose to do each of these things.

II. THE POLITICAL AND CULTURAL ARGUMENTS FOR AFFIRMATIVE ACTION

A. *The Political Case*

I favor large scale race-based affirmative action, using quotas if they are necessary to produce results. The first basis for this view is that law school teaching positions are a small but significant part of the wealth of the United States. They are also a small but significant part of the political apparatus of the United States, by which I mean that the knowledge law teachers produce is intrinsically political and actually effective in our political system. In short, legal knowledge is ideological.[20]

A second basic idea is that we should be a culturally pluralist society that deliberately structures institutions so that communities and social classes share wealth and power. The sharing of wealth and power that occur automatically, so to speak, through the melting pot, the market and meritocracy are not enough, according to this notion. At a minimum, cultural pluralism means that we should structure the competition of racial and ethnic communities and social classes in markets and bureaucracies, and in the political system, in such a way that no community or class is systematically subordinated.[21]

From these two ideas, I draw the conclusion that, completely independently of "merit" as we currently determine it,[22] there should be a

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19. *Id.* at 1807.

20. *See* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys 2d ed. 1990); D. Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 1685 (1976) [hereinafter D. Kennedy, *Form and Substance*]; D. Kennedy, *The Structure of Blackstone's Commentaries,* 28 BUFFALO L. REV. 209 (1979); D. KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM 14-32 (1983).

21. *See* Freeman, *Legitimizing Racial Discrimination, supra* note 1; Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection,* 61 N.Y.U. L. REV. 1003 (1986); R. Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate,* 99 HARV. L. REV. 1327, 1335-36 (1986) [hereinafter R. Kennedy, *Persuasion and Distrust*]; R. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court,* 101 HARV. L. REV. 1388, 1424 (1988); C. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32-45 (1987); Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis,* 63 TEX. L. REV. 387, 390-401, 429-30 (1984); Ansley, *supra* note 5, at 1063-64.

22. "Independently of 'merit' " means regardless of whether the candidates in question would be hired or promoted if the law schools applied their current standards without taking affirmative action goals into account. I put the word "merit" in quotation marks because, in my twenty years as a law school faculty member, I have quite consistently found myself voting "on the merits," without regard to affirmative action, for minority teaching candidates who did not get the job and against

substantial representation of all numerically significant minority communities on American law faculties. The analogy is to the right to vote, which we refuse to distribute on the basis of merit, and to the right of free speech, which we refuse to limit to those who deserve to speak or whose speech has merit. The value at stake is community rather than individual empowerment. In the case of affirmative action, as in those of voting and free speeeh, the goal is political, and *prior to* the achievement of enlightenment or the reward of "merit" as determined by existing institutions.

Race is, at present, a rough but adequate proxy for conneetion to a subordinated community, one that avoids institutional judgments about the cultural identity of particular candidates. I would use it for this reason only, not because race is itself an index of merit, and in spite of its culturally constructed character and the arbitrariness involved in using it as a predicter of the traits of any particular individual. My argument is thus addressed to only one of the multiple forms of group subordination, though it could be extended to gender, sexual preference, social class, and ethnicity within the "white community."[23]

The political argument includes the idea that minority communities can't compete effectively for wealth and power without intelligentsias that produce the kinds of knowledge, especially political or ideological knowledge, that will help them get what they want. To do this, they need or at least could use some number of legal academic jobs. It also includes the idea that cultural diversity and cultural development are

white candidates who did. This means that I disagree with my own school's institutional application of the merit standard before we even get to questions of affirmative action. Extensive indirect exposure to hiring and promotion decisions at a range of other schools suggests to me that they are not different. I would say most law school faculties give too much weight to paper credentials, overvalue old-boy conneetions, make bad intuitive judgments based on interviews, and tend to misevaluate the substantive quality of presentations and written work when applying formally colorblind standards. For these reasons, the current institutional interpretation of standards yields no more than a very loose approximation of what I myself regard as merit. For a somewhat different but I think accurate critique of elite law school hiring, see Carter, *The Best Black, and Other Tales,* 1 RECONSTRUCTION 6 (1990). For a critique of Carter, see *infra* Part IV. D. *See also* Bartholet, *Application of Title VII to Jobs in High Places,* 95 HARV. L. REV. 945 (1982).

23. *Cf.* Appiah, *The Uncompleted Argument: Du Bois and the Illusion of Race,* in "RACE," WRITING AND DIFFERENCE 21 (H. Gates ed. 1986). I see the groupings that Amerieans identify as "racial," such as the black, Hispanic, Asian-American, or Native American communities as different from communities characterized as "ethnic," such as the Irish-American, Italian-American, etc. The difference I am asserting derives not from the biology of group members, but from their different places in the American ideology of racial and group identity and from the historic practice of differential treatment in the context of subordination. *See* W. JORDAN, THE WHITE MAN'S BURDEN: HISTORICAL ORIGINS OF RACISM IN THE UNITED STATES (1974); G. FREDRICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY (1981); N. Gotanda, *supra* note 11.

good in themselves, even when they do not lead to increased power for subordinated communities in markets and political systems.

The political case is complicated by the fact that when law faculties distribute jobs in legal academia, they do more than distribute wealth and the power to participate in politics through the production of ideology. They also distribute power to influence who will participate in the future, because those they choose will vote on those decisions. In deciding who to hire or promote according to colorblind criteria, law faculties make culturally and ideologically contingent judgments about what candidates are most promising or deserving, *and* about who should make these very judgments in the future. Given the ideological and cultural character of these choices, and their (limited but significant) political impact, white males have no more business monopolizing the process of distributing the benefits than they have monopolizing the benefits themselves.[24]

A serious obstacle to this proposal is the "pool problem."[25] The number of minority teaching candidates is limited, and the prospects for the future are clouded by the decline in the number of black college graduates. (The situation is different for each cultural community.) I would therefore limit affirmative action by imposing a floor or cut-off point in the form of a requirement of minimum actual or anticipated competence in performing the instructional function of a law professor.[26]

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24. This is not a "reparations" argument for affirmative action, since it is not dependent on establishing for any particular cultural community that a history of racial oppression justifies special measures in the present. The idea is that if the politically dominant groups decide to annex, transport, or admit into the United States large numbers of people who form a subordinated cultural community, then they should make sure those people have the resources to function in the national political arena. But the argument is not averse to reparations, and I favor them where there has been a history of oppression. For a reparations argument, see Matsuda, *Looking to the Bottom, supra* note 4.

25. *See* R. Kennedy, *supra* note 3, at 1765-70.

26. Incorporating a floor into the proposal means that faculties that decide to adopt it will have to negotiate over what should be considered minimum qualifications. If a faculty set the floor very high, the result would be little change in existing practices, since all but the candidates who would have been considered anyway would be excluded. For the proposal to have an impact, the faculty adopting it would have to intend to change its practices by identifying a significant pool of candidates of color considered minimally qualified, and then choosing "the best" from among them until the faculty had achieved a reasonable representation of minorities. The terms "reasonable representation" and "minimum qualifications" are vague, but this does not seem to me a drawback to the proposal. We are talking about changes at the level of particular law faculties rather than about legislation or administrative or even Association of American Law Schools (AALS) guidelines. No faculty would adopt the proposal unless there was a majority committed to a quite radical change in existing practices. That majority could choose to define the new policy much more specifically, say in terms of quotas and lists of credentials, rather than leave it vague. But another faculty might see the vagueness of the standard as valuable for "equitable flexibility" rather than viewing it as a drawback.

It would seem to me a problem (requiring tradeoffs) if the implementation of this view would be unfair to individual whites excluded from teaching jobs, or if it would lead to a decline in the quality of legal scholarship. But I believe that massive affirmative action would not be unfair to excluded whites, and that it would improve the quality of legal scholarship as I assess it. It would also have, I think, a beneficial effect on the quality of life, by undermining the fetishistic, neurotic and just plain irrational attitude toward "standards" and merit-based "entitlement" that prevails in legal academia.

B. *Affirmative Action and the Quality of Work*

The standards that law schools apply in deciding who to hire and who to promote function to exclude scholars from cultural communities with a history of subordination. Because we exclude them, we get contributions to legal knowledge from only a small number of people with ties to those communities. I believe that if there were a lot more such people, they would make contributions that, taken as a whole, would have a culturally specific character. Judging by my own culturally and ideologically contingent standards, I think they would produce outstanding work not otherwise available. Law schools would do better to invest resources in evoking this contribution than in the fungible white male candidates at the margin who get jobs under the existing selection systems. (Though quite a few who appear marginal turn out to be terrific.)

I don't mean that there would be a minority "line." But there would be a variety of positions, debates and styles of legal academic writing that everyone would identify as resulting from the rise of minority legal culture. Some of these debates, positions and styles would be produced by whites, but no less a product of change in the racial makeup of the academy. Some of the new work would certainly look wrong or mediocre to me. But some would knock our socks off, in unexpected ways and in ways already presaged by Critical Race Theory.[27] I have no doubt that in terms of the social and intellectual value of scholarly output, legal

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The floor, as I define it in the text, refers only to instructional functions of the law professor. I would leave writing out altogether, for at least three reasons. First, existing criteria of merit do not seem to me either to predict or to reward *ex post* the particular qualities that make for what I regard as scholarly excellence. Second, arbitrariness and ideological disagreement about what scholarship is good scholarship chill the academic freedom and undermine the quality of life of candidates and assistant professors. Third, since the rationale of the proposal is partly political empowerment of cultural communities that are subordinated by the dominant white community, it is undesirable to invite the white male majorities of our law faculties to engage in exclusion from the pool of "minimally qualified" scholars of color according to criteria of "quality" that have a heavy ideological load.

27. *See supra* notes 4 & 5.

academia would be better off than it is now. We have lost a lot by preventing minorities from making this contribution. We can't get it unless we give them the resources, in the form of legal academic jobs, to make it.

Second, I think some legal scholarship is exciting and enriching and stimulating, but that's not very much. People seem to produce the good stuff through neurotic, often dramatic processes, full of twists and turns and surprises. I think most legal scholarship is pretty much done by the numbers, and it's hard to make any sharp quality differential between articles. This stuff is useful. Writing it is hard work. But it doesn't take deep scholarly quality. There are many, many people who are excluded by the "standards" from teaching law who could do it as well or as mediocrely as those who do it in fact. For this reason, I think we would lose little in the way of quality even if massive affirmative action failed to produce the rich harvest of new ideas and approaches that I anticipate.

The possibility of (dramatically) improving legal scholarship provides a second strong reason for a massive affirmative action program. It is not just that there is no trade-off between quality and affirmative action. The existing system denies us a benefit. Even in the absence of the political justification, I would favor a new system on this ground.[28]

C. *Affirmative Action and White Entitlements*

Suppose a law faculty adopts this version of affirmative action because it hopes to *improve* the quality of legal academic work, as well as because it is politically more just. When the faculty prefers a minority job applicant over a white even though the present system would give the job to the white, it does so, in part, because it thinks that in the long run this approach will improve scholarship and teaching. We are treating race as a credential (as a proxy for culture and community) because we

28. Yet a third important reason for affirmative action is that it will improve the quality of legal pedagogy. The political case anticipates that increasing the number of law teachers of color will influence the experience of law students of color in directions that will empower subordinated communities. This is a part of the general strategy of building minority intelligentsias so that subordinated communities can participate effectively in the political process. The cultural case anticipates that scholars of color will have an impact on the substantive content of what is taught about particular legal issues and on the composition of the curriculum and on the syllabi of particular courses. In all these areas, "white moderate" bias is rampant, by which I mean that white moderate ideological blinders render minority issues invisible. But affirmative action is also important to improve the educational experience and the practical value of legal education for people of color. The availability of "role models" is only a part of what is at issue here. Improvements should derive in part directly from what minority teachers do in and out of the classroom, and in part from their influence on what white teachers do. And the benefits should run to white students as well as to students of color. *See* Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1 (1989); *cf.* Lopez, *supra* note 5.

anticipate terrific work from some of these applicants, work that we don't think we can get from the whites they replace. The reason we don't expect it from them is that we believe that work from authors with ties to subordinated communities is likely to have different excellent qualities from work from inside the dominant community.

Are the excluded whites "entitled" to prevent this improvement in scholarship? I would say they are not. Even if all the colorblind criteria of academic promise that we can think of favor a white candidate, he or she lacks something we want in some substantial number of those we will hire. He or she has less promise of doing work with the particular strengths likely to derive from connection to a subordinated cultural community.

The white male law teaching applicant whose resume and interviews would get him the job were it not for affirmative action has indeed accomplished something, and will not be rewarded for it with the job. But if he understands in advance that the terms of the competition are that he is competing against other white males, for the limited number of slots that a politically just system makes available to people who have had his advantages, then I don't think he has any reason to complain when a job he would have gotten under a different (less just) system goes to a minority applicant. But the excluded white candidates do not have as strong a claim as assumed above.

First, those who win out in the existing system have no claim to be "the best," even according to the colorblind criteria, because the underlying systems of race and class and the system of testing excludes so many potential competitors from the very beginning. The competition in which our teaching applicants and tenure candidates win out is restricted, with only a tiny number of notable exceptions, to people born within a certain race-class distance of those positions. At every step, the differences in educational resources and the testing process screen out millions of people who might be able to do the job of law professor better than those who end up getting it. As against those excluded from the competition by race and class and the vagaries of the testing system, those who win out have only a very limited claim of entitlement.

Second, the "standards" that law schools apply in hiring assistant professors and promoting them to tenure are at best very rough proxies for accomplishment as we assess it after the fact. People who get good grades and have prestigious clerkships often turn out to be duds as legal scholars and teachers by the standards of those who appointed them. People with less impressive resumes often turn out to be terrific scholars and teachers. People who get tenure on the basis of an article that looks good to the tenure committee (and those of the faculty who read it) often

never produce anything of comparable quality again. "Entitlements" based on these rough proxies are worthy of only limited respect. The white males who would be displaced to make way for large numbers of minority scholars would be hurt, but not in a way that would be unfair, given the importance of the goals to be achieved.[29]

Third, law school faculties apply a pedestrian, often philistine cultural standard in judging white male resumes, interviews and presentations at the entry level, and white male teaching and tenure work at the promotion level. They administer this pedestrian, philistine standard with an unconscious but unmistakable moderate conservative to moderate liberal bias. And they serve it up with a powerful seasoning of old-boyism and arbitrary clique preference *as between white males.* This doesn't mean a more pluralist academy would necessarily do better or produce more political diversity. It does mean for me that there is an element of laughable exaggeration in the claims often made for the meritocratic purity of existing arrangements. The people who would win out in this system were it not for affirmative action have weak claims of unfairness just because they are not so wonderful, even by comparison with other white males, that they can regard themselves as innocent victims.

29. The mainly white male candidates who win jobs and tenure under the existing system do so through a difficult, effortful, often draining process of academic competition, before and during law school. The criteria of success, mainly getting good grades on exams, writing good student papers, and making professors think you are intelligent and "sound" (not too far out of the political mainstream) have real bite. I do not see them as arbitrary in the sense that there is enormous variance in how different professors evaluate a given student, or that just anyone can do equally well, or that grades are random. But the fact that there is a difficult process of selection does not mean we should regard those who get through the screening as having "merit" that "entitles" them to the jobs we offer.

The undergraduate and law school work that qualifies students for jobs usually has no academic "merit" in the sense of making permanent contributions to knowledge. Its function is to develop skills that will pay off, if they do pay off, later on. Possession of the skills is no guarantee of success, and people who have less skill at the competition often produce better work in the end than those with more. The academic performances that get one into law school and then into the legal academic job market are at best a weak proxy for the merit of actually producing valuable legal scholarship or teaching.

Even the criteria we apply in granting tenure are no more than proxies for merit in the lifetime careers we are distributing. We grant future job security on the basis of past performance, without subsequent readjustment if the candidate turns out to lack merit over the coming decades. We do reward actual academic merit, but we do it through the process of lateral appointment up the prestige ladder, through the distribution of high reputation and by academic honors and prizes.

In short, the white male applicant is in a very different situation than the white male author of a law review article rejected because the editors accepted an article by a black that has no claim to cultural distinctiveness and is "not as good" by colorblind standards as his. Even in this case, the decision may be justified as an investment by the white community in developing minority scholars who may eventually use the resources generated by publication to produce distinctive work, and as the distribution of a share of the social power represented by publication to people who have traditionally been excluded. But the case is harder because we are dealing with a direct judgment of scholarly merit rather than with a proxy.

There is no trade-off between racial justice and legal academic quality. Indeed, both goals point in the same direction. There is no claim of entitlement against these goals even for candidates who are plausibly the best by every colorblind criterion. The actual candidates likely to be rejected have claims weakened by exclusion of competitors, especially competitors from the groups that would gain by affirmative action. Their claims are further weakened by the fact that their accomplishments are mere proxies for legal academic merit, and by the low cultural quality and arbitrary subjectivism of the screening system that would otherwise have delivered them the goods.

D. *Destabilizing Attitudes about Race and Merit*

It would be a beneficial side effect of massive, politically and culturally grounded affirmative action if it upset or destabilized the way most law teachers experience the whole issue of merit, and especially its relationship to race. One of the least attractive traits associated with fundamentalism is the tendency to fetishize "credentials" that are only proxies for actual achievement. See the case of the academic who wants the law school transcript of a candidate for a teaching job who is thirty-five years old and has written four law review articles and taught several thousand law students.

But this is just the extreme case. We are generally too dependent on, even addicted to, the continual reward of being told we are better, and that our law schools are better, according to an objective merit scale, than other people and law schools. And as a group we are excessively susceptible to injury by judgments that we fall below others. Addictive concern with pellets of meritocratic praise and blame manifests itself in neurotic vices.

The most striking of these is resentment, intense preoccupation with the ways in which one has been unjustly denied the praise or job or honor that one's "merit" "entitles" one to, and with the ways in which others have received more than their due. A second vice is careerism or opportunism, in which an interest in climbing the ladder or maximizing one's academic capital comes to dominate attachment to any set of ideas or any set of autonomous judgments about others.

On the flip side, obsession with merit funnels emotional energy into generating distinctions that will justify the claim that differences in people's rewards and punishments are deserved rather than arbitrary. Sometimes we just can't admit that our standards lack power to make the distinctions that law school roles require of us, among students or job applicants or tenure candidates. Intensely debated but meaningless small distinctions at the margin allow us to imagine that merit is ruling the

day, so that no one has been wronged, when the distinctions that have real meaning are too crude to do the job.

Sometimes what we are denying is that merit is only part of the story of colleagueship. The torturing of standards until they confess that "he got what he deserved" may be a cover-up for other motives. The hypertrophy of standards-talk also has a narcissistic payoff, since it endlessly reaffirms the merit of those who make judgments of merit.[30]

Affirmative action has already somewhat destabilized these neurotic patterns. They might be further jarred by an explicitly political and culturally based increase, because everyone involved in the enterprise would be forced to recognize a degree of relativity to the idea of merit. Dissociating some hiring and promotion decisions from any particular set of credentials undermines everyone's sense that their true being is their academic capital.

A political move to large scale affirmative action would say to minorities, "Here is a part of the resources. Do what you can with it." It would free whites from some of the political obligation that comes of unjust treatment of minorities. It would reduce the nagging sense that our ability to assess merit is consciously or unconsciously corrupted because we now accomplish limited power and wealth sharing through academic decisions on hiring and promotion.

It would reduce the sense that we coerce minorities who want the rewards we have to offer into "being like us." It would also increase integration, the chance for more relations with minorities in our own workplaces. But it would do this without presupposing that our "merit" joins us together in a way that is "more important than" or "independent of" cultural community. In short, it might promote integration while undermining the ideology of colorblindness.

There are obvious dangers. The proposal might increase the stereotyping of minorities as intellectually inferior. It might lead to protracted, destructive racial conflict between majority and minority groups on faculties, and within those groups. It might be impossible to design a scheme of wealth and power sharing that would be easy to administer so as to avoid endless conflict about how to define it in practice. I don't deny these dangers. I just think them worth risking, given the possible benefits.

The proposal obviously contemplates race-conscious decisionmaking as a routine, non-deviant mode, a more or less permanent norm in

30. That these vices are widespread does not invalidate meritocracy. They may be present in valuable meritocratic systems and in corrupt ones, or largely absent in either type. I am asserting that they are distressingly prevalent in our system and constitute a significant cost of doing business the way we do.

distributing legal academic jobs. A "racial distinctiveness" theory (actually cultural distinctiveness) combined with race-conscious decisionmaking is "assimilated into our conception of meritocracy,"[31] which is just what Kennedy's article urges us to avoid at all costs. The position is problematic as well as controversial, because it relies on the idea of cultural subordination, rather than on the more familiar fundamentalist ideas of prejudice and discrimination.[32]

III. THE CULTURAL SUBORDINATION THESIS

The issue is whether there is enough cultural distinctiveness, and enough subordination and exclusion, so that we must treat representation in academia as a political question, and so that we can expect major intellectual gains from doing so.[33] The argument thus far has been largely hypothetical. Even if one accepted the value of the notions of culture and ideology, one might deny that, in the actual conditions of the United States in 1990, cultural and ideological differences are significant. Or one might merely deny that they are large enough so that we need to structure law schools to take them into account.[34]

The cultural pluralist position to the contrary rests on a whole complex of ideas about American society. I am going to introduce them in

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31. R. Kennedy, *supra* note 3, at 1807.

32. It is an interesting question, but one I will not deal with in this Article, whether the proposed program violates the equal protection clause of the United States Constitution or Title VII of the Civil Rights Act of 1968, as they are currently interpreted by the United States Supreme Court. *See* D. BELL, *The Racial Barrier to Reparations,* in AND WE ARE NOT SAVED *supra* note 4, at 123-39. *See generally* Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases,* 100 HARV. L. REV. 78 (1986) (arguing that affirmative action can be justified with "forward-looking" goals of an integrated future rather than solely for past sins); Brest, *Affirmative Action and the Constitution: Three Theories,* 72 IOWA L. REV. 281 (1987) (analyzing "original intent," "discrete and insular minorities" and "color-blind equality" approaches to affirmative action).

33. The tone of Kennedy's article is unrelentingly hostile to the "racial distinctiveness" thesis, but surprisingly unhelpful in assessing it. He writes as if it must mean either that there is a single minority or black or Hispanic "voice," or that anything any minority person says is said in a minority voice. He suggests (note irony) that we should develop a definition of what a meritorious black voice is, and then apply colorblind criteria in judging whether candidates have it, or that we should just abandon the idea altogether. *See* R. Kennedy, *supra* note 3, at 1802-03. As indicated in the text following this note, the issue seems to me a good deal more complicated than his position makes it seem.

34. Randall Kennedy, and I think most others of his camp, is not willing to go that far. At a number of points, his article recognizes, tentatively, one might even say grudgingly, that the groups that make up our society have differing characteristics and that under some circumstances it might make sense to take them into account:

> [E]ven taking into account class, gender, and other divisions, there might remain an irreducible link of commonality in the experience of people of color: rich or poor, male or female, learned or ignorant, *all* people of color are to some degree "outsiders" in a society that is intensely color-conscious and in which the hegemony of whites is overwhelming.

Id. at 1784.

highly schematic form. Together they define a variant of the "nationalist" ideology.[35]

A. *Premises of Cultural Pluralism*

Groups exist in a sense that goes beyond individuals having similar traits. People act together, in the strong sense of working out common goals and then engaging in a cooperative process of trying to achieve them. Just as important, they engage in discussion and mutual criticism both about the goals and about what group members are doing (or not doing) to achieve them. This is true of small task-oriented groups (family members getting the car packed for a trip), and also of large, diffuse groups, like "the black community," or a law faculty.

An important human reality is the experience of defining oneself as "a member of a group" in this strong sense of sharing goals and a discursive practice. Another important experience is being treated by others as a group member. One's interlocutor interprets what one says and does as derived from a shared project. We all constantly identify groups and their members, assuming that we need to in order to understand other people and predict what they will do.[36]

> I do not maintain that no appreciable differences exist in the prevailing opinions and sensibilities of various racial groups. Nor do I maintain that it is improper ever to make decisions based on racial generalizations.

Id. at 1816 (footnote omitted). *See also id.* at 1805 n.271 (noting that in some cases the "fact of being black—like that of being tall, being able to see, or simply being alive—may help one to accomplish something admirable"). There is black literature, music, film, in the sense of contributions of individuals who happen to be black, *id.* at 1758-59, but no "black art" in a stronger sense, *id.* at 1803 & n.262. There are patterns of behavior and particular opinions (e.g., opposition to the death penalty, *id.* at 1816) that characterize one ethnic subculture more than another. It is even true that "racial and other ascriptive loyalties continue to organize a great deal of social, political and *intellectual* life throughout the world; in many areas such loyalties have intensified." *Id.* at 1782 (emphasis added) (footnote omitted). When talking about the production of academic knowledge, the article places the burden of proof on the person who would assert that membership in a defined community is associated with a particular way of knowing or with particular intellectual strengths or weaknesses. The crucial question in the debate about standards is:

> But what, as a function of race, is "special" or "distinct" about the scholarship of minority legal academics? Does it differ discernibly in ways attributable to race from work produced by white scholars? If so, in what ways and to what degree is the work of colored intellectuals different from or better than the work of whites? . . . [A]t least with respect to legal scholarship, [Matsuda] fails to show the newness of the "new knowledge" and the difference that distinguishes the "different voices."

Id. at 1778-79. It seems to me unlikely that we will get far by trying to resolve the substantive dispute by the placement of the burden of proof. If we take the idea of proof seriously, then whoever bears the burden will lose. The decision to allocate the burden to one side or the other is no less ideological than a decision on the merits.

35. Peller, *supra* note 1.

36. J.-P. SARTRE, CRITIQUE OF DIALECTICAL REASON I: THEORY OF PRACTICAL ENSEMBLES (A. Sheridan-Smith trans. 1976).

Communities are more than mere statistical groupings of individuals with particular traits, but less than self-organized groups. Membership presupposes interaction, but the interaction may be sporadic, routine, alienated. A community is an historically specific collection of people with a common past, and a future that will take place on the basis of what has gone before. That basis can be reinterpreted but not obliterated. We are stuck, at any given moment, in the communities we started or ended in, and that is never "just anywhere." Wherever it is, it is both more inert than a self-organized group and less demanding. The crucial idea is that communities are made up of living individuals, but they have an element of trans-individual stability and particularity; to be a member is to be *situated,* and you can be situated only in one or two places at a time. Membership is limiting as well as empowering.

Communities have cultures. This means that individuals have traits that are neither genetically determined nor voluntarily chosen, but rather consciously and unconsciously taught through community life. Community life forms customs and habits, capacities to produce linguistic and other performances, and individual understandings of good and bad, true and false, worthy and unworthy. Culture is first of all a product of community. People living in different groups possess different understandings of value as well as exhibiting different capacities and behavior traits (kinship, cooking, dress). But as I am using it, culture is a characteristic of an individual as well. You can break all your ties to a community yet remain a person with that community's cultural identity.[37]

A large part of the population of the United States lives in racial and ethnic communities that have a measure of cultural distinctiveness. The distinctiveness comes in part from the origins in Africa, Asia, Europe and Latin America of the different groups that live here. But the cultures of particular communities have been dramatically transformed by the experience of immigration, forced transportation or annexation, and by the heterogeneous cultural life of this country. Each group has put its culture of origin together with its peculiar circumstances in the United States to produce a distinct set of behaviors, attitudes, beliefs and values.[38]

The racial and ethnic communities of the United States are in constant contact with one another. This contact is asymmetrical. There is a dominant cultural community which is less influenced by and less con-

37. *See generally* J. CLIFFORD, THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE AND ART (1988).

38. *See* D. Kennedy, *Radical Intellectuals in American Culture and Politics, or My Talk at the Gramsci Institute,* RETHINKING MARXISM, Fall 1988, at 100, 129; A. ROSS, NO RESPECT: INTELLECTUALS AND POPULAR CULTURE (1989).

scious of the subordinated groups than they are influenced by and conscious of it. As a result, it is hard to identify any aspect of the cultures of subordinated groups that might be relevant to academic production that has not been influenced by contact with the dominant culture.

The boundaries of cultural communities are blurred by the presence of large numbers of people who can trace their family history back into a subordinated community, but who now regard themselves and are regarded by others as situated in a culturally intermediate space, or as assimilated to the dominant culture. There are millions of people for whom the "authenticity" of having always belonged to a relatively homogeneous community with an unselfconsciously shared ethos is simply impossible. Most of those likely to benefit by a program of culturally-conscious distribution of academic power and opportunity come from these intermediate, multi-cultural positions. (The existence of this group may make it more likely that we could actually succeed in implementing cultural diversity.)

Though communities are different in ways that are best understood through the non-hierarchical, neutral idea of culture (some groups do things one way, value one set of things, other groups do it in different ways), some differences are not like that. Americans pursue their collective and individual projects in a situation of group domination and group subordination. By this I mean that we can compare "how well" different groups have done with regard to income, housing, health, education, local and national political power, and access to cultural resources. The groups are not so different that they define these things in radically different ways, or that some groups are just not interested in them. With respect to these common measures of equality and inequality, we all recognize that some groups are enormously better off than others.

The experiences of youth within a particular community, or on the border between communities, equip individuals with resources for competition in markets and bureaucracies. Different communities have different access to wealth and power with which to endow their members. And the rules of competition in markets and bureaucracies are structured in ways (both formal and informal) that advantage people from different communities regardless of the resources they bring as individuals to the competition.

Some of these advantages are overtly or covertly correlated to the community membership of the people competing. Historically, the white community imposed systematic race-based discrimination, outright job and housing segregation, and rules that excluded racial minorities and women from directly exercising political power. In the current situation, particular cultural groups control or dominate some markets and bu-

reaucracies, and these groups exercise the enormous range of discretionary choice that is inevitable in ways that favor dominant over subordinated communities. Racial and gender discrimination still direct the flow of opportunities and thereby affect the shares groups achieve.

The notion of domination and subordination is meant to indicate that we cannot understand what happens according to a model in which everyone in the society has innate or individual qualities and individual preferences that they bring into a neutrally structured competitive process that correlates their rewards with their social contributions. There are patterns to the characteristics of the individuals society produces—they are identifiably members of the particular communities they grew up in, and their fortunes depend on that fact.

Differences of fortune result from themselves in a circular process. To speak of domination is to say that the group and individual exercise of power given by resources occurs in a competitive struggle in which the better off communities manage over time to reproduce their advantage by winning enough in each game to reconstitute their stakes. Even the rules of the game are produced by the game, in the sense that power to compete is also power to modify the rules. The dominant communities are those that have the most resources and rewards, those that manage to influence the rules that define the game to their advantage, and those that through time manage to reproduce or improve their top-dog position through competitive struggle.[39]

The game is cooperative as well as competitive. In order to be rewarded, the members of the different communities have to cooperate across ethnic lines in producing goods and services. There are all kinds of influences and concrete alliances formed, and there are areas and moments when community identity is actually pretty much submerged in the collective aspects of tasks. Within the communities, there are divisions that are best understood in class terms, and other cross-cutting divisions that represent the community's participation in national life (region, gender, religion, etc.). Power and resistance to power pervade the structure.[40]

Though there is a self-conscious ruling class at the top of this structure, neither the class nor the structure fully controls the outcomes and impacts of the game on the communities whose members play it. All the

39. *See* D. FUSFELD & T. BATES, THE POLITICAL ECONOMY OF THE URBAN GHETTO (1984).

40. *See generally* Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress,* 41 STAN. L. REV. 1 (1988); M. FOUCAULT, *Two Lectures,* in POWER/KNOWLEDGE 78 (1980). On the homologies in the legal treatment of class and race, see Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law,* 61 OR. L. REV. 157 (1982).

players are functions of the game, as well as vice versa. There is no "outside position." Communities themselves change internally and through collision with other communities, but the process has as much fate, drift and chance mutation to it as it does mechanical necessity or self-organized group will. Communities can disperse or assimilate and then re-form, and they can die out or be killed.[41]

The American racial and ethnic communities have intelligentsias, linked in overlapping patterns to a national intelligentsia and to each other. By an intelligentsia, I mean a "knowledge class" working in education, the arts, social work, the law, religion, the media, therapy, consulting, and myriad spin-offs like charitable foundations, for-profit research ventures, and the like. Intelligentsia members perform multiple functions beyond their formal job descriptions. In self-organizing groups or individually, some of them work at defining their community's identity (its cultural distinctiveness) or lack thereof, its interests in competition and cooperation with other communities, and its possible strategies.[42]

The national, racial and ethnic intelligentsias are internally divided along ideological lines. One national ideological axis is radical-liberal-moderate-conservative-rightwing. Another is traditional-modern-postmodern. Another is science-social science-humanities-arts. There are also a wide range of ideological debates within particular intelligentsias, for example about their relationship to the national community.

An ideology in the sense in which I am using it is a set of contested ideas that provides a "partisan" interpretation (descriptive and normative) of a field of social conflict.[43] The social conflict could be between capital and labor, farmers and banks, men and women, gay and straight, North and South, native born and foreign born, export industries and import industries, or whatever. The concepts that describe and justify the positions of the conflicting groups can be drawn from almost anywhere, from philosophy to economics to religion to biology; within the fields that we use ideologically, complex systems of contested ideas reflect and at the same time influence social conflict.[44]

Ideologists choose their ideas, in the sense that there is no consensus either in their favor or against them. Many people may think a particu-

41. *See* D. KENNEDY, *The Politics of Hierarchy,* in LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY, *supra* note 20, at 78-97.

42. *See generally* A. GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS (Q. Hoare & G. Smith eds. 1971).

43. *See generally* K. MANNHEIM, IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE (1954).

44. *See generally* L. ALTHUSSER, *Ideology and Ideological State Apparatuses (Notes towards an Investigation),* in LENIN AND PHILOSOPHY AND OTHER ESSAYS 127 (B. Brewster trans. 1971).

lar system is objectively right and many others that it is objectively wrong, or it may be seen as posing a question you can only resolve by a leap of faith. The most basic critique of the ideologist is that she has chosen her ideas to fit her partisan allegiance, and therefore lacks allegiance to "truth." In the conception of ideology I am using, this must always be recognized as a possibility. People do sometimes distort their intellectual work to serve causes or interests they adhere to. At the same time we have to recognize that where there is social conflict and contested interpretations of that conflict, there is no intellectual space outside of ideology. Intelligentsia virtue consists not in "objectivity" or "neutrality," which are impossible once there is ideological division, but in the attempt to empower an audience to judge for itself.

It follows that being an ideologist doesn't mean being closed minded, or uninterested in questioning fundamental assumptions, or being blind to evidence that contradicts those assumptions. In this sense of the term, one is in the position of the ideologist just by virtue of having, at any given moment, made choices between contested views that influence the intellectual work one does (and are influenced by it). "Moderates" are ideologists because when they call themselves that they implicitly appeal to a controversial critique of "ideologues." (This is the ideology of moderation.)

Members of minority intelligentsias are linked to their cultural communities in various ways, and divided from them as well, usually by social class, income, intelligentsia interests, and links to the national intelligentsia and culture that are different from those of the "masses." A basic ideological conflict is over how to describe and evaluate the courses of conduct that intelligentsia members adopt in this situation. There are ideologies of assimilation and of authenticity, of group accommodation and of group resistance, of individual self-realization and of collective obligation, and so forth.

The existence of ethnic intelligentsias, their size, and the power they produce for communities, all depend on access to resources, as does their ability to contribute to national intellectual/political life. One index of a community's cultural subordination is dependence on others to produce knowledge in areas where it would seem, at least superficially, that community interests will be affected by what that knowledge is. Another is inability of its intelligentsia to influence the national intelligentsia, and indirectly the American mass culture audience on issues of importance to the community.[45]

45. Some important discussions of the role of intellectuals in situations of domination are P. FREIRE, PEDAGOGY OF THE OPPRESSED (M. Ramos trans. 1970); F. FANON, THE WRETCHED OF

The above definition of cultural subordination is patently ideological. The conceptual scheme proposed is only one of many available to describe and judge the status of an intelligentsia, and within each scheme there is a well developed critique of its rivals.

B. *What Might Be Gained Through Large-Scale Affirmative Action*

Against this background, I would deny the existence of a "black point of view" or a "black voice" in any essentialist (or racialist) sense.[46] But that doesn't answer the particular questions that are relevant to the political and cultural arguments for large scale affirmative action. The first of these is whether minority communities would get, from a much larger minority legal intelligentsia, a scholarly output that would better serve their diverse political, social and economic interests than what they get from an overwhelmingly white legal intelligentsia. The second is whether the legal academic community as a whole would get a more valuable total corpus of scholarship.

I see two likely changes in this regard. A much larger minority intelligentsia should produce more scholarship about the legal issues that have impact on minority communities. The subject matter of scholarship is determined at present by the unregulated "interest" of academics. What we decide to write about just "flows naturally" from our backgrounds, education and individual peculiarities. I think it is obvious that some significant proportion of minority intellectuals would be led in this way to write about minority legal issues[47]

The precedent for this is the creation of modern civil rights law by black lawyers who devised the litigation strategy of the National Association for the Advancement of Colored People. It would be farfetched to argue that the race of these lawyers was irrelevant to their choice of subject matter, or that the black civil rights cause wonld have evolved in the same way had all the lawyers involved been white.[48]

Along with more scholarship on minority issues, there should be more scholarship on the implications for minorities of *any* issue currently under debate. In other words, Hispanic scholars working on the purest

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THE EARTH (C. Farrington trans. 1968); E. FRAZIER, BLACK BOURGEOISIE (1957); H. CRUSE, THE CRISIS OF THE NEGRO INTELLECTUAL (1967).

46. Harris, *Race and Essentialism in Feminist Legal Theory,* 42 STAN. L. REV. 581 (1990).

47. For an example of the kind of work I am talking about see Harold McDougall's articles about the *Mt. Laurel* decision. McDougall, *The Judicial Struggle Against Exclusionary Zoning: The New Jersey Paradigm,* 14 HARV. C.R.-C.L. L. REV. 625 (1979); McDougall, Mt. Laurel II *and the Revitalizing City,* 15 RUTGERS L.J. 667 (1984); McDougall, *From Litigation to Legislation in Exclusionary Zoning Law,* 22 HARV. C.R.-C.L. L. REV. 623 (1987).

48. *See* M. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-50 (1987).

of corporate law questions within the most unquestionably Anglo scholarly paradigm are still, I think, more likely than white scholars to devote, over the long run, some time to thinking about the implications of law in their chosen technical area for the Hispanic communities.[49]

The second anticipated change is crucial to my argument. Along with a quantitative change in the focus of scholarship, it seems likely that an increase in minority scholarship would change the framework of ideological conflict within which issues in the race area but also in other areas are discussed. I do not mean by this that there is *a* black (or other minority) ideology. The point is rather that there are historic, already established *debates* within the minority intelligentsias that are obviously relevant to law, but that have been largely absent from legal scholarship.

Here are some examples of debates in the black intellectual community that have only begun to get played out and transformed in law: between nationalists and integrationists,[50] between progressives and conservatives,[51] between those who see current racism as a more or less important determinant of current black social conditions,[52] and between black feminists and traditionalists.[53] The nationalist versus integrationist

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49. An example of the kind of work I am talking about is Baeza, *Telecommunications Reregulation and Deregulation: The Impact on Opportunities for Minorities,* HARV. BLACKLETTER J., Spring 1985, at 7.

50. I am referring here to the century and a half long discussion about the character of African American identity and its implications for strategy. The debate involves famous pairs, among them Martin Delany, *see* THE CONDITION, ELEVATION, EMIGRATION, AND DESTINY OF THE COLORED PEOPLE OF THE UNITED STATES (1852), and Frederick Douglass, *see* MY BONDAGE AND MY FREEDOM (1855); Booker T. Washington, *see* THE FUTURE OF THE AMERICAN NEGRO (1899), and W.E.B. Du Bois, *see* THE SOULS OF BLACK FOLK (1903); Marcus Garvey, *see* E. CRONON, BLACK MOSES: THE STORY OF MARCUS GARVEY AND THE UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION (1957), and the later W.E.B. Du Bois, *see* DUSK OF DAWN: AN ESSAY TOWARD AN AUTOBIOGRAPHY OF A RACE CONCEPT (1940); E. Franklin Frazier, *see* BLACK BOURGEOISIE (1957), and Harold Cruse, *see* THE CRISIS OF THE NEGRO INTELLECTUAL (1967); Malcolm X, *see* THE AUTOBIOGRAPHY OF MALCOLM X (1965), and Martin Luther King, Jr., *see* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. (J. Washington ed. 1986). This list is just an appetizer. The primary and secondary literatures are enormous. A valuable summary and reinterpretation is C. WEST, *The Four Traditions of Response,* in PROPHESY DELIVERANCE!: AN AFRO-AMERICAN REVOLUTIONARY CHRISTIANITY 69 (1982). *See also* R. ALLEN, BLACK AWAKENING IN CAPITALIST AMERICA: AN ANALYTIC HISTORY (1969). For an extensive collection of sources, see Peller, *supra* note 1.

51. *See* T. SOWELL, MARKETS AND MINORITIES (1981) and T. SOWELL, RACE AND ECONOMICS (1975). For a progressive critique of Sowell, see Crenshaw, *Race, Reform and Retrenchment,* 101 HARV. L. REV. 1331, 1339-46 (1988).

52. *See* W. WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1987); W. WILSON, THE DECLINING SIGNIFICANCE OF RACE?: A DIALOGUE AMONG BLACK AND WHITE SOCIAL SCIENTISTS (1978); *See* R. Kennedy, *supra* note 3, at 1814 n.296.

53. For a classic statement of the conflict, see Z. N. HURSTON, THEIR EYES WERE WATCHING GOD (1937). *See generally* P. GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA (1984); B. HOOKS, AIN'T I A WOMAN: BLACK WOMEN

and gender debates are now for the first time beginning to get a hearing as a result of the presence of more minorities in the legal academy.[54] There are similar debates in the other minority communities.[55]

C. *The Cultural Case in the Context of Cultural Subordination*

It comes down to a question of value. I have come (belatedly) to the view that American culture and politics are rendered radically more intelligible when viewed through the lens that intellectuals of color have constructed over the years. There is more in this general literature than any one person can assimilate. But there is nowhere near as much legal scholarship as there ought to be. Scholars with ties to subordinated communities are uniquely situated in respect to these ideological resources, and more likely than white scholars to mobilize them to contribute to our understanding of law-in-society.

They are uniquely situated because, "even taking into account class, gender, and other divisions," there does indeed remain "an irreducible link of commonality in the experience of people of color: rich or poor, male or female, learned or ignorant, *all* people of color are to some degree 'outsiders' in a society that is intensely color-conscious and in which the hegemony of whites is overwhelming."[56] The ideological literature of subordinated communities comes out of this experience, in all its variants, and is addressed to it. The flowering in legal scholarship of this literature combined with these experiences is just not something we can plausibly expect from white scholars.

Again, the resources are not Truths to which only people of color have access (though, who knows, there *may* be some of them), but de-

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AND FEMINISM (1981); *see also* L. RAINWATER & W. YANCEY, THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY (1967); H. CHEATHAM & J. STEWART, BLACK FAMILIES: INTERDISCIPLINARY PERSPECTIVES (1990).

54. Derrick Bell's point of view has always contained elements of nationalism—particularly his writing on school desegregation. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation,* 85 YALE L.J. 470 (1976) (educational improvement for blacks must take precedence over failed integration policies); Bell, *The Burden of* Brown *on Blacks: History-Based Observations on a Landmark Decision,* 7 N.C. CENT. L.J. 25, 26 (1975) (recognizing *Brown*'s limitations and arguing that it should be used as "critical leverage for a wide range of [continuing] efforts" by black communities to improve education for blacks). The debate is internal to Bell's book AND WE ARE NOT SAVED, *supra* note 4. With the publication of the articles cited in *supra* notes 4 and 5, and the response in R. Kennedy, *supra* note 3, the issue seems finally to have its own momentum within legal scholarship. On black feminism in law, *see* Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,* 1989 U. CHI. LEGAL FORUM 139; Harris, *supra* note 46.

55. For example, *compare* R. RODRIGUEZ, HUNGER OF MEMORY: THE EDUCATION OF RICHARD RODRIGUEZ (1982) *with* A. MIRANDÉ, GRINGO JUSTICE (1987).

56. R. Kennedy, *supra* note 3, at 1784. Kennedy's article says only that there "might" be a link of commonality among people of color. *Id.*

bates involving all the complexity of incompatible conceptual frameworks and flatly contradictory conclusions. They relate the internal dialectics of subordinated communities, and the dialectic of their interaction with the United States at large. They are open to multiple interpretations, including specifically white interpretations. For this reason, a substantial increase in the number of minority scholars should also improve white scholarship.

An increase in scholarship that takes seriously the issues that have been raised by the black intelligentsia would have relevance to the debates in legal scholarship about gender, sexual orientation and class. Indeed, I find it hard to think about, say, the separatist or culturalist strand in modern feminism without relating it to the debate about racial identity with which it is intertwined. The historical influence of black liberation thought on all other forms of late 20th century American theory about subordinated groups has been enormous. But the influence has been indirect in legal thought, in part because of the small size of minority legal intelligentsias. Wherever groups are in question, whether in corporate law or in family law, or in the law of federalism or local government law, the historic minority debates and their contemporary extensions should have an impact on sophisticated mainstream thinking.

The issue is not whether there should be a cultural bias in judging actual work. When we have the work before us, there is no reason not to consult it and decide for ourselves, individually, who has produced knowledge of value to us. In judging value to us, the cultural status of the producer is irrelevant, and so is the "merit" of the producer. In and of themselves they neither add nor subtract value, though knowing the author's status and accomplishment can change our understanding of a work and allow us to find value in it that we would otherwise have missed. This knowledge can also mislead us. There is no way to eliminate this risk, since as I will argue in the next Section, we can understand and assess the work only as a text situated in *some* presupposed cultural and ideological context, and assess it only from our own particular cultural and ideological situation.

There is nothing that *precludes* white scholars from making the contributions anticipated from scholars of color. An outsider may learn about a culture and its debates and produce work about or even "within" them that is "better" than anything an insider has produced. There are advantages as well as disadvantages to outsider status, and everyone in a multi-cultural society is simultaneously inside and outside. And there is nothing to guarantee that minority scholars will choose to or be able to make those contributions. They may squander their resources, or decide to do work that is indistinguishable in subject matter and approach from

that of white scholars. But their track record, with and without affirmative action, has been good enough, easily, even as tokens, to sustain a prediction of excellence to come.

D. *The Political Case in the Context of Cultural Subordination*

Through scholarship focusing on their own concerns and through ideological debate played out in the legal arena, minority communities (through their intelligentsias) develop themselves internally, assimilate for their own purposes the resources of the culture at large, and build power for the competitive struggle with other groups. The power to create this kind of knowledge is political power. Therefore it should be shared by all groups within the community affected.

This argument has two levels. First, both the choice and the application of academic standards have strikingly contingent cultural and ideological dimensions. Law faculties distribute political resources (jobs) through a process that is political in fact, if not in name. One group (white males of the dominant culture) largely monopolizes this distribution process, and, perhaps not so surprisingly, also largely monopolizes the benefits (jobs). This outcome is politically illegitimate. Second, supposing that you disagree with what I have just said, and believe that standards are and should be apolitical, that position is itself ideological. Law faculties shouldn't make the ideological choice between colorblind meritocracy and some form of race-conscious powersharing without a substantial participation of minorities in making the decision.

1. *Cultural and Ideological Dimensions of Academic Standards.* There are different questions we ask when assessing an academic work. There is the question of truth or falsity, understood to be a question susceptible of answers that when argued out will produce a broad consensus. Then there are questions of "originality" and questions of "interest" or "value."

My experience has been that work in law (like, I assume, some work in physics) is sometimes wrong or untrue in a quite strong sense. I am convinced that when the error is pointed out just about everyone will agree that it was an error. I don't think the kinds of cultural differences that can plausibly be asserted to characterize American society have much impact on these judgments. This is *sometimes* true as well of questions of originality, interest and value.

Judgments of originality are obviously more contested. And judgments of whether the problem addressed was "interesting" or "valuable"

seem to me very strongly influenced by the politics of academic life.[57] Different people in a field often have very different ideas about which true, original work is interesting. Though the judges have a strong sense that they know what they mean by interest, and that they are not making "merely" subjective judgments, they also concede that the standard is difficult to apply.

More important for our purposes, they will generally concede that interest or value can be judged only by reference to a particular research tradition or scholarly paradigm, usually one among many that might have won dominance in the field.[58] Yet conclusions at the level of what is valuable or interesting are very often dispositive in deciding which of two articles is better.

Once we acknowledge the possible existence of different research traditions, or collective scholarly projects, we have to acknowledge that the white male occupants of faculty positions have more than the power to decide which performances are better. They have also had the power to create the traditions or projects within which they will make these judgments. It seems obvious that these traditions or projects are culturally and ideologically specific products.

The projects themselves, as well as the judgments of originality, interest and value they ground (not the narrow judgments of truth and falsity) would almost certainly change if people of excluded cultures and excluded ideologies were allocated power and opportunity to create research traditions and scholarly projects of their own, or to participate in those ongoing. If this were done, there would be a gradual re-evaluation of existing legal scholarship. Some currently low-ranked work would gain esteem, and some high-ranked work would lose it. There are no meta-criteria of merit that determine which among culturally and ideologically speeific research traditions or scholarly paradigms is "better" or "truer." Judgments of merit are inevitably culturally and ideologically contingent because they are inevitably paradigm-dependent.

57. The dividing line between questions that seem "objective" and those that seem "political" or "subjective" or "cultural" or "ideological" cannot be fixed "objectively." Although, we experience merely cognitive questions (Did the article cite and discuss the leading treatise on its subject?) as very different from "value" questions (Did the article discuss the leading treatise fairly?), we also argue about which domain we are operating in. I might claim the article did discuss the treatise, although it disposed of its (silly) argument in a single sentence. You might respond that a single, dismissive sentence just does not count as discussion. I might counter that your view that there was no discussion is a disguised judgment on the merits of the discussion. And so forth. For an analogous argument about adjudication, see D. Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology,* 36 J. LEGAL EDUC. 518 (1986).

58. *See generally* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

The choice of standards of originality, interest and value in judging academic work has profound consequences for what a society knows about itself and its values. And for who the members of society *are* in consequence of their existence within the particular known universe that the knowledge-licensers have promoted. Who they are in turn reacts back through their powers and weaknesses onto the knowledge-licensing process that has created its own author.[59]

At a much more mundane level, the choice of standards controls the choice of personnel in the enterprise of knowledge production, which in turn affects the relative power of the cultural communities that compete in civil society. Excluded communities compete in the legislative process, for example, on the basis of social science data assembled in research projects whose funding and direction is under control of the dominant community. They compete for favorable rulings from courts on the basis of economic theories about the relative importance of distributional equity and efficiency that are unmistakably tied to the white conservative and white moderate research agendas of law and economics scholars.

The fundamentalist has to deal with the claim that choices to allocate scholarly opportunity are grounded in power, rather than merit, and function to reproduce the very distribution of power they reflect. The power is that of white, mainly male academics, mainly of "moderate" ideology, to impose their standards. They hold, and have held for many generations, the positions to which society has allocated authority to distribute this kind of opportunity. And they have distributed it to themselves.

As with the cultural case, there is nothing to guarantee that a larger minority legal intelligentsia would use the resources of law schools in ways that I would find politically constructive. More jobs might just widen the gap between scholars of color and their communities, and the hiring process might select those least likely, for class and ideological reasons, to pursue the project of empowerment. If that happened, those for whom empowerment is the goal would have to think of something else.

2. *Who Gets to Decide Whether or not to Share Power?* The decisionmaking process is decentralized, and largely depoliticized, in the sense of "not understood" as political. The main decisionmakers are faculty members of law schools. My (ideological) position is that the depoliticization is bad, the decentralization good. If politicization would

59. *See generally* 1 M. FOUCAULT, THE HISTORY OF SEXUALITY (R. Hurley trans. 1978).

lead to centralization within the state sector, then these positions conflict. But assume for the moment that they are not in conflict—that faculties so inclined could go a long way toward power sharing with subordinated cultural communities (and social classes) without losing their autonomy through conflict with other political institutions (such as state legislatures) committed to colorblind fundamentalism.

Faculties decide personnel questions by voting, usually on the basis of one-tenured-person-one-vote. In the process, individual faculty members decide between colorblind fundamentalism and the vague available alternatives. Much more important, given the political weakness of advocates of alternatives, they decide how to interpret fundamentalism in the face of its internal gaps, conflicts and ambiguities.

These choices are incomprehensible unless put in the context of conflicting ideologies about the past and present of race in the United States. The question is whether law faculties as presently constituted are the proper people to make these ideological decisions. Our selection processes, combined with our historic selection *practice*, fail to guarantee adequately that the whole community will be represented in these decisions. That is, they are democratically inadequate. Some measure of democracy is required where decisions will affect the very being of the community.

At this point the argument does a kind of backflip. Suppose that the fundamentalist responds to the claim of inclusion based on the political nature of knowledge production that the premise is wrong. Knowledge is true or false, not left or right. The goal is to produce as much of it as possible, without regard to the politics of the producers. This goal is inherently apolitical or supra-political.

The second level argument is that the question of whether these decisions are necessarily ideological is itself ideological. Even if you think knowledge production can be, is and ought to be non-political, you still have to decide whether that view is one you should be authorized to implement institutionally without having to argue and contend with people who disagree.

Colorblind meritocratic fundamentalism is itself an ideology. The very concepts of race, culture, merit and knowledge are intensely contested both within and between groups.[60] As the tone, the passion, of

60. Let me illustrate this as follows. A person from a group that has successfully used the idea of merit to wrest from a dominant group advantages previously denied on the basis of race might well have a different view of how much is lost in the use of cultural criteria from a person who was born into the dominant group. But the differences could cut many ways in generating positions. The person from the previously excluded group might conclude that merit is the only way to overcome prejudice, and that adherence will lead eventually to a society in which skin color is irrelevant.

Kennedy's article shows on every page, it is a matter of commitment, a choice, to be a fundamentalist. He rightly presents it as a fighting faith. The question whether knowledge production is political is itself political. Is the community's process for resolving the contest, its political process, in short, a good one?

The current procedure is inadequate because it involves neither the normal democratic procedure of majority vote nor any of the more complex procedures that often seem adequate to guarantee representation of all interests. Recognition of the political character of the decisions being made need mean neither merger into the central state apparatuses nor local "home rule" through elections. But it does mean that the licensers have to do *something* to bring about accountability for their choices between and within the competing ideologies. That something should be affirmative action sufficiently extensive so that minorities have enough representation on faculties to be players in the decision about whether to adopt race-conscious decisionmaking.[61]

IV. DO RACE-BASED CRITERIA OF SCHOLARLY JUDGMENT "DEROGATE INDIVIDUALITY"?

This Section turns to Randall Kennedy's claim that race-conscious decisionmaking "derogates from individuality." This argument is typical of fundamentalist thinking as it might apply to a culturally and politi-

But a person from the same group might believe that as long as merit is the only basis on which to claim advances, advances will be at the expense of cultural identity and will lead to assimilation, which is cultural suicide. A person born into the dominant group might believe that the only basis on which advances are justified is merit, and that the dominant group is itself organized according to merit. Departures from race neutrality that favor the previously excluded may be necessary, but they have a heavy cost of unfairness to meritorious members of the dominant group. By contrast, some ruling class people believe that the internal meritocratic culture of the dominant group has large elements of sham. Also that it has serious anti-social consequences, and that departures from its forms are likely to be beneficial even if it turns out, unhappily, that they do not lead to serious cultural pluralism.

61. One defense of the system would be that there is basic social consensus on the way faculties do their job, so that self-consciously culturally pluralist procedures are unnecessary. This would deny that colorblind fundamentalism is significantly contested, either by alternative visions or with respect to the resolution of its internal gaps, conflicts and ambiguities when we have to decide what it means in particular cases. *Contra* Peller, *supra* note 1 and articles cited in *supra* notes 4 & 5. Another (somewhat inconsistent) defense would be that the process of colorblind meritocratic selection, along with ideological divisions among white males, has already produced a representation of minorities and enough dissidents so that debate occurs or soon will occur within faculties. The formal adoption of power sharing is therefore not needed. *Contra* Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988).

cally based affirmative action program. (As noted above, Kennedy is sympathetic to affirmative action, though on other grounds.)[62]

Kennedy's article makes the familiar argument that racial categorization is dangerous per se, because it can be and and is used for racist purposes.[63] I recognize that this is a danger, but I think its degree has to be assessed case by case. In most situations, it is easy to distinguish between racist and anti-racist use of racial categories. Facially neutral categories can accomplish almost anything a confirmed racist would want. Whether we do better on balance by using race explicitly in institutional decisionmaking, or by finding other ways to achieve racial objectives, isn't a question to which we will ever find a decisive empirical answer. I advocate pervasive use of race-conscious decisionmaking because I don't think we can deal with the problem of subordination without confronting it directly, and I don't think we can fully achieve the value of cultural pluralism without self-consciously designing our institutions with that in mind.

I don't think Kennedy's contrary position is just a matter of a different empirical-intuitive assessment of the probabilities of "misuse" or "socially destructive" application.[64] Rather, it is tied to the general fundamentalist conception of prejudice and discrimination as subspecies of the evil of stereotyping. And the intense fundamentalist preoccupation with stereotyping is, in turn, closely tied to what strikes me as the fetishizing of "individual merit." In Kennedy's article, there are a few paragraphs about the bad consequences of racial classification,[65] but the theme that pervades the whole article is that: "[R]acial generalizations, whether positive or negative, derogate from the individuality of persons insofar as their unique characteristics are submerged in the image of the group to which they are deemed to belong."[66]

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62. *See supra* text accompanying notes 16-19. *See also* R. Kennedy, *Persuasion and Distrust, supra* note 21, at 1328-29 (affirmative action "on balance . . . is useful in overcoming entrenched racial hierarchy").

63. For example, Kennedy argues that:

> [T]he use of *race* as a proxy is specially disfavored because, even when relatively accurate as a signifier of the trait sought to be identified, racial proxies are especially prone to misuse. By the practice of subjecting governmentally-imposed racial distinctions to strict scrutiny, federal constitutional law recognizes that racial distinctions are particularly liable to be used in a socially destructive fashion.

R. Kennedy, *supra* note 3, at 1794.

64. *Id.*

65. These include his remarks on the use of the racial distinctiveness thesis by the Nazis, among others. *See id.* at 1789 n.197. He also discusses the possibility that using race as an "intellectual credential" will backfire and harm minorities. *See id.* at 1796.

66. *Id.* at 1816. To derogate means "to cause to seem inferior" or "disparage" or "detract" from. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 342 (1984).

"Derogation from individuality" occurs whenever there is a failure to distinguish between the "will" of the individual and his or her merely "social," "accidental," "ascribed" or "inherited" characteristics. And it occurs equally whenever we fail to distinguish the act of "will" from the materials, likewise merely given, on which the individual works:

> [N]either one's racial status nor the experience one suffers as a result of that status is capable of translating itself into art, a point applicable as well to scholarship, the "art" of academicians. An experience is simply inert—something that happened. That something only becomes knowable in a public way through an act of will: interpretation.[67]

Kennedy's article is a brief against allowing "race-conscious decisionmaking to be assimilated into our conception of meritocracy"[68] because to do so would be unfair to "the individual," whether white or black, who is denied recognition of his or her "merit" in the sense of "accomplishment" (attainment, achievement).[69]

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67. R. Kennedy, *supra* note 3, at 1804 (citing R. ELLISON, SHADOW AND ACT 146 (1972)).

68. *Id.* at 1807.

69. The following quotations show, I think, that Randall Kennedy's article is very strongly preoccupied with the "derogation of individuality," "act of will," "ascribed versus achieved," and "given materials versns willed addition" issues:

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

Id. at 1777.

> My central objection to the claim of racial distinctiveness [is] . . . that it *stereotypes* scholars. By stereotyping, I mean the process whereby the particularity of an individual's characteristics are denied by reference to the perceived characteristics of the racial group with which the individual is associated. . . . But . . . *"any* stereotype results in a partial blindness to the actual qualities of individuals, and consequently is a persistent and prolific breeding gronnd for irrational treatment of them."

Id. at 1786-87 (quoting Lusky, *The Stereotype: Hard Core of Racism,* 13 BUFFALO L. REV. 450, 451 (1964)) (footnote omitted). "There are many types of classification that negate individual identity, achievement, and dignity. But racial classification has come to be viewed as paradigmatically offensive to individuality." *Id.* at 1794.

> Rather, the point is that distance or nearness to a given subject—"outsiderness" or "insiderness"—are simply social conditions; they provide opportunities that intellectuals are free to use or squander, but they do not in themselves determine the intellectual quality of scholarly productions—*that* depends on what a particular scholar makes of his or her materials, regardless of his or her social position.

Id. at 1795. According to Kennedy, application of Delgado's idea of racial standing

> would be bad for all scholars because status-based criteria for intellectual standing are anti-intellectual in that they subordinate ideas and craft to racial status. After all, to be told that one lacks "standing" is to be told that no matter what one's message—no matter how true or urgent or beautiful—it will be ignored or disconnted because of *who* one is.

Id. at 1796.

> [S]cholars should keep racial generalizations in their place, including those that are largely accurate. Scholars should do so by evaluating other scholars as individuals, without prejudgment, no matter what their hue. Scholars should . . . inculcate . . . a skeptical attitude

This argument depends on our ability to separate people from their context: "As I define the term, 'merit' stands for achieved honor by some standard that is indifferent to the social identity of a given author."[70] Judgments that are colored by "social identity" are "ameritocratic." Social identity gets in the way when we allow our judgment to be distorted by the skin color or ethnic experience of the person or work in question, and also when we allow personal relationships to influence us.

Kennedy's initial list of ameritocratic motives in scholarly citation includes: "to display one's knowledge of a given literature, to show deference to those in a position to harm or help one's career, and to advance

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toward all labels and categories that obscure appreciation of the unique features of specific persons and their work.

Id. at 1796-97 (footnotes omitted). For more, see *id.* at 1798 n.240. In passing, the article emphatically applies the same individualist idea to virtue and art, as well as merit: "Participation in struggles against racial tyranny or any other sort of oppression is largely a matter of choice, an assertion of will. That is why we honor those who participate in such struggles." *Id.* at 1800. Quoting Ellison: "[W]e select neither our parents, our race nor our nation . . . . But we *do* become writers out of an act of will, out of an act of choice." *Id.* at 1804 n.265. Back to the theme: Quoting Ellisou: "What moves a writer . . . is less meaningful than what he makes of it." *Id.* at 1804. "A badge of merit should not be pinned onto someone simply because she exists in a state that she had no hand in creating. Merit should be limited to describing something that a person *adds* to their received condition." *Id.* at 1805 n.271.

> The strategy of elevating racial status to an intellectual credential undermines the conception of intelleetual merit as a mark of *achieved* distinction by confusing the relationship between racial background and scholarly expertise; the former is a social condition in which one is born, while the latter is something an individual attains. Confusing accidental attributes and achieved distinctions in turu derogates the process by which all individuals, simultaneously limited and aided by the conditions they inherit, personally contribute to human cultnre.
>
> As I use the word, "merit" is an honorific term that identifies a quality of accomplishment that has been achieved; it does not refer to inherited characteristics such as race or gender.

Id. at 1805-06.

"All he [Isiah Thomas] rightly argues is . . . that observers not be so overwhelmed with his God-given attributes that they fail to appreciate what he, on his own, adds to them . . . ." *Id.* at 1806 n.272.

Part I of Keunedy's article discusses the "cultural context" of the racial critiques. There is a nod to the idea that this context requires an understanding of the "relationship between knowledge and power," *id.* at 1749, but the overwhelming emphasis is on negative stereotyping of black intellectuals by whites. The notion of "derogation" is ceutral. *See id.* at 1751 ("derogatory comments") & n.25 ("derogation of Negro capacity").

> [A]lthough the overt forms of racial domination described thus far were enormously destructive, *covert* color bars have been, in a certain sense, even more insidious. After all, judgments based on expressly racist criteria make no pretense about evaluating the merit of the individual's work. Far more cruel are racially prejudiced judgments that are rationalized in terms of meritocratic standards. Recoguizing that American history is seeded with examples of intellectnals of color whose accomplishments were ignored or undervalued because of race is absolutely crucial for understanding the bone-deep resentment and distrust that finds expression in the racial critique literature.

Id. at 1752-53.

70. *Id.* at 1772 n.114.

the careers of friends or *ideological* allies."[71] He then adds racial favoritism.[72] A second list begins with "academic nepotism by using citations to promote friends."[73] Then, along with racial favoritism, he denounces "*all* practices that exploit the trappings of meritocracy to advance interests—friendship, the reputation of one's school, career ambitions, *ideological affiliations*—that have nothing to do with the intellectual characteristics of the subject being judged."[74]

From the point of view of the political and cultural cases for affirmative action, there are three problems with the "derogation from individuality" argument. First, it repeatedly confuses the scholarly judgment of a particular work with the judgment of a candidate for a job or promotion. It is uncontroversial that when we are assessing a particular article, we don't give it a higher quality ranking because it has a black author than we would if it had a white author. But Kennedy often seems to interpret the "racial critiques" as though that were their position. I don't read them that way. The question is whether, in assessing candidates, we should "presume" that we will get a different and ultimately more valuable total body of scholarly work if we allocate resources in a race-conscious way.[75]

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71. *Id.* at 1772 (emphasis added).

72. *Id.* at 1773.

73. *Id.* at 1806.

74. *Id.* at 1807 (emphasis added).

75. Kennedy defines "merit" as "achieved honor by some standard that is indifferent to the social identity of a given author." *Id.* at 1772 n.114. He seems to think that from this it follows that race should not (cannot?) be an "intellectual credential."

> The strategy of elevating racial status to an intellectual credential undermines the conception of intellectual merit as a mark of *achieved* distinction by confusing the relationship between racial background and scholarly expertise; the former is a social condition into which one is born, while the latter is something that an individual attains. Confusing aceidental attributes and achieved distinctions in turn derogates the process by which all individuals, simultaneously limited and aided by the conditions they inherit, personally contribute to human culture.

Id. at 1805-06. But the confusion here is Kennedy's. The word "credential" was introduced into his discussion of affirmative action as part of the argument that as a matter of probabilities we can expect to get more of some desirable capacities from minority rather than from majority scholars:

> Arguing that race should be a consideration in matching instructors to course offerings, Harvard Law School Professor Christopher Edley, Jr., maintained that "[r]ace remains a useful proxy for a whole collection of experiences, aspirations and sensitivities. . . . [W]e teach what we have lived . . . ." Similarly, Professor Derrick Bell argued that '[r]ace can create as legitimate a presumption as a judicial clerkship in filling a teaching position intended to interpret . . . the impact of racial discrimination on the law and lawyering." Racial background can properly be considered a credential, he observed, because of "[t]he special and quite valuable perspective on law and life in this country that a black person can provide."

Id. at 1758 (footnotes omitted).

Richard Delgado's *Imperial Scholar, supra* note 4, likewise speaks in terms of probabilities in arguing that the minority community should not rely on white scholars to develop fields of law that deeply affect their interests. *See* R. Kennedy, supra note 3, at 1788-89. Delgado then argues that the actual outcome of white scholarship is less favorable to minority interests than minority scholarship

Second, the cultural and ideological aspects of my achievements (accomplishments, attainments) aren't separable, for purposes of the judgment of others, from the effects of my "individuality" or of my "will." So there's nothing wrong, nothing "derogatory," in judging my work or my promise in a way that is race-conscious and sensitive to my ideological commitments. (Of course, the judgment may be incorrect, and it may be prejudiced.) Third, the judgment process, whose integrity Kennedy's article wants above all to preserve, is always already corrupted by the ideological and cultural factors he wants to exclude. We avoid this only if we deliberately impoverish and trivialize judgment by excluding the very aspects of individuals and their works that legal academics should care most about.

A. *Culture, Ideology and Individuality*

1. *Culture.* The category of culture fits neither the colorblind meritocratic view, emphasizing individual freedom to succeed or fail under universally agreed standards, nor the racialist view that biology has the power to determine people as meritorious or meritless. Its significance for fundamentalism is that membership in a culture looks somewhat like a status attribute of the individual, rather than something "earned" or "achieved." Culture is reproduced through child rearing and through life in a habitually closed discursive system. But people can "change cultures" or "assimilate" to a culture other than their own. People are often "bicultural" or even "tricultural."

As with class, there seem to be no inherent limits on what a person can achieve in an adopted culture. On the other hand, assimilation is hard work, a talent in itself, and we usually think of assimilation as very different from being "born into" a culture. There are always doubts about "authenticity," or the possibility that the assimilated person is "neither fish nor fowl."

Introducing the notion of culture blurs the distinction between judging on the basis of "mere" status, assumed to have no counection with

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would be, but here he is doing just what Kennedy approves. He is making substantive judgments of actual works (although he may be wrong or may not have proved his points). *See id.* There is no confusion between "accidental attributes and achieved distinctions."

In a footnote, Kennedy concedes that for some jobs under some circumstances, race would be a valid basis for favoring one candidate over another. But instead of asking whether legal academic jobs do or do not fall into this category, he instead argues that we should not use the word "merit" to describe what makes the candidate better for the job. No one is arguing about how to define the word "merit." The issue is what should count as a "credential" in a hiring situation, and Kennedy's own text here recognizes, without refuting, the type of argument his opponents are making. *See id.* at 1805 n.271.

capacities or other qualities of individuals, and judging on "achievement of the individual," assumed to be independent of status. Culture is both deeply ingrained (not changeable at will, even if changeable over the long run) and strongly differentiating; my ability to produce artifacts with meaning is therefore tied to my status.

This concept of culture makes the notion of "inert" experience transformed into something of value by the "individual" seem pretty crude. The individual is "made" by a whole body of experiences, shaped into a particular cultural being. When he or she sets out to produce an artifact out of a particular experience, what gets made is a product of all these other experiences that are collective, group, consciously and unconsciously cultural experiences. These collective things influence everything from the way the particular "raw material" is experienced to the way it is translated into whatever artifactual medium the "individual" chooses.

Culture is an attribute of an individual that is "inherited" (though not biological), both in the sense of "coming from the past" and in the sense of being, in any particular case, partially ineradicable through individual will. And that attribute is one that produces a heavy collective influence on all the performances and capacities of the individual. The fundamentalist cannot level against cultural claims the assertion of "irrelevance" or "irrationality" that is enough to dismiss claims based on race per se.[76]

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76. This does not mean that only cultures produce culture. We can still identify authors of artifacts within a culture and compare them. If the culture has only group authors, then we can distinguish between the groups. The mere existence of culture poses no *a priori* problems for making judgments of value between artifacts or between their creators.

It is equally wrong to think that the fact of culture (if it is a fact) makes it impossible to judge the merit of work or capacities of a person from another culture. We can assess the ability of *anyone* to produce a given type of artifact of our own culture. We look at the work, not who produced it, and we just treat it as an attempted performance within our own culture and ask if it succeeded. Then we make inferences about the likely capacity of the individual or group author to do more work of the same quality. We can even rank cultures according to their production of particular kinds of valued artifacts and capacities.

Yet another mistake is to believe that one can't assess the value of people or work in another culture according to its own, alien standards. A person from one culture often has the experience of knowing what is going on in another. It is possible to pick up on the way the other culture assesses work and people, and predict accurately what the consensus view of quality in a foreign culture will be. But it is also true that what we think we know about actions or performances in another culture is suspect in a way not true of what we think we know in our own, because we may "misread" behavior in the other culture. Given the "inherited" quality of cultural capacity, we never "read" in the unselfconscious way we do in our own context.

Finally, it's wrong to think there cannot be shared values between cultures. Each culture may understand the other as using the same standards for assessing particular kinds of artifacts. On the other hand, a conviction that we are applying the same standards across cultures must be held more tentatively than the same view within a culture. Because of "our" difference from "them," the

At the same time, there is the experience of freedom within culture (indeed, where else could one experience it, since there is no extra-cultural space), and the experience of individual accomplishment. A given culture may be more or less committed to the "cultural fluidity, intellectual freedom, and individual autonomy"[77] Kennedy's article defends. People self-consciously make their own selection from among the positions or attitudes available within a culture (as part of the repertoire); and they choose positions and attitudes *toward* the very culture that constitutes their being. A person's action can change the culture that defines the possibilities of action. Recognizing culture doesn't *annihilate* the individual. But recognizing it does blur the bonndary between self and social context and problematizes the assertion that a capacity or an artifact can be divided up into one part that is the inert matter and another part that is reflective of "will," "accomplishment" or "achievement."

2. *Ideology.* Once you choose an ideology, you have "rejected one path in favor of another," and what you see and do as you travel that path will be different from what you would have seen and done going the other way. Ideology is commitment. It is the decision to work on this line of inquiry rather than that one, to assume away these issues rather than those, in a situation where one cannot say that there was no other course available. You may be able to say that given your good faith belief in the rightness of your path, you obviously had no choice. But if other people believed equally in good faith that your path was wrong, and theirs right, then your choice was ideological. Once one has made, explicitly or implicitly, choices of this kind, there are kinds of work one doesn't find oneself doing and kinds of problems one finds oneself ignoring.

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appearance of sharing a standard may be illusory. When we discuss an evaluative or even a descriptive issue with a person from another culture on the mutual assumption that we share standards, there is always the possibility that we will find ourselves at a stalemate that seems best explained by admitting that the standards were not shared in the first place.

The point in all these cases is that we can *problematize* the operation of making judgments of value, of applying standards, without abandoning it altogether. See *supra* note 57. *See also* R. RORTY, CONSEQUENCES OF PRAGMATISM 166-67 (1982):

> "Relativism" is the view that every belief on a certain topic, or perhaps about *any* topic, is as good as every other. No one holds this view. Except for the occasional cooperative freshman, one cannot find anybody who says that two incompatible opinions on an important topic are equally good. The philosophers who get *called* "relativists" are those who say that the grounds for choosing between such opinions are less algorithmic than had been thought.... So the real issue is not between people who think one view [is] as good as an other and people who do not. It is between those who think that our culture, or purpose, or intuitions cannot be supported except conversationally, and people who still hope for other sorts of support.

77. R. Kennedy, *supra* note 3, at 1805.

My view is that it just isn't possible to do legal scholarship without making choices of this kind, consciously or unconsciously. [This view is part of my ideology.] Within legal scholarship, we are fighting out basic questions about how society is organized. More specifically, we are fighting about the lives of the ethnic minorities and majorities of the country. The descriptive and prescriptive categories we use (e.g., balancing, rights, efficiency, domination) are sharply contested among us, as are underlying conceptions of American social reality itself.[78]

One's ideology is more a matter of choice than one's cultural identity, but it poses similar difficulties for the fundamentalist understanding of individual merit. When you choose one among the possible ideological paths, you lose, as you travel along it, access to the data and the perspective you might have had along another possible path. Of course, it is not as though the view from another ideological vantage point is just unimaginable. And it is always possible to go back and start again or to set off through the underbrush. But whenever you stop and decide to write something, you do it from a particular position on the ideological map. You are enlightened but also limited, "situated" in ideological space much as you are situated in a community and in a cultural identity. There is no no-position-position.

Further, ideologies are collective projects created over time. Individuals discover them, in the sense of coming upon them, but do not invent them, any more than an individual can invent a culture. Once you discover an ideology, you explore it, grapple with its great figures or its everyday cliches, assimilate to it little by little or undergo conversion. You adapt it to your purposes, and perhaps try to change it, even radically, but it has a trans-individual continuity. Someone else will reinterpret your reinterpretation.

Finally, the "you" who pursues pre-ideological purposes is never in a purely instrumental relation to the ideology that consciously or unconsciously provides your framework and conceptual vocabulary. The frame remakes you through and through even as "you" "use" "it." Kennedy's article treats ideological affiliation as just another bias, like friendship or the desire to advance one's career.[79] But the "slant" that each person's ideological formation gives his or her work and his or her judgments of other people's work is neither an idiosyncratic individual matter, irrelevant in the same way that hair or eye or skin color is irrelevant, nor a distortion that we could purge if we tried hard enough.

78. *See supra* note 20.

79. *See supra* text accompanying notes 71-74.

3. *Individuality.* Individuality, against this background, is a problematic as well as an indispensable idea. There are many possible interpretations, but two seem to me to emerge tempered rather than consumed by critical fire. Both start from the notion that culture and ideology provide a vocabulary from which "individuals" pick and choose to produce themselves, constrained by their situation in time and space but with plenty available, even in the most apparently "disadvantaged" position, from which to make something that has the stamp of unpredictable humanity.

In the first interpretation, individuality is a pattern we read into behavior, from the most mundane to the most exalted, behavior that may seem at first glance nothing more than a jumble of familiar elements culled from the stockpiles of culture, ideology and psychology. Everyone has a race, a sex, a class, a culture, ideological presuppositions, even a more or less immutable neurotic style. But no one is only these things, because each person's production of self at any given moment, in any given law review article, is a particular selection and combination from an inexhaustible universe of possibilities. "Individuality" is an effect produced on, an experience of "readers," brought about by the juxtaposition of elements in a way that is neither logically compelled nor arbitrary, but recognizably designed to say something to someone.

In this way of looking at it, my individuality is something you have access to only through my behavior, my tone of voice or my tome on hardy perennials. I exist, even for myself, only embedded in materials, some of my choosing, some not, materials produced by others for purposes other than those I now pursue.

In the second interpretation of individuality, we try to get at the producer of these shows, to sneak behind the stage and confront the Wizard of Oz. But there is an infinite regress. Who is the wizard producing the modest humbug who produced the Wizard? The condition of meeting up with another "individual," in this second view, is accepting that he or she will just appear on your wave length, in moments of intersubjective zap. There is no assurance that he or she will be there, in contact, at the next moment, or that when he or she reappears it will be as "the same person." There is no way to fix the other through understanding (through an image of what he or she is really like, or a theory of his or her personality, or whatever). Both the other and the self are unitary in the moment but multiple over time—intelligible in the moment but contradictory taken all together. The individual, in this view, is what is not embedded, and therefore what is ineffable, unjudgeable, ungraspable with the apparatus of thought.

I subscribe to both views (they do not seem to me incompatible), and so am happy to be called an "individualist."[80] But neither view allows the operation of meritocratic judgment of a person or a work, without regard to cultural and ideological context, that is so important in fundamentalism.

B. *"Individuality" Cannot Be Distinguished from Culture and Ideology*

It is not unfair to judge the individual, in deciding to hire or promote, on the basis of the social characteristic of connection to a cultural community, because the individual cannot be separated from his or her culture in the way that Kennedy's article requires. The "individual" simply doesn't exist in that way. It is quite reasonable, and I have no cause to complain, if you expect different things of me, predict different things of me, and make different interpretations and hence different evaluative judgments of what I say, because you know something of my cultural context.

It doesn't derogate from my individuality that you "do this to me." There just isn't work I do or a me you can evaluate, or about whom you can make reasonable predictions, that isn't embedded in culture. All I can do in response is to reserve the right to argue when I feel that the stereotypes you apply distort your perceptions of my meaning or my capacity.

Second, I wouldn't *want* my legal scholarship to be evaluated in a colorblind way. Because we do our scholarly work in a context of culturally specific meanings, we are limited as individuals in what we can do and express, even in what we can be understood to say. But we are also empowered to do things that are only intelligible because we do them in the particular context. Because I know that Randy Kennedy is a black American intellectual writing in 1989, I get much more out of his article than I could if I had to guess at who had written it and when and where.

In an earlier article, *On Cussing out White Liberals,*[81] Kennedy described a style of black protest and critiqued it. *Racial Critiques of Legal Academia* has much the same agenda. I read both articles as written in the cussing-out-black-militants genre, in which a progressive integrationist black author takes black radicals to task. I suspect that I don't pick up on all the subtleties, but because I have a notion that this genre exists,

80. The first interpretation is influenced by C. LÉVI-STRAUSS, THE SAVAGE MIND 1-33 (1966), the second by J.-P. SARTRE, BEING AND NOTHINGNESS 3-30 (H. Barnes trans. 1956), and both by Derrida, *The Law of Genre,* in ON NARRATIVE (W. Mitchell ed. 1981).

81. NATION, Sept. 4, 1982, at 169.

the article has a whole level of coherence for me that it would not otherwise have.[82]

An important rhetorical move in cussing is to begin with denunciations of white racism adequate to refute in advance the accusation of Tomism. Then comes the central pitch: the militants are using unsubstantiated accusations of white racist discrimination and white cultural bias as lame excuses for their own and the minority community's failure to live up to neutral standards of excellence. All the hot but in the end contentless talk about racial identity is just posturing.

Writers in this genre typically charge that black militant posturing diverts attention from the real problems of minority performance, and lays a spurious claim to special treatment from white institutions, a claim that white liberals are all too willing to accept. That acceptance is condescending, because the liberals won't openly apply to what the militants say the same standards of sensible discourse that they apply among themselves or to their white adversaries. This reflects both white liberal wimpiness and an underlying white racist belief that sloppy militant rhetoric is the best that can be expected from black (and Hispanic and Asian) folk.

Kennedy's article falls into the trickiest subspecies of this genre, the one that is concerned with the "academic study of academia." The basic move in this sub-genre is to apply the standards the militants are criticizing to the militants' own critique. Neutral standards of scholarly excellence show that the attack on neutral standards of scholarly excellence lacks scholarly excellence. This type of argument can cut to the quick because of the history of racial stereotyping of minorities as intellectually inferior, and because mainstream post-1960s political thought dismisses radical minority intellectuals as hysterical second raters or racists.

I don't think it derogatory to assess Kennedy's article as a performance in this specific genre. The article is more interesting, and also it seems to me better in some ways and worse in others, when read as coming from a racial (cultural) and ideological position. The "individual" who wrote it is more accessible when we understand the literary materials he was working with. The danger is that we will confuse the "voice" of the genre with the actual author, whose individuality, as I suggested above, is ungraspable. If we confused the person with the genre in this case, it would be difficult to understand how Randy Kennedy could have written the following:

82. A striking example of the genre is Kilson, *The Black Experience at Harvard,* N.Y. TIMES., Sept. 2, 1973, § 6 (Magazine), at 13. It is interesting to contrast the genre in which a more or less conservative white author attacks the same black radical and white liberal characters, but in a quite different tone. *See* T. WOLFE, RADICAL CHIC AND MAU-MAUING THE FLAK CATCHERS (1970).

> In the forties, fifties and early sixties, against the backdrop of laws that used racial distinctions to exclude Negroes from opportunities available to white citizens, it seemed that racial subjugation could be overcome by mandating the application of race-blind law. In retrospect, however, it appears that the concept of race-blindness was simply a proxy for the fundamental demand that racial subjugation be eradicated. This demand, which matured over time in the face of myriad sorts of opposition, focused upon the *condition* of racial subjugation; its target was not only procedures that overtly excluded Negroes on the basis of race, but also the self-perpetuating dynamics of subordination that had survived the demise of American apartheid. The opponents of affirmative action have stripped the historical context from the demand of race-blind law. They have fashioned this demand into a new totem and insist on deference to it no matter what its effects upon the very group the fourteenth amendment was created to protect.[83]

Because you know that I am a white American intellectual writing in the 1990s, there are a million things I can say in this article without saying them, because you will infer them from this cultural context. And there are a million things you will read in that I didn't mean to be there. I see the interdependence, the inseparability of my individuality and my context as inevitable and also as something to be embraced. Likewise my simultaneous limitation and empowerment by the fact of working in a context. My individuality is not "derogated" when I am judged and when I communicate in a context, though there is bitter with the sweet. The same is true of ideology.[84]

C. *Rational Meritocratic Judgment Cannot Be Culturally and Ideologically Neutral*

The flip side is that there is no evaluation aimed at getting at what I value in my own work that won't be contingent on *your* cultural identity. What I am trying to achieve in my work is a contribution to a cultural situation in which I am implicated, culturally specific. This is equally true of the people whose judgment I most value. If I can't be judged outside of my context, they can't judge me outside of their context. This means that no matter how favorable the judgment, I can't take it as "objective." But it also means I can criticize critiques and reject their condemnation as "distorted." I don't have to claim or to abandon either universality or context-dependence. I can switch back and forth between the two perspectives, though without any "meta-level" assurance that I'm ever getting it right. All of the above applies to my ideological as well as to my cultural context.

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83. R. Kennedy, *Persuasion and Distrust, supra* note 21, at 1335-36.

84. *Cf.* Frug, *Argument as Character,* 40 STAN. L. REV. 869 (1988).

There are a million misunderstandings, based on racial, ideological, national and temporal stereotypes, to which Randy Kennedy and I are subject because you read us in this context. And because you know what you know of the context, there are good readings of our texts that you may discern against our will. There is nothing we can do about this, except argue on our own behalf.

The argument may involve racism. I see racism as more than "inaccurate stereotyping." It is "neurotic" in the same sense that the fetishizing of merit is. It is insisting on the stereotype's truth because you want or need it to be true, in the face of evidence that the group or a particular member is completely different from what you expected. The racist, whether white or black, won't let you be other than what he or she wants you to be, and that is something bad. But if you accept that you have a cultural identity, the attack on it can't be dismissed as "just" irrational, in the way it could if all cultural communities were the same, or if the differences between them made no difference.

It might be true that the racist is making a correct negative judgment about something that really is a part of you but that there is little or nothing you can do about. It might be true because cultural communities are different and you have characteristics that are derived from your cultural community. The hatred you encounter is wrong or crazy, as hatred. But there might be, somewhere mixed in with it, a valid negative judgment on your group identity. If you don't think that's so, then even after you have rejected and condemned the crazy hatred dimension, you have to defend the communal aspect of your being on the "merits."

Against this background, it seems to me legitimate and useful for Richard Delgado to attempt an explicitly race-conscious assessment of the white liberal constitutional law scholarship of the 1970s and 80s. "Scholars should . . . evaluat[e] other scholars as individuals, without prejudgment, no matter what their hue,"[85] as Kennedy's article suggests, in the sense of avoiding stereotyping like the plague. But Keunedy's article urges us (somewhat ambiguously) to "keep racial generalizations in their place, including those that are largely accurate."[86]

I don't agree with this if it means that we can't try to figure out whether, for example, a distaste for the "reparations" argument for affirmative action is a characteristic trait of a particular white liberal mode of con law analysis. And I see nothing wrong with trying to connect such a trait to the unconscious motives of white liberal scholars as a culturally and ideologically distinct group, or with condemning it as a

85. R. Kennedy, *supra* note 3, at 1796; *see also id.* at 1796-97.

86. *Id.* at 1796.

"defect." It is not, for me, a question of the legitimacy of a type of analysis, but of the plausibility of a particular interpretation.[87]

In short, it is legitimate for Delgado to argue for a "linkage of White scholars' racial background to the qualities in their work that he perceives as shortcomings,"[88] so long as he makes his case.[89] Kennedy's article poses a false alternative:

> [T]he point is that distance or nearness to a given subject— "outsiderness" or "insiderness"—are simply social conditions; they provide opportunities that intellectuals are free to use or squander, but they do not in themselves determine the intellectual quality of scholarly productions—*that* depends on what a particular scholar makes of his or her materials, regardless of his or her social position.[90]

Cultural and ideological situations are neither "simply social conditions" (in the sense of "inert matter") nor attributes that "determine . . . intellectual quality." They are betwixt and between. They are "formative" rather than "inert" or "determining." And this is the premise of Kennedy's own article, the first section of which is "The Cultural Context of Racial Critiques."

In that section, the article argues that the racial critiques "share an intellectual kinship with several well-known and influential intellectual traditions."[91] We learn that we can't "understand" the racial critiques except in the context of "the ongoing effort by intellectuals of color to control the public image of minority groups."[92] In the sections entitled, "The Racial Exclusion Claim as a Form of Politics," and "The Politics of Publicity," Kennedy's article assesses the arguments of Bell, Delgado and Matsuda as *the arguments of scholars of color.* Their claims have

87. Along the same lines, I see nothing wrong with trying to figure out the social psychology of the preference for efficiency and "unequal bargaining power" arguments over distributional arguments in "moderate" legal scholarship, *see* D. Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power,* 41 MD. L. REV. 563 (1982), or with attributing the white CLS hostility to rights rhetoric to some combination of neo-marxist ideology and middle class white cultural context. *See* Williams, *supra* note 5, at 414. As in the case referred to in the text, the question for me is not whether the type of analysis is legitimate but whether the particular instance is convincing.

88. R. Keunedy, *supra* note 3, at 1793 (commenting on Delgado, *Imperial Scholar, supra* note 4, at 568-69).

89. Since what is involved is a cultural/ideological analysis, there is no inconsistency, indeed there is "merit" in noting that the traits are not shared by all whites and that the same traits appear in the work of some scholars of color. For a rejection of this position, see R. Keunedy, *supra* note 3, at 1793.

90. *Id.* at 1795.

91. *Id.* at 1747.

92. *Id.* at 1754. In the text and footnotes, Kennedy repeatedly points out the racial composition of the groups trying to control this public image, referring to the "Black Power Movement," *id.* at 1755, "black scholars," *id.* at 1756 nn.46 & 48, "black writers," *id.*

"an *outer* facet addressed principally to whites and an *inner* facet addressed principally to minorities."[93]

He then proceeds to analyze the bad motives (guilt tripping white liberals and cheerleading for minorities)[94] behind their arguments in a way that seems indistinguishable from what Delgado did with the white liberal constitutional law scholars.[95] His attribution of motives is a complex inference from their texts, but also from his knowledge that they are scholars of color writing in the radical intellectual tradition that he has identified, and pursuing a particular political (ideological) project.

Imagine that Kennedy's article shows up in the file of Professor Bell, Matsuda or Delgado when one of them is being considered for a lateral appointment. The article would certainly be read as an assessment of the "merit" of their scholarship, but hardly as applying a "standard that is indifferent to the social identity of a given author."[96] Wouldn't it, using Kennedy's criterion, "derogate from [their] individuality . . . insofar as their unique characteristics are submerged in the image of the group to which they are deemed to belong"?[97] Indeed, one might argue that the article "stereotypes" them as "militants of color" in order to cuss them out for the sins of the Black Panthers and the black sociology movement of the 1960s.[98]

Of course, it is not unimaginable that any of the racial critique articles could have been written by a white. In that case, it seems likely that Kennedy's article would have levelled many of the same criticisms against the white author, but omitted some and added others. Kennedy's article asserts that "some observers do not have much confidence in the abilities, or perhaps even the capacities, of minority intellectuals. . . . [T]hey lack the sense that those with whom they disagree are their intellectual equals."[99] If Bell, Matsuda or Delgado were white, Kennedy might critique the "merit" of their discussions of minority scholarship through the observation that "[s]ometimes observers display their lowered expectations . . . by more generously praising work by minorities than they would praise similar work by whites."[100]

93. *Id.* at 1807 (emphasis added).

94. *See id.* at 1808.

95. Kennedy writes, "Professor Delgado rejects both 'conscious malevolence or crass indifference.' Rather, he posits that the imperial scholars' exclusionary conduct is mainly unconscious and prompted by their desire to maintain control, to prevent scholarly criticism from becoming too threatening to the academic and political status quo." *Id.* at 1771 (footnotes omitted).

96. *Id.* at 1773 n.114.

97. *Id.* at 1816.

98. *See id.* at 1755 & n.44, 1790.

99. *Id.* at 1818-19 (footnotes omitted).

100. *Id.* at 1819 n.308.

My point is not to censure Kennedy's article for "race-conscious" assessment of merit. It is rather that if one wants to take work like theirs seriously, as he does, it just is not possible to make the rigid separation he proposes between the authors' merely accidental or inherited aspects and their "will" or "achievement" as "individuals." Kennedy is wrong to claim that the cultural background (race) and ideological affiliations of an author "have nothing to do with the intellectual characteristics of the subject being judged."[101]

Since it is legal scholarship and law teaching that is in question, culture and ideology (mediated through intellectual paradigms and research projects) permeate the subject being judged. It is *about* how our culturally diverse and ideologically divided society should be organized. We can achieve colorblind neutrality and ideological neutrality only if we refuse to assess these aspects. Kennedy's article proposes (his own practice to the contrary notwithstanding) to judge the work without considering its subject and purpose. This is an evasion of politics.[102]

D. *Taking Colorblindness Seriously*

We *could* avoid all this in assessing candidates for jobs and tenure. Many law faculties adopt in practice (though not in theory) a rule that if you publish some number of articles on clearly legal topics in well regarded law reviews, you will get tenure. Period. No one will try to decide whether they think the articles are any good.

A judgment of this kind is not outside culture and ideology, because what counts as "legal," what law reviews are "well regarded," and the criteria by which those reviews judge articles submitted for publication, are all culturally and ideologically contingent. But it is perfectly true that when the faculty accepts the standard, they can apply it without animadversion to culture or ideology. They can grant tenure to anyone who meets the standard, even if all the articles would be culturally strange and ideologically abhorrent to them if they read them.

Another tack is to distinguish "craft" or "technique" from substance, conceding the cultural and ideological contingency of the latter, but maintaining neutral standards for the former. The distinction is problematic, because different cultures and ideologies and paradigms

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101. *Id.* at 1807.

102. Kennedy remonstrates that he does not seek to evade politics. He quotes Lionel Trilling with approval:

> [O]ur fate, for better or worse, is political. It is therefore not a happy fate, even if it has an heroic sound, but there is no escape from it, and the only possibility of enduring it is to force into our definition of politics every human activity and every subtlety of human activity. There are manifest dangers in doing this, but greater dangers in not doing it.

Id. at 1787 n.191 (quoting L. TRILLING, THE LIBERAL IMAGINATION 96 (1950)).

have different conceptions of craft. It is problematic because different paradigms may be at different levels of technical development at a given moment. But the deeper objection is that judging a work that aspires to substantive importance on this basis is arbitrary if the judges are themselves interested in rewarding valuable substance (as well as in virtues of execution). It means we hire people who are substantively empty or evil because they are "competent." It means we refuse to hire people who have profound insights because they lack something valuable but less important.

Yet another approach is to recognize that there are "genres" of legal scholarship, and to hire or promote "the best" within each. The obvious objections here are that "outsider" judgments about what is good within a genre are likely to vary dramatically according to the ideological commitments and genre loyalties of the judger. And once one has ranked works within various genres, there is the question of allocating the "slots" among them. If you think right-wing law and economics work is the most valuable now being done in legal academia, yonr neutral "intra-genre" criteria won't help you choose between a third rate econ-jock and a much higher ranked centrist "doctrinal" candidate. Some quite patently ideological or cultural criterion of appropriate pluralism will have to come in at the end, or the outcome will be random.

But what of the scholar of color who rejects this patently ideological version of standards, and himself or herself demands to be judged colorblind?[103] If this demand is addressed to a law faculty that is deciding on hiring or promotion, it is misaddressed. The faculty will decide by vote, on the basis of each faculty member's understanding of the appropriate criteria. I wouldn't see myself as bound to vote against a candidate I would otherwise favor because the candidate wanted to be judged colorblind.

If the candidate thinks he had the benefit of what he regards as an illegitimate preference, he can refuse the job, or take it and use his power as a voting member to influence his colleagues to abandon the error of their ways. We are dealing with an ideological dispute about culturally conscious decision. I don't see a faculty member as obliged to abandon his or her position, even if the candidate views the criterion as "insulting" or as "derogating from individuality," unless I am persuaded on the merits that this is the case.[104]

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103. This last section is a response to Carter, *supra* note 22.

104. This view is dependent on the existence of real disagreement among minorities about affirmative action. If there were an indisputable consensus among blacks, say, that culturally conscious decisionmaking is "derogation" and "insult," and an equally indisputable willingness to abide by the consequences, it would be a tough call whether affirmative action should continue. My problem

But now suppose I am addressed as an individual, rather than as someone voting on hiring or promotion. The demand is simply for my judgment: Is this person of color "the best law teacher" in the school, or "the best scholar," or is this particular article the "best in the field"? Suppose further that this scholar does his or her damnedest to write as a member not of an ethnic culture but of the "cosmopolitan" culture to which Kennedy refers approvingly.[105] It might be possible to answer without cultural identity playing any role at all. A white or a black scholar might so overwhelmingly dominate that it just wouldn't be plausible that anyone else could be "the best."

In this sense, law teaching and scholarship have an irreducible resemblance to a game with highly determinate rules. The resemblance is not in the rules, but in the possibility of a person being so good that any particular observer will judge without hesitation.[106] This possibility also exists at the bottom end. But such cases are rare.

In the usual case, it will be possible to answer "without regard to race" only if we pose the question narrowly enough. The article is within a particular genre. Suppose the author has either deliberately or just naturally written it in such a way that no reader would be likely to advert to the question of the author's race in reading it. This means, as a matter of fact, that a white reader is likely to assume that the author was white, but suppose the reader is reading lots of articles and knows some of them are by blacks. The reader can rank the articles colorblind.

If I am the reader, I will have an ideological judgment about the genre. The genre is the product of a joint scholarly endeavor in paradigm creation. It has a cultural history. The vast majority of recognizable genres, moreover, have a specifically white, ideologically moderate or conservative history. Their culture and ideology is built into their rules, their habitual literary and intellectual devices. If I am asked to compare an article in such a genre with one that has a different cultural and ideological history, my comparison will be based on my own cultural and ideological situation. I can rank the black author of an antitrust article in the interest-balancing-cum-institutional-competence genre against other authors in the same genre without race having any effect on the judgment. But in the cross-genre comparison, I will understand and

would be my (ideological) conviction that the type of judgment required is both politically incorrect, impossible to do, and bad for legal scholarship. I might nonetheless feel that the value of cultural pluralism paradoxically required agreeing to the self-exclusion that would result from colorblind judgment.

105. R. Kennedy, *supra* note 3, at 1802.

106. On the vexed question of the boundary between situations in which judgment seems somehow "compelled" and those in which we experience it as closer to "choice," see *supra* notes 57 and 76.

rank his article as the product of a white, ideologically moderate group identity.

When I am told after the fact that the author was black, my reaction will be that the author is an excellent performer in the cultural mode of the dominant community. This is a far cry from "the best, period." In other words, I do not regard the genres of the "cosmopolitan" culture as universal vessels into which each of us is free to pour his or her individual content. They are vessels but they are also molds, each with a history as part of the project of domination and subordination, *as well as* a history as part of the project of transcendence and enlightenment.

Now suppose the question is about teaching. I judge teachers according to the values I myself aspire to as a teacher. My view is that law teaching is inescapably an intelligentsia activity of cultural and ideological development in a situation of contest, domination and subordination. But I also fully recognize and embrace the craft dimension of law. I can rank teachers colorblind according to their skill in getting students to understand the meaning and relationship of an easement, a covenant and an equitable servitude. But a teacher whose course teaches only this kind of determinate content and cognitive skill is pursuing a culturally derived, ideologically charged agenda, teaching a philosophy of law by omission. The teacher who goes beyond this cognitive minimum is moving not toward "neutrality," but toward some *different,* more explicit but no less ideological philosophy of law.

Whatever the solution, from the purely cognitive to the explicitly culturally-conscious and political, the teacher's relation to the students has a symbolic dimension: the teacher is black or white, a purported "neutral, black letter man" or a touchy-feely liberal. Every teacher does something with these contingent attributes in the classroom, consciously or unconsciously. His or her individuality does not exist in a way that can be distinguished from them. Well, you will say, he or she could teach from behind a screen. Then the choice to use a particular voice would be a choice to situate himself or herself in the American cultural context. But he or she could write on a word processor that would flash his or her words onto the screen. Right. But the words themselves would communicate not only an individual but an individual's choices among the multiple ways of expression that characterize a society divided the way ours is. And so forth.

And what would be gained by teaching from behind a screen with a word processor flashing one's words before the students? The teachers who chose this method could be ranked colorblind a lot more plausibly than those who chose the "normal" method. But in comparing them to those who taught as culturally and ideologically situated individuals,

openly deploying and developing those aspects of their identity, we would find ourselves judging the cultural and ideological context of the choice. Unless the fundamentalists made everyone teach their way, they could never be sure they were "the best, period," and not just "the best white" or "the best black."

In order to achieve Kennedy's ideal meritocratic academy, we have to imagine that both the bitter and the sweet of cultural and ideological differences are eliminated or reduced to such an extent that it no longer seems important to take them into account in structuring hiring and promotion. So long as they exist, there will be an element of cultural and ideological contingency to judgments of merit, or an element of arbitrariness in substituting "objective" but non-substantive criteria. I see the differences and the process of self-consciously negotiating to take the element of contingency into account as valuable in themselves. So the fundamentalist utopia seems to me impoverished. We could have colorblind meritocracy only in a society less desirable than ours would be, if we could preserve class, cultural, community and ideological differences but consciously mitigate their bad effects.

V. CONCLUSION

If there is a conceptual theme to this Article, it is that of "positionality," or "situatedness." The individual in his or her culture, the individual as a practitioner of an ideology, the individual in relation to his or her own neurotic structures, is always somewhere, has always just been somewhere else, and is empowered and limited by being in that spot on the way from some other spot. Communities are like that too, though in a complicated way. One of the things that defines a community's position—its situation, and the specific possibilities that go with it—is its history of collective accomplishment. Another is its history of crimes against humanity. It seems unlikely that there are communities without such histories.

The crime of slavery is deep in the past of white America. But ever since slavery, in each succeeding decade after the Emancipation Proclamation, we have added new crimes until it sometimes seems that the weight of commission and omission lies so heavily on non-white America that there just isn't anything that anyone can do about it. All anyone can hope is to be out of the way of the whirlwind, the big one and all the little ones played out in day-to-day life.

The bad history also creates opportunities that other communities don't have, or have in different ways. It would be quite something to build a multicultural society on the basis of what has happened here, where we have neither a consensual foundation in history nor a myth of

human benevolence to make it all seem natural. An American multicultural society will arise out of guilt, anger, mistrust, cynicism, bitter conflict, and a great deal of confusion and contradiction, if it arises at all, and would be, to my mind, the more wonderful for it.

Of course, the specific proposal put forth above, for a kind of cultural proportional representation in the exercise of ideological power through legal academia, would be a very small step in that direction. As is true of any very specific proposal that can be implemented right now by small numbers of people holding local power, it is a drop in the bucket. But the minute we imagine it as a government policy applied in a consistent way across the whole range of situations to which it is arguably applicable, it loses most of its appeal. First, none of us local power-holders could do much to bring it about, and, second, taking the proposal seriously as state policy might lead to all kinds of disastrous unintended side-effects.

This has been a proposal for drops in the bucket, not for the reorganization of state power. If it made a trivial contribution at vast social cost, we could abandon it as we adopted it, faculty by faculty, decision by decision. If it worked, the "kerplunk" of drops falling in near empty buckets might cause others to prick up their ears. And in any case, legal academics can and so should exercise their power to govern themselves in accord with the ideals of democracy and intellectual integrity— ideals that white supremacy compromises all around us.

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Race and Rapport: Homophily and Racial Disadvantage in Large Law Firms

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RACE AND RAPPORT: HOMOPHILY AND RACIAL DISADVANTAGE IN LARGE LAW FIRMS

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INTRODUCTION

Over the past two decades, clients and other constituencies have pushed large law firms to pursue greater racial diversity in attorney hiring and retention.[1] Although these firms have devoted extraordinary resources

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1. This issue has generated collective and individual action on the part of the general counsels' offices at hundreds of corporations. *See* INST. FOR INCLUSION IN THE LEGAL PROFESSION, THE BUSINESS CASE FOR DIVERSITY: REALITY OR WISHFUL THINKING? 15 (2011) (describing how in 1988, General Motors became the first major corporation to formally request that their law firms promote greater racial diversity); MELISSA MALESKE, DESIGNING DIVERSITY: LAW DEPARTMENTS SHARE THEIR STRATEGIES TO DRIVE INCLUSION PROGRAMS 47–48 (2009) (discussing how in-house counsel and law firms have addressed diversity); Anjali Chavan, *The "Charles Morgan Letter" and Beyond: The Impact of Diversity Initiatives on Big Law*, 23 GEO. J. LEGAL ETHICS 521, 523 (2010) (noting that in 1999, more than 500 corporations signed "Diversity in the Workplace, A Statement of Principle," vowing to "give significant weight" to law firms' diversity efforts when hiring law firms); Karen Donovan, *Pushed by Clients, Law Firms Step Up Diversity Efforts*, N.Y. TIMES, July 21, 2006, at C6 (discussing Sara Lee General Counsel Roderick A. Palmore's 2004 letter, "The Call to Action," which insisted that law firms take more proactive measures in improving diversity); Catherine Ho, *Diversity, By The Hour Lawyers Live by the Billable Hour. Now, One Law Firm Is Hoping That Mentality Will Translate into a More Diverse Workplace*, WASH. POST, Mar. 24, 2013, at A21 (discussing DuPont's practices in selecting female and minority lawyers to manage their firms' day-to-day work); Kellie Schmitt, *Corporate Diversity Demands Put Pressure on Outside Counsel*, CORPORATE COUNSEL (ONLINE) (Dec. 28, 2006), http://www.corpcounsel.com/id=900005470357/Corporate-Diversity-Demands-Put-Pressure-on-Outside-Counsel. *But see* Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1063 (2011) (observing that Wal-Mart continues to give its legal work to firms with poor diversity records); Veronica Root, *Retaining Color*, 47 U. MICH.

toward better recruiting and retaining attorneys of color,[2] and despite a proliferation of "best practices" guides and diversity policy recommendations,[3] these considerable efforts have yielded only modest gains.[4] With respect to black attorneys in particular, the tide of racial progress in these firms has moved forward at a glacial pace, even ebbing and receding in recent years.[5]

Although large law firms now hire significant numbers of black attorneys as junior associates, these black associates report significantly worse career experiences and outcomes than their white counterparts. As a group, they receive lower quality work assignments,[6] are less satisfied with their experiences,[7] and ultimately leave these firms at faster rates.[8] Very few ever become partners.[9]

J.L. REFORM 575, 605 (2014) (questioning the commitment of corporate clients to law firm racial diversity).

2. *See* Douglas E. Brayley & Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 J. LEGAL PROF. 1, 5 (2009) (discussing a survey finding that 50 percent of participating Am Law 200 firms allocated an average of $513,500 for their diversity managers' offices); Root, *supra* note 1, at 598–601 (discussing diversity efforts undertaken by various law firms in response to client pressure).

3. *See, e.g.*, ABA, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 26–30 (2010); MINORITY CORP. COUNSEL ASS'N, CREATING PATHWAYS TO DIVERSITY: A SET OF RECOMMENDED PRACTICES FOR LAW FIRMS (2001), *available at* http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=613; NAT'L ASS'N FOR LAW PLACEMENT, DIVERSITY BEST PRACTICES GUIDE (2014); N.Y. BAR COMM. ON MINORITIES IN THE PROFESSION, BEST PRACTICES STANDARDS FOR THE RECRUITMENT, RETENTION, DEVELOPMENT, AND ADVANCEMENT OF RACIAL/ETHNIC MINORITY ATTORNEYS 1–2 (2006); Erin Brereton, *The New Face of Law Firm Diversity*, 29 LEGAL MGMT. 1 (2010) (suggesting that law firms undertake a number of organizational reforms); *see also* ARIN N. REEVES, ABA COMM'N ON WOMEN IN THE PROFESSION, FROM VISIBLE INVISIBILITY TO VISIBLY SUCCESSFUL: SUCCESS STRATEGIES FOR LAW FIRMS AND WOMEN OF COLOR IN LAW FIRMS (2008); DRI, THE DRI LAW FIRM DIVERSITY RETENTION MANUAL (2005); MINORITY CORP. COUNSEL ASS'N, A STUDY OF LAW DEPARTMENT BEST PRACTICES (2005).

4. *See* Root, *supra* note 1, at 587–93 (discussing the incremental increases in minority representation in elite law firms since 2000).

5. Press Release, Nat'l Ass'n for Law Placement, Law Firm Diversity Among Associates Erodes in 2010 (Nov. 4, 2010), *available at* http://www.nalp.org/uploads/PressReleases/10NALPWomenMinoritiesPressRel.pdf.

6. *See infra* note 74.

7. Monique R. Payne-Pikus et al., *Experiencing Discrimination: Race and Retention in America's Largest Law Firms*, 44 LAW & SOC'Y REV. 553, 567–569 (2010).

8. *Id.* at 560; *see also* EEOC, DIVERSITY IN LAW FIRMS 9 (2003) (describing minority attorneys as more likely to report that work and partnership opportunities at their firms are not "equally available to all"); GITA Z. WILDER, ARE MINORITY WOMEN LAWYERS LEAVING THEIR JOBS?: FINDINGS FROM THE FIRST WAVE OF THE AFTER THE JD STUDY 12–13 (2008) (noting that minority women are more likely to anticipate leaving their employment); Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755, 1805–07 (2006) (discussing how black associates are more likely to leave their firms as associates than their white cohorts). As of 2009, minority attorneys still constituted only 1.3 percent of partners at firms of 101–250 lawyers, 1.8 percent of partners at firms of 251–500 lawyers, 2.02 percent of partners at firms of 501–700 lawyers, and 2.05 percent of partners at firms with more than 700 attorneys. Nat'l Ass'n for Law Placement Bulletin, *Women and Minorities at Law Firms by Race and Ethnicity—An Update* (Apr. 2013), *available at* http://www.nalp.org/0413research [hereinafter NALP Bulletin].

9. NALP Bulletin, *supra* note 8, at tbl.2; *see also* Jonathan D. Glater, *Law Firms Are Slow in Promoting Minority Lawyers to Partnerships*, N.Y. TIMES, Aug. 7, 2001, at A1; Alan

The failure of firms to achieve greater racial equity has generated extensive research and commentary from legal scholars[10] and other interested parties including practicing attorneys,[11] journalists,[12] and the organized bar.[13] The existing legal scholarship has tended to address this problem through the conceptual lens of racial bias. From this perspective, the difficulties of black law firm associates are manifestations of the racial biases of their (predominantly white) colleagues, embedded in, and enabled by, the institutional workings of their firms.[14]

This Article calls attention to a different, heretofore unacknowledged source of racial disadvantage in these firms, one that is neither dependent

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Jenkins, *Losing the Race*, AM. LAW., Oct. 3, 2001, at 36 (discussing one prominent New York City law firm's failure to retain or promote its many black associates).

10. *See, e.g.*, James E. Coleman, Jr. & Mitu Gulati, *A Response to Professor Sander: Is It Really All About the Grades?*, 84 N.C. L. REV. 1823 (2006); Tiffani N. Darden, *The Law Firm Caste System: Constructing a Bridge Between Workplace Equity Theory & Institutional Analyses of Bias in Corporate Law Firms*, 30 BERKELEY J. EMP. & LAB. L. 85 (2009); David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581 (1998) [hereinafter Wilkins & Gulati, *Reconceiving the Tournament*]; David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493 (1996) [hereinafter Wilkins & Gulati, *Why Are There So Few Black Lawyers*]; David B. Wilkins, *On Being Good* and *Black*, 112 HARV. L. REV. 1924 (1999) (reviewing PAUL M. BARRETT, THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA (1999)); *see also* Payne-Pikus et al., *supra* note 7; Root, *supra* note 1; Sander, *supra* note 8.

11. *See, e.g.*, Frederick H. Bates & Gregory C. Whitehead, *Do Something Different*, 76 A.B.A. J. 78 (1990); Pamela W. Carter, *Diversity on Trial: Integrating the Legal Profession*, 52 DRI FOR DEF. 55 (2010); Luis J. Diaz & Patrick C. Dunican, Jr., *Ending the Revolving Door Syndrome in Law*, 41 SETON HALL L. REV. 947 (2011); J. Cunyon Gordon, *Painting by Numbers: "And, Um, Let's Have a Black Lawyer Sit at Our Table,"* 71 FORDHAM L. REV. 1257, 1273–75 (2003); Vance Knapp & Bonnie Kae Grover, *The Corporate Law Firm—Can It Achieve Diversity?*, 13 NAT'L BLACK L.J. 298 (1994).

12. *See, e.g.*, Ann Davis, *Big Jump in Minority Associates, But . . .*, NAT'L L.J., Apr. 29, 1996, at A1; Jenkins, *supra* note 9; Rita Jensen, *Minorities Didn't Share in Firms' Growth*, NAT'L L.J., Feb. 19, 1990, at A1; Adam Liptak, *In Students' Eyes, Look-Alike Lawyers Don't Make the Grade*, N.Y. TIMES, Oct. 29, 2007, at A10; Julie Triedman, *The Diversity Crisis: Big Firms' Continuing Failure*, AM. LAW., May 29, 2014, http://www.behblaw.com/Hidden-Pages/The-Diversity-Crisis-Big-Firms-Continuing-Failure-_-The-American-Lawyer.pdf.

13. *See, e.g.*, CHI. BAR ASS'N, DIVERSITY INITIATIVE (2006); THE LAW FIRM DIVERSITY REPORT, MINORITY BAR ASSOCIATIONS OF WASHINGTON JOINT COMMITTEE ON LAW FIRM DIVERSITY (2009); ABA, *supra* note 3.

14. *See, e.g.*, Darden, *supra* note 10, at 131 (stating that "inequitable practices [that] stem from stereotypes and cognitive biases that are allowed to manifest through discretionary and informal structures"); Rhode, *supra* note 1, at 1053–55 (noting the in-group bias of white male attorneys and the status-based rejection of attorneys from marginalized groups); Root, *supra* note 1, at 607–10 (describing implicit bias and aversive racism against black attorneys); Wilkins & Gulati, *Why Are There So Few Black Lawyers*, *supra* note 10, at 507, 511 (discussing "the persistent *myth* of black intellectual inferiority" and emphasizing "the interplay between . . . structural factors and background assumptions about race and merit"). Even Richard Sander, who controversially has argued that the primary source of black associates' difficulties in these firms are merit-based, has inferred that stereotype discrimination also likely contributes substantially. *See* Sander, *supra* note 8, at 1818 (positing that law firm partners stereotype black associates as incompetent).

upon these inferences of racial bias, nor incompatible with them.[15] Cultural homophily,[16] the tendency of people to develop rapport and relationships with others on the basis of shared interests and experiences,[17] profoundly and often determinatively disadvantages many black attorneys in America's largest law firms.[18] Although not intrinsically racial,[19] cultural homophily has decidedly racial consequences in this context because of the profound social and cultural distance that separates black and white Americans,[20] evident in pronounced racial patterns in a wide variety of social and cultural behavior.[21] Drawing evidence from interviews of seventy-five black attorneys who have worked as associates at large law firms throughout the country,[22] this Article argues that homophily-based behavior deprives many

15. This Article does not question that racial bias, both conscious and unknowing, continues to contribute to the difficulties of black associates in these firms. Rather, my purpose in this Article is to call attention to a different source of racial inequality, one that potentially carries very different implications for our efforts to understand and address this problem. The evidence uncovered in my research, however, does problematize default inferences of racial bias to explain racial disparities in employment. It suggests that in many instances, problems attributed to bias and stereotyping may, to a larger extent, reflect the workings of cultural homophily instead.

16. Homophily, the tendency of similar people to develop relationships with one another, can occur on the basis of any number of personal characteristics and attributes. *See* Paul F. Lazarsfeld & Robert Merton, *Friendship As a Social Process: A Substantive and Methodological Analysis*, *in* FREEDOM AND CONTROL IN MODERN SOCIETY 18, 23–24 (Morroe Berger et al. eds., 1954) (introducing the term homophily); Miller McPherson et al., *Birds of a Feather: Homophily in Social Networks*, 27 ANN. REV. OF SOC. 415, 416 (2001).

17. *See, e.g.*, Thomas J. Berndt, *The Features and Effects of Friendship in Early Adolescence*, 53 CHILD DEV. 1447, 1454 (1982) ("Friends are similar in their orientation toward contemporary teen culture. They like the same kind of music, have similar tastes in clothes, and enjoy the same kinds of leisure time activities." (citations omitted)); Noah P. Mark, *Culture and Competition: Homophily and Distancing Explanations for Cultural Niches*, 68 AM. SOC. REV. 319, 320 (2003) ("[C]ultural similarities and differences among people provide bases for cohesion and exclusion. Empirical research shows that individuals who are culturally similar are more likely to be associates than are individuals who are culturally different." (citations omitted)); Andreas Wimmer & Kevin Lewis, *Beyond and Below Racial Homophily: ERG Models of a Friendship Network Documented on Facebook*, 116 AM. J. SOC. 583, 607 n.20 (2010) (noting that "students display a significant preference for culturally similar [others]").

18. For a more comprehensive discussion of the detrimental consequences of cultural homophily for black workers in high-status positions at elite corporate firms in several industries, see Kevin Woodson, *Beyond Bias: A Reassessment of Institutional Discrimination in the American Workplace*, WASH. & LEE J. CIVIL RTS. & SOC. JUST. (forthcoming).

19. Employment dynamics consistent with cultural homophily have been documented in several studies using predominantly non-black samples. *See, e.g.*, ROBERT JACKALL, MORAL MAZES: THE WORLD OF CORPORATE MANAGERS (1988); ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION (1977); David Purcell, *Baseball, Beer, and Bulgari: Examining Cultural Capital and Gender Inequality in a Retail Fashion Corporation*, 42 J. CONTEMP. ETHNOGRAPHY 291 (2013); Catherine J. Turco, *Cultural Foundations of Tokenism: Evidence from the Leveraged Buyout Industry*, 75 AM. SOC. REV. 894 (2010).

20. *See infra* Part I.B. This discussion of cultural differences associated with race is by no means intended to essentialize racial identity or to downplay the rich intraracial cultural diversity amongst black and white Americans.

21. *See infra* notes 44–48 and accompanying text.

22. These interviews were conducted as part of my dissertation research, which consisted of interviews of a larger sample of black workers who held professional or

black attorneys of equal access to critical relationship capital in predominantly white firms,[23] thereby reinforcing racial inequality.[24]

This Article proceeds in three parts. Part I introduces the social tendency of cultural homophily and provides a brief overview of the social and cultural differences that separate many black and white Americans. Part II demonstrates the manner in which these dynamics deprive black associates of equal access to all-important relationship capital and premium opportunities, thus limiting their careers. Part III briefly considers some of the potential means by which law firms and individual attorneys might better manage the effects of this potent driver of law firm inequality.

I. CULTURAL HOMOPHILY AND RACIAL DISTANCE

A. Cultural Homophily

Recognized as "one of the most striking and robust empirical regularities of social life,"[25] homophily has been detected in a wide variety of social contexts and relationship types.[26] The term itself, derived from the Greek roots for love (-phily) and same (homo-), is encapsulated in the ancient truism that "birds of a feather flock together."[27] The theory of homophily

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managerial positions in large corporate firms and a smaller comparison sample of white workers. *See* Kevin Woodson, Fairness and Opportunity in the Twenty-First Century Corporate Workplace: The Perspectives of Young Black Professionals (Nov. 2011) (unpublished Ph.D. dissertation, Princeton University) (on file with author).

23. As of 2012, 93.29 percent of law firm partners were white. *See* NALP Bulletin, *supra* note 8.

24. Other researchers have alluded to the effects of cultural differences in impeding the careers of black professionals in corporate firms. *See* Elijah Anderson, *The Social Situation of the Black Executive: Black and White Identities in the Corporate World*, *in* THE CULTURAL TERRITORIES OF RACE: BLACK AND WHITE BOUNDARIES 3, 27 (Michèle Lamont ed., 1999) (concluding that black professionals who did not assimilate into the cultural and social practices of their firm's white elite were less successful than others); Ronit Dinovitzer & Bryant G. Garth, *Lawyer Satisfaction in the Process of Structuring Legal Careers*, 41 L. & SOC'Y REV. 1, 42 (2007) (sharing an anecdote of a black attorney who chose not to work at a corporate law firm because of her social discomfort and lack of familiarity with the cultural terms of conversation ("golf and similar subjects") at a law firm informational reception).

25. Thomas A. DiPrete et al., *Segregation in Social Networks Based on Acquaintanceship and Trust*, 116 AM. J. SOC. 1234, 1236 (2011) ("The homophily principle is so powerful that its existence is taken as a given in the social capital literature."); Gueorgi Kossinets & Duncan J. Watts, *Origins of Homophily in an Evolving Social Network*, 115 AM. J. SOC. 405, 405 (2009); Lazarsfeld & Merton, *supra* note 16; McPherson et al., *supra* note 16.

26. *See* Denise B. Kandel, *Homophily, Selection, and Socialization in Adolescent Friendships*, 84 AM. J. SOC. 427 (1978) (finding homophily patterns in friendship according to behavior); J. Miller McPherson & Lynn Smith-Lovin, *Homophily in Voluntary Organizations: Status Distance and the Composition of Face-to-Face Groups*, 52 AM. SOC. REV. 370 (1987); McPherson et al., *supra* note 16; Lois M. Verbrugge, *The Structure of Adult Friendship Choices*, 56 SOC. FORCES 576 (1977) (finding homophily patterns in adult friendships); Aaron Retica, *Homophily*, N.Y. TIMES, Dec. 10, 2006 (Magazine), http://www.nytimes.com/2006/12/10/magazine/10Section2a.t-4.html.

27. In the words of Aristotle, "Some define [friendship] as a matter of similarity; they say that we love those who are like ourselves: whence the proverbs 'Like finds his like,' birds of a feather flock together,' and so on." ARISTOTLE, NICOMACHEAN ETHICS bk. VIII, i,

has been firmly established as an important tenet of social life and friendship formation through sixty years of social science research.[28]

Cultural homophily, attraction on the basis of shared cultural traits (including cultural preferences, knowledge, and interests),[29] is a particularly important source of rapport and interactional ease.[30] It reflects the rather unremarkable observation that people generally find it easier to develop and enjoy relationships with others who share similar interests, tastes, and life experiences.[31] When given the choice, we prefer to spend time around people with whom we "get along," and we tend to get along especially well with others when we share things in common (this should be apparent to anyone who has ever made new friends or sought romantic "matches" via internet dating sites).[32] Such common ground makes our social encounters with one another more mutually gratifying, which in turn leads us to feel more inclined to engage in future sociable interactions with each other.[33] These repeat encounters often eventually develop into friendships and other enduring relationships.[34]

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at 6 (H. Rackham trans., Harvard University Press 1968) (c. 384 B.C.E.); *see also* McPherson et al., *supra* note 16.

28. *See, e.g.*, DiPrete et al., *supra* note 25, at 1236 ("The homophily principle is so powerful that its existence is taken as a given in the social capital literature."); Lazarsfeld & Merton, *supra* note 16; McPherson et al., *supra* note 16.

29. All people possess cultural repertoires and resources (often referred to as cultural capital) encompassing all of their many lifestyle-related tastes, practices, knowledge, and possessions. *See* Michèle Lamont & Annette Lareau, *Cultural Capital: Allusions, Gaps and Glissandos in Recent Theoretical Developments*, 6 SOC. THEORY 153, 156 (1988) (noting that "the forms of cultural capital enumerated by Bourdieu . . . range from attitudes to preferences, behaviors and goods"); Purcell, *supra* note 19, at 294 (discussing cultural capital as "cultural knowledge, tastes, practices, attitudes, and goods"). Our cultural repertoires include everything from the music we listen to (and how we listen to it), to the food we prepare and consume (and how we talk about it), the places we travel, the television shows and movies that we watch, the sports that we watch and play, the books and magazines that we read, and the alcoholic beverages that we drink (and the venues where we choose to drink them). *See, e.g.*, Douglas B. Holt, *Distinction in America? Recovering Bourdieu's Theory of Tastes from Its Critics*, 25 POETICS 93, 101 (1997) (identifying sports, pop culture, dining, and travel as important culture-related activities).

30. *See, e.g.*, Berndt, *supra* note 17, at 1454 (noting "friends are similar in their orientation toward contemporary teen culture. They like the same kind of music, have similar tastes in clothes, and enjoy the same kinds of leisure-time activities" (citations omitted)); Mark, *supra* note 17, at 320 ("[C]ultural similarities and differences among people provide bases for cohesion and exclusion. Empirical research shows that individuals who are culturally similar are more likely to be associates than are individuals who are culturally different." (citations omitted)); Wimmer & Lewis, *supra* note 17, at 607 n.20 (finding that "students display a significant preference for culturally similar [others]").

31. *See, e.g.*, Daniel J. Brass et al., *Taking Stock of Networks and Organizations: A Multilevel Perspective*, 47 ACAD. MGMT. J. 795, 796 (2004) ("Similar people tend to interact with each other. Similarity is thought to ease communication, increase the predictability of behavior, and foster trust and reciprocity."); Marshall Prisbell & Janis F. Andersen, *The Importance of Perceived Homophily, Level of Uncertainty, Feeling Good, Safety, and Self-Disclosure in Interpersonal Relationships*, 28 COMMC'N Q. 22, 24–25 (1980) (listing "feeling good" as a benefit of homophily-based interactions).

32. *See* Prisbell & Andersen, *supra* note 31, at 23; Lazarsfeld & Merton, *supra* note 16; McPherson & Smith-Lovin, *supra* note 26.

33. Paul DiMaggio, *Classification in Art*, 52 AM. SOC. REV. 440, 443 (1987).

34. *Id.*

Thus, within a given work setting, some cultural traits are more easily leveraged than others to forge relationships with colleagues, depending upon the number and status of the workers who share them.[35] Those that are widely embraced, for example interest in a popular television program or a local sports team,[36] can provide valuable "ins" for an associate seeking to fit in and develop career-enhancing rapport with her colleagues.[37]

B. Racial Distance

Though not as morally invidious or legally suspect as discrimination driven by racial stereotypes and bias, cultural homophily nonetheless functions as a critical source of institutional bias that imposes burdens and barriers upon many black law firm associates because of the considerable social and cultural distance that exists between them and their colleagues. Centuries of racial stratification have produced profound social separation between black and white Americans.[38] Even today, black and white Americans largely live in different neighborhoods[39] and attend different schools.[40] As children, they develop same-race friendship circles during their formative adolescent years,[41] a pattern that persists into adulthood,

35. The values of specific forms of cultural capital vary considerably according to the cultural preferences predominant within particular social and organizational settings. *See* Prudence Carter, *"Black" Cultural Capital, Status Positioning, and Schooling Conflicts for Low-Income African American Youth*, 50 SOC. PROBS. 136 (2003) (discussing the different returns to dominant and nondominant forms of cultural capital in different institutional settings); Bonnie H. Erickson, *Culture, Class, and Connections*, 102 AM. J. SOC. 217, 249 (1996) (explaining that "more than one kind of culture is useful" within a given institutional context).

36. Several interviewees alluded to the value of sports-related cultural capital, particularly its impact on gender inequality. *See also* Turco, *supra* note 19, at 899–901 (discussing sports knowledge as a source of social closure in the leveraged buyout industry).

37. *Id.*

38. For general overviews of this history, see JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS (8th ed. 2000); and AUGUST MEIER & ELLIOT RUDWICK, FROM PLANTATION TO GHETTO (3d ed. 1976).

39. *See* JOHN R. LOGAN, SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS, HISPANICS AND ASIANS IN METROPOLITAN AMERICA (2011), *available at* http://www.s4.brown.edu/us2010/Data/Report/report0727.pdf (finding considerable residential segregation for black Americans at all income levels); *see also* Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation*, 29 ANN. REV. SOC. 167, 169 (2003) ("Despite declines in black-white segregation [since 1980], blacks remain severely segregated in the majority of U.S. cities.").

40. The magnitude of the continued racial separateness of American schools is staggering.

> Forty percent of white students attend high schools that are 90 percent or more white, and close to 30 percent of African American and Latino students attend high schools that are 90 percent or more minority. Nearly three-quarters of Latino and African American students attend high schools where most students are minority.

Robert Balfanz, *Can the American High School Become an Avenue of Advancement for All*?, 19 FUTURE OF CHILDREN 17, 20 (2009).

41. *See* Maureen T. Hallinan & Richard A. Williams, *Interracial Friendship Choices in Secondary-Schools*, 54 AM. SOC. REV. 67, 76 (1989) (discussing the rarity of interracial friendships); Kara Joyner & Grace Kao, *School Racial Composition and Adolescent Racial Homophily*, 81 SOC. SCI. Q. 810 (2000); James Moody, *Race, School Integration, and*

where they maintain racially defined social networks.[42] Black and white people rarely enjoy close friendships with each other.[43]

In light of these longstanding, ongoing patterns of social separateness, it is not surprising that black and white Americans have developed racially distinct cultural milieus.[44] Racial patterns are evident across a spectrum of cultural traits, including preferences and consumption practices relating to music,[45] television,[46] games,[47] humor, fashion, and art.[48]

The plain fact of this stark racial separateness was evident in interviewees' discussions of their college and law school careers. Although most had attended predominantly white universities, few had enjoyed close social relationships with their white classmates. Instead, many had led racially isolated social lives. One such interviewee described her time as an undergraduate at an elite public university:

> [I]f you looked at my photo albums from school, you would have thought that I went to Howard or Hampton or Spelman because all my friends were black. And we just had the community . . . [A]ll your friends were black, you were going to the black mixers, the Kappa parties[49] . . . you were in the black organizations . . . . My [college] experience—it was an HBCU[50] experience, essentially.[51]

Friendship Segregation in America, 107 AM. J. SOC. 679, 698 (2001) (noting that adolescent students' friendships are "highly segregated by race").

42. *See generally* SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 127–66 (2004) (finding that many middle-class black families seek out suburban black middle-class enclaves). *See also* LAWRENCE OTIS GRAHAM, OUR KIND OF PEOPLE: INSIDE AMERICA'S BLACK UPPER CLASS (1999); Kathryn M. Neckerman et al., *Segmented Assimilation and Minority Cultures of Mobility*, 22 ETHNIC & RACIAL STUD. 945, 952 (1999) ("Few in the black middle class socialize with white colleagues outside of the workplace."). For a characterization of this social separateness as "discrimination in contact," see generally GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 95–104 (2002).

43. Elizabeth Flock, *Poll: White Americans Far Less Likely to Have Friends of Another Race*, U.S. NEWS & WORLD REP. (Aug. 8, 2013), *available at* http://www.usnews.com/news/articles/2013/08/08/poll-white-americans-far-less-likely-to-have-friends-of-another-race (discussing results of Reuters/Ipsos poll finding that 40 percent of white Americans had no nonwhite friends).

44. *See* LAWRENCE W. LEVINE, BLACK CULTURE AND CONSCIOUSNESS: AFRO-AMERICAN FOLK THOUGHT FROM SLAVERY TO FREEDOM (1977) (providing a detailed overview of the evolution of various black American cultural traditions).

45. *See* MARK ANTHONY NEAL, WHAT THE MUSIC SAID: BLACK POPULAR MUSIC AND BLACK PUBLIC CULTURE (1999).

46. *See* Jane D. Brown & Carol J. Pardun, *Little in Common: Racial and Gender Differences in Adolescents' Television Diets*, 48 J. BROAD. & ELEC. MEDIA 266 (2004).

47. *See* Alex Johnson, Jr., *Bid Whist, Tonk, and* United States v. Fordice*: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401 (1993) (discussing black cultural and social traditions involving the card games of bid whist and tonk).

48. Paul DiMaggio & Francie Ostrower, *Participation in the Arts by Black and White Americans*, 68 SOC. FORCES 753 (1990) (finding differences in black and white Americans' consumption of art).

49. "Kappa" here refers to Kappa Alpha Psi, one of the most prominent African American Greek-letter organizations. *See* LAWRENCE C. ROSS, JR., THE DIVINE NINE: THE HISTORY OF AFRICAN-AMERICAN FRATERNITIES AND SORORITIES 46–48 (2000). These organizations were founded to provide social and civic outlets for black students in an era when blacks were widely excluded from white fraternities and sororities. Their continuing

Another interviewee explained that even the fairly small black student population at his Ivy League college provided enough of a critical mass for black students to maintain their own "black environment" with "black Greek organizations [and] . . . different social organizations."[52]

Stories like these were common and consistent with research on racial patterns in campus social life at American universities.[53] But while black students can thrive academically and socially without engaging in in-depth interracial interactions, doing so causes them to miss out on opportunities for interracial acclimation and acculturation that might prove to be valuable later on, during their careers in predominantly white firms.

Though this race-based distance potentially impedes black and white attorneys alike from developing rapport with attorneys of other racial backgrounds, given the skewed racial demographics of large law firms, black associates bear the brunt of this problem. As a practical matter, they suffer more from their difficulties establishing relationships with white attorneys than those white attorneys suffer from their inability to develop rapport with them. The following part explains the importance of relationship capital in large law firms, and presents interviewees' firsthand accounts to further illuminate the effects of these subtle disadvantages in undermining the careers of many black attorneys.[54]

II. RACE-BASED DISTANCE AND HOMOPHILY DISADVANTAGE IN LARGE LAW FIRMS

"[T]he biggest thing is that ultimately what you want is for one person with clout here to like you."[55]

These social and cultural dynamics can carry considerable professional consequences in large law firms, where careers are contingent upon rapport

role in shaping the social lives and networks of many black college students and graduates exemplify the complex manner through which social and cultural distance between black and white Americans that originate in racial stratification become self-sustaining over time.

50. Woodson, *supra* note 22, at 184.

51. Interview with Attorney (Jan. 28, 2010).

52. Interview with Attorney (Nov. 11, 2009).

53. *See, e.g.*, MAYA A. BEASLEY, OPTING OUT: LOSING THE POTENTIAL OF AMERICA'S YOUNG BLACK ELITE 57–82 (2011) (noting that many black college students at majority white colleges immerse themselves in their school's black communities and have limited contact with white students); Elizabeth R. Cole & Kimberly R. Jacob Arriola, *Black Students on White Campuses: Toward a Two-Dimensional Model of Black Acculturation*, 33 J. OF BLACK PSYCHOL. 379 (2007); Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241, 2270 (2000) (finding that white students wanted friendships with black students while black students "preferred same-race friendships"); Sandra S. Smith & Mignon R. Moore, *Intraracial Diversity and Relations Among African-Americans: Closeness Among Black Students at a Predominantly White University*, 106 AM. J. SOC. 1 (2000). This social separateness has several causes, including both homophily and racial alienation. *See generally* WENDY LEO MOORE, REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS, AND RACIAL INEQUALITY 99–100 (2008); Meera E. Deo, *Separate, Unequal, and Seeking Support*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 9, 29–31 (2012).

54. *Infra* Part II.

55. Interview with Attorney (Feb. 10, 2010).

and relationships with colleagues.[56] For associates in these firms, relationship capital can be every bit as important as work performance. The mutual affinity, trust, and empathy that some attorneys develop through sociable interactions with each other renders them more likely to help and bestow preferential treatment on one another.[57] Regardless of race or gender, law firm associates who manage to develop the right relationships enjoy greater access to high quality work opportunities, advice, advocacy, and generous performance reviews.[58] Conversely, those who are less able to develop rapport with colleagues face longer odds of success.[59]

To understand the power of relationship capital in these firms, one need only consider the process through which associates receive work assignments and other opportunities. As senior attorneys generally enjoy considerable autonomy in allocating work assignments,[60] associates are not guaranteed equal access to the scarce,[61] high quality "training work" vital for their careers.[62] Instead, junior attorneys who have the strongest relationships and rapport with senior colleagues tend to receive greater

56. *See, e.g.*, Wilkins, *supra* note 10, at 1943–44 ("[T]hose who make it must have . . . 'relationship capital,' consisting of strong bonds with powerful partners who will give the associate good work and, equally important, report the associate's good deeds to other partners."). These observations about the importance of relationships in large law firms is consistent with the extensive, multidisciplinary body of social science research on social capital, the goodwill and access to preferential treatment that is available to people based on their membership in groups and relationships. *See* James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. SUPPLEMENT S95, S100–05 (1988).

57. *See* Herminia Ibarra, *Race, Opportunity, and Diversity of Social Circles in Managerial Networks*, 38 ACAD. MGMT. J. 673 (1995) (investigating the informal networks of white and minority managers); Paul Ingram & Xi Zou, *Business Friendships*, 28 RES. ORG. BEHAV. 167 (2008) (finding that friendships with colleagues offer numerous career enhancing benefits).

58. Wilkins & Gulati, *Reconceiving the Tournament*, *supra* note 10, at 1609.

59. *See* Wilkins, *supra* note 10 (discussing how highly credentialed black attorney Lawrence Mungin's seemingly promising career at a large law firm interested in racial diversity was nonetheless doomed by his lack of relationship capital). *See generally* PAUL M. BARRETT, THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA (1999) (discussing Mungin's failed career and subsequent employment discrimination lawsuit against Katten Munchin Rosenman LLP).

60. *See* Diaz & Dunican, *supra* note 11, at 974–76. Though many firms have developed centralized assignment systems in recognition of the potential inefficiency and unfairness of "free market" assignment practices, these rules are frequently ignored as partners and senior associates often staff their own cases and allocate assignments outside of the formally prescribed procedures. *Id.* at 974–78. Furthermore, these formal systems do little to curb the discretion of partners in allocating follow-up assignments amongst the multiple associates who are already working for them on a given matter. *Id.* at 975–76.

61. Wilkins, *supra* note 10, at 1944 (noting that premium work is "inherently in short supply").

62. *See* Wilkins & Gulati, *Reconceiving the Tournament*, *supra* note 10, at 1644–51 (explaining that some associates have more or less access to high quality assignments than others); Wilkins & Gulati, *Why Are There So Few Black Lawyers*, *supra* note 10, at 541–42 (referring to "training" assignments as the "royal jelly" of corporate law firms, in that a steady diet of this work allows a select few associates to rise from worker bees to queen bees); *see also* Diaz & Dunican, *supra* note 11, at 974–76.

access to the scarce supply of training work.[63] As one interviewee explained:

> Though law firms have formal ways to distribute assignments, the way that you're really going to get the assignment that you want to get is to know senior associates, to know partners . . . by being someone that they want to have a conversation with, being somebody that they wouldn't mind talking to outside of the [office].[64]

In the path-dependent realm of law firm careers,[65] even modest advantages in access to premium assignments can cumulatively result in attorneys ending up on very different career paths.[66]

This relational dimension of law firm careers works to the disadvantage of black attorneys. On average, black associates have less relationship capital with colleagues than their white peers: they have less social contact with colleagues[67] and are less likely to receive sufficient mentorship support.[68] Although these disparities frequently have been attributed to racial bias,[69] they are just as consistent with the workings of homophily. The logic of homophily dictates that black associates, who share fewer social and cultural characteristics with their colleagues, will receive less preferential treatment from them, not as a covert form of invidious group-

63. *See* Diaz & Dunican, *supra* note 11, at 975–76 (observing that assignments in some firms are "socially constructed" and occur "based on existing relationships").

64. Interview with Attorney (Feb. 17, 2010). Other interviewees concurred with this assessment. Some viewed the inability to find work outside of their firms' formal assignment processes as an indicator that an associate was not held in particularly high regard and lacked adequate relationship capital. Rapport with partners and senior associates also enables some associates to avoid the less desirable, and more abundant, "paperwork" assignments. *See* Wilkins & Gulati, *Reconceiving the Tournament*, *supra* note 10, at 1609; Wilkins & Gulati, *Why Are There So Few Black Lawyers*, *supra* note 10, at 565.

65. *See* Wilkins & Gulati, *Reconceiving the Tournament*, *supra* note 10, at 1646 (observing that "[a]ssociates who do well on their initial training assignments are given preferential access to additional training opportunities").

66. *Id*. at 1646–47.

67. Payne-Pikus et al., *supra* note 7, at 566 (finding black attorneys were less likely to report joining partners for meals and more likely to report desiring more mentoring). Most large firms have attempted to mitigate the disparities produced by informal mentorship by instituting formal mentorship programs. *See, e.g.*, *Attorney Development and Retention*, SKADDEN, http://www.skadden.com/diversity/development (last visited Mar. 25, 2015) ("Skadden's formal mentoring program pairs junior associates with a partner and an associate or counsel."). Though well-intentioned, these types of formally imposed mentorship relationships tend to be less useful than those that develop organically, through interpersonal rapport. *See* Belle Rose Ragins & John L. Cotton, *Mentor Functions and Outcomes: A Comparison of Men and Women in Formal and Informal Mentoring Relationships*, 84 J. APPLIED PSYCHOL. 529 (1999) (demonstrating that workers perceive organic mentorship to be more effective than formal mentoring relationships).

68. Payne-Pikus et al., *supra* note 7; Sander, *supra* note 8, at 1798 ("Nonwhites—especially blacks—exhibit a striking concern over the absence of mentoring and training in their jobs, relative to white men.").

69. Payne-Pikus et al., *supra* note 7.

based discrimination,[70] but quite simply because they have less rapport with them.[71]

Nearly half of the attorneys (thirty-five of seventy-five) interviewed for this project reported that issues of racial distance—racially-influenced differences in attorneys' personal backgrounds and cultural repertoires—hindered some, if not all, of the black associates working in their firms from developing relationship capital with colleagues.[72]

For example, one interviewee, a former associate at a Washington, D.C. firm, explained how social and cultural differences rendered informal firm-related social events and gatherings problematic for some of his black colleagues.

> [T]here's another layer of complication, stress, and almost like another layer of the job that you have to go through if you're not comfortable. So for example, if you don't like to go out and drink beer. . . . [T]here's small annoyances. If you go to a firm event you know there's gonna be shitty music. That's just the way it is. [Y]ou almost ignore it but why should you? Why is it that there are only certain genres . . . what it meant to go out and have a good time was very monolithic. I'm sure there are certain people who have a very difficult time adapting to that or have no desire to adapt and don't think it's worth the price.[73]

As this interviewee's reflection suggests, some black associates who are not acclimated to the cultural preferences that are predominant in their firms eventually disengage socially and forego potential opportunities to develop relationship capital with colleagues, thereby reinforcing their isolation.

This lack of relationship capital reduces their access to premium work opportunities.[74] One interviewee, a senior associate at a West Coast firm who spoke of the "undeniable" affinity between associates and partners at

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70. *But see* Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 719–28 (2000) (discussing this process as a form of racial discrimination driven by racial stereotyping).

71. Researchers have found a great deal of evidence consistent with this. Several of the classic qualitative studies of corporate careers found that sharing cultural traits and common leisure-time activities with one's employers was critical for career advancement. *See* JACKALL, *supra* note 19; KANTER, *supra* note 19. More recently, sociologists including Rivera concluded that "employers prioritized cultural similarity because they saw it as a meaningful quality that fostered cohesion, signaled merit, and simply felt good." Lauren Rivera, *Hiring As Cultural Matching: The Case of Elite Professional Service Firms*, 77 AM. SOC. REV. 999, 1016 (2012). Sociologists Catherine Turco and David Purcell each found that workers who lacked cultural common ground with their senior colleagues suffered greater marginalization and alienation. Purcell, *supra* note 19; Turco, *supra* note 19.

72. To provide context for this finding, only twenty-three interviewees, including four of the thirty-five who reported disadvantages relating to their dissimilar cultural repertoires and personal backgrounds, reported observing acts of discrimination rooted in anti-black racial biases or stereotypes.

73. Interview with Attorney (Feb. 19, 2010).

74. *See* Sander, *supra* note 8, at 1801 tbl.19. Compared to the white attorneys in the AJD sample, a lower percentage of black attorneys reported handling an entire matter on their own, being involved in formulating strategy on half or more of their matters, or being responsible for keeping their clients updated on matters. They were more likely to report spending "100+ Hours Reviewing Discovered Documents/Performing Due Diligence on Prepared Materials." *Id*.

his firm with "similar backgrounds," explained how this dynamic left many black associates on the outside looking in while some of their white counterparts bonded with influential partners.

> I don't have the same experiences [as the white partners]. I didn't play golf growing up. I didn't have much to offer to a conversation that was talking about how [golfer Arnold] Palmer was doing. . . . It also goes to where people vacation, stuff like that. The chit chat varies according to whose experiences are being discussed. . . . If African Americans don't have those experiences, then often times we won't get as close to the partners. It's not racial but the appearance is that the white attorneys will get a lot of the more posh assignments that can lead to greater things.[75]

Although this particular interviewee ultimately was able to forge relationships based on his superlative work product, eventually being promoted to partner, these dynamics made his upward trajectory more difficult.[76]

Another interviewee, a junior associate in the southern office of a large national firm, discussed her difficulties in developing rapport with colleagues with dissimilar backgrounds and interests as the primary cause of her inability to secure enough work assignments.[77] She described her difficulties, which she sensed were related to race but not a matter of racial bias.

> [T]here's just nothing that goes on that feels race related; I just don't feel plugged in . . . that would be the only thing that I could say would be race but then it's not racism, it's just that I'm different and I have no idea how to fit in here. I have no idea how to be the person that you want to drink with.[78]

At the time of our interview, she was chronically unable to meet her firm's billable hour expectations and feared that she would be amongst the first attorneys let go if the firm conducted layoffs.[79] As her account reveals, the disadvantages of racial distance can be just as frustrating and just as impactful as those caused by racial bias.

Another interviewee, a former associate in an East Coast office of a large West Coast firm, explained that one of his black classmates from law school had a far more successful law firm career because her cosmopolitan background better enabled her to build rapport with partners.

> [W]hereas we were doing the same in law school, and I even had an easier time getting a job . . . she excelled and just did really, really well [at her firm] . . . . I always attribute the difference to being [that] she knows how to get along better with those sort of people who are decision makers . . . and it had huge differences in how she was perceived and how

75. Interview with Attorney (Aug. 12, 2009) (partner).

76. This interviewee explained that many black associates were also disadvantaged by their own homophily preferences, which led them to gravitate toward each other and forego networking with more influential white partners. *Id*.

77. Interview with Attorney (Sept. 27, 2009) (associate).

78. *Id.*

79. *Id.*

> work went for her . . . that's something that comes a little easier for [her], she'll go out to drink with a partner from her law firm . . . .[80]

While his friend excelled at her firm and ultimately made partner, he bounced between multiple law firms before landing in an in-house position at a small company.[81] This stark contrast between the careers of these two similarly situated attorneys—both black and both possessing comparable educational credentials—underscores the role of obstacles other than colleagues' stereotypes and biases in shaping the careers of black attorneys. The fact that those black associates who, like this interviewee's friend, are equipped to navigate the social and cultural terrain of their firms, may tend to enjoy more satisfying and successful careers suggests that difficulties arising from race-related social and cultural differences may be every bit as determinative as racial bias in shaping the fates of many black attorneys.

Whether or not the attorneys discussed in this part were also subjected to the types of racial stereotypes and biases contemplated in the previous scholarship,[82] many were undoubtedly handicapped by their inability to develop rapport with colleagues. The recognition of homophily as a formidable, independent source of institutional discrimination capable of perpetuating racial inequality in predominantly white firms should inform all future efforts to promote racial diversity. The following part will briefly discuss some proposed policies and strategies that might promote better career experiences and outcomes for black attorneys in these firms, in light of racial distance and cultural homophily.

III. ADDRESSING THE RACIAL DISTANCE PROBLEM

Scholars and practitioners concerned about law firm diversity already have proposed a wide-ranging assortment of sensible organizational reforms that might help improve the career prospects of black attorneys.[83] Rather than attempting to reinvent the wheel, this part focuses on how firms might enhance some of these proposals to better address the racial disadvantage that arises from homophily and racial distance. Though these strategies certainly will not eradicate this problem—the tendency of homophily is simply too pervasive and the reality of racial distance too deeply entrenched—they should help ensure greater access to critical opportunities and support for many black associates who would otherwise be deprived of these career-defining resources.

A. Organizational Reforms

There are several organizational tools that could be implemented to better address the effects of homophily and racial distance: (1) universal management practices, (2) diversity staff and infrastructure, (3) training

80. Interview with Attorney (Nov. 11, 2009) (former associate).
81. *Id.*
82. *See supra* note 14 and accompanying text.
83. *See infra* notes 84–100 and accompanying text.

programs, (4) enhanced mentorship programs, and (5) affirmative assignment action.

1. Universal Management Practices

Several observers have posited that law firms may be able to improve the careers of minority associates by implementing management practices that facilitate more equitable outcomes for all associates.[84] These proposed measures include formal assignment systems,[85] efforts to provide greater transparency with respect to performance standards and expectations,[86] and enhanced professional development training.[87] Though these measures have the potential to help all associates, they may prove particularly valuable for the many black associates who would otherwise "fall through the cracks" and miss out on opportunities and information because cultural and social dissimilarities have impeded them from securing sufficient relationship capital with the partners in their practice groups.

2. Diversity Staff and Infrastructure

Other proposals have emphasized the importance of retaining diversity professionals,[88] and creating robust diversity infrastructures, including diversity committees[89] and affinity groups.[90] Although experience has demonstrated that these steps are far from sufficient as means of achieving racial diversity, they seem indispensible as foundational measures that

84. *See generally* Wilkins, *supra* note 10, at 1955–62 (discussing the role of poor management practices in exacerbating the problems of minority associates). *But see* Fiona M. Kay & Elizabeth H. Gorman, *Developmental Practices, Organizational Culture, and Minority Representation in Organizational Leadership: The Case of Partners in Large U.S. Law Firms*, 639 ANNALS AM. ACAD. POL. & SOC. SCI. 91, 108 (2009) (finding that "an organizational culture of fostering and taking responsibility for employees' professional development works to *decrease* the proportions of minorities in management").

85. *See* N.Y. BAR COMM. ON MINORITIES IN THE PROFESSION, *supra* note 3, at 2. *But see* Wilkins & Gulati, *Why Are There So Few Black Lawyers*, *supra* note 10, at 591–92 (positing that formal assignment procedures do not work because powerful partners are free to bypass them).

86. *See, e.g.*, N.Y. BAR COMM. ON MINORITIES IN THE PROFESSION, *supra* note 3, at 2; REEVES, *supra* note 3, at 13.

87. *See* N.Y. BAR COMM. ON MINORITIES IN THE PROFESSION, *supra* note 3, at 2.

88. *See* ABA, *supra* note 3, at 27–28 (firms should retain diversity experts); Brereton, *supra* note 3, at 4 (hire full-time diversity professionals); N.Y. BAR COMM. ON MINORITIES IN THE PROFESSION, *supra* note 3, at 1 (same).

89. There appears to be a consensus that firms should form diversity committees with representation, commitment, and support from firm leaders. *See, e.g.*, ABA, *supra* note 3, at 28; REEVES, *supra* note 3, at 14; N.Y. BAR COMM. ON MINORITIES IN THE PROFESSION, *supra* note 3, at 1. Some observers have emphasized the importance of incentivizing white male attorneys to prioritize diversity and champion its virtues, for example, by tying diversity measures to compensation. *See* Root, *supra* note 1, at 623–28 (advocating that firms provide billable credit for time spent participating in firms' diversity programming); *see also* ABA, *supra* note 3, at 29; Brereton, *supra* note 3, at 4; N.Y. BAR COMM. ON MINORITIES IN THE PROFESSION, *supra* note 3, at 1.

90. *See* ABA, *supra* note 3, at 27–28; REEVES, *supra* note 3, at 12. *But see* Deborah L. Rhode, *Women and the Path to Leadership*, 2012 MICH. ST. L. REV. 1439, 1469 (noting that affinity programs have yielded mixed results).

enable issues of racial disadvantage to be articulated, monitored, evaluated, and addressed.

3. Training Programs

One common diversity management strategy targets the presumed racial biases of partners through mandatory diversity education and training programs.[91] Though well intended, the existing data suggests that diversity training efforts have not been particularly successful thus far.[92] Law firms should enhance these efforts by incorporating information about the tendencies toward homophily and their systemic racial consequences. This improved training would, at the very least, help expand and refine partners' understanding of their firms' diversity problems. This training regarding homophily, a universal human tendency, may especially resonate with partners who react defensively or skeptically to bias-centered training programs, which many may interpret as all but accusing them of being closet racists.

4. Enhanced Mentorship Programs

The need for firms to provide better mentoring for black associates has also been a central emphasis of the existing commentary.[93] Employers might be able to ameliorate some of the racial effects of cultural homophily through greater commitment to formal mentorship and sponsorship programs aimed at providing minority workers greater access to relational capital and its professional benefits.[94] These programs should work to ensure that black associates have access to a constellation of mentors within their firms,[95] including some who will be responsible for providing these protégés substantive work opportunities. Although formal mentorship programs have thus far yielded mixed results,[96] there is evidence that they

91. *See* ABA, *supra* note 3, at 27–28; N.Y. BAR COMM. ON MINORITIES IN THE PROFESSION, *supra* note 3, at 2.

92. Several scholars have questioned the effectiveness of training programs. *See* Rhode, *supra* note 90, at 1469 (noting the limited effectiveness of such programs); Wilkins & Gulati, *Why Are There So Few Black Lawyers*, *supra* note 10, at 592–94 (questioning the value of diversity training efforts).

93. *See, e.g.*, REEVES, *supra* note 3, at 11–14; N.Y. BAR COMM. ON MINORITIES IN THE PROFESSION, *supra* note at 3; Brereton, *supra* note 3; Payne-Pikus et al., *supra* note 7, at 577 ("Affirmative action mandates with regard to partner contact and mentoring of minority associates may be essential to achieve an effective racial integration of the upper reaches of the legal profession.").

94. Kay & Gorman, *supra* note 84, at 95 (discussing potential value of formal mentorship program for racial minorities).

95. *Id.*; *see* Monica C. Higgins & David A. Thomas, *Constellations and Careers: Toward Understanding the Effects of Multiple Developmental Relationships*, 22 J. ORGANIZATIONAL BEHAV. 223, 236–38 (2001) (emphasizing the value of a protégé's having multiple mentors).

96. *See supra* note 67 and accompanying text.

enhance the careers of minority professionals.[97] Given the laxity of many existing programs,[98] firms have considerable room for improvement on this front by imposing greater expectations and requirements concerning the partners who serve as mentors. Where feasible, in designing mentorship programs, firms should seek to take advantage of homophily by pairing black associates with mentors who have similar interests or backgrounds.[99] Identifying and calling attention to such cultural and experiential common ground may better enable these attorneys to develop rapport with each other across racial lines.

5. Affirmative Assignment Action

Recognizing that many black associates will not receive equal access to premium assignments without active, sustained interventions, some observers have suggested that firms should essentially develop affirmative action assignment procedures to ensure that all minority associates receive access to premium work opportunities.[100] There is much to commend in such policies. Given the pervasiveness of homophily and its power in ordering relationships in the workplace, such proactive, affirmative efforts will be necessary to ensure equitable treatment for black associates.

B. Strategic Acculturation

Though these organizational reforms may be able to manage and ameliorate some of the potential harms of homophily, they do nothing to disrupt the root causes of the problem—the race-related social and cultural distance that exists between black and white attorneys. To address this dimension of the problem, attorneys of all races must strive to develop greater interracial acclimation and acculturation.

As a normative matter, all attorneys, particularly partners, should shoulder the considerable burden of crossing the social and cultural disconnects that often divide black and white attorneys. Though law firms have limited institutional capacity to effect change on this front, firms could promote greater cosmopolitanism by emphasizing the value of all attorneys

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97. Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 590, 604 (2006).

98. *See* Rhode, *supra* note 1, at 1072 (explaining that most law firm mentorship programs fail to "specify the frequency of meetings, set goals for the relationship, or require evaluation").

99. *See generally* Stacy Blake-Beard et al., *Matching by Race and Gender in Mentoring Relationships: Keeping Our Eyes on the Prize*, 67 J. SOC. ISSUES 622, 638 (2011) (suggesting that shared background experiences between mentors and protégés may be more important than demographic similarities); Connie R. Wanberg et al., *Mentor and Protégé Predictors and Outcomes of Mentoring in a Formal Mentoring Program*, 26 J. VOCATIONAL BEHAV. 410, 420–21 (2006) (protégés' perceptions of similarity with mentors may contribute to higher quality mentorship relationships).

100. *See, e.g.*, ABA, *supra* note 3, at 29; REEVES, *supra* note 3, at 12; Wilkins & Gulati, *Why Are There So Few Black Lawyers*, *supra* note 10, at 605 (arguing that firms must extend affirmative action to assignments and other personnel decisions).

taking deliberate, self-conscious efforts to expose themselves to the interests and experiences of other groups during their diversity training programs.

As a practical matter though, the burden of interracial acclimation will in all likelihood continue to fall disproportionately upon black associates. As members of an underrepresented, marginalized group, black attorneys have far greater personal incentives to seek out opportunities to develop common ground with their white colleagues, and face far greater costs for failing to do so. Rather than waiting—quite possibly futilely—for firms to stamp out homophily-based behavior and for white attorneys to more fully embrace the moral imperative of greater interracial acclimation, black attorneys (and aspiring attorneys) can work to equip themselves with the social and cultural resources that might better enable them to develop relationship capital in their firms. By strategically working to gain greater experience and comfort in predominantly white social settings and familiarity with the cultural capital that holds currency in their offices, some black associates may be able to improve their career prospects within their firms.

The potential value of this approach was evident in the accounts of several of the interviewees who had arrived at their firms with extensive prior acclimation to their white counterparts through high quality interracial social relationships and interactions. A few of these interviewees explained that their background experiences had provided them the comfort and acclimation necessary to develop relationship capital in their firms. For example, one interviewee who had attended several elite, predominantly white schools and who counted several white men amongst his closest friends, described the difficulties of his black peers while distinguishing his own experience. He explained:

> From the day you walk in the door, it's based on who you know, who you can create relationships with, so it's a very tricky place to navigate . . . . For me, to be clear, this wasn't really a problem because I've pretty much been operating in these environments . . . for most of my life. . . . [i]t didn't feel any different than anywhere else I've ever been.[101]

Similarly, another interviewee noted, "I've just been in a lot of different social environments, and I have a lot of different types of friends so for me fitting in is not something that's that difficult . . . but I think for other [black attorneys] it is a lot more difficult."[102]

Another interviewee who had held close interracial friendships throughout her life provided a vivid account of the benefits of her interracial acculturation. She explained that her interactional ease in all white social settings and cultural interests in the fine and performing arts enabled her to bond with a number of colleagues, including one of the most powerful partners at the firm, an older white man.

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101. Interview, *supra* note 73.
102. Interview with Attorney (Feb. 12, 2010).

> I knew he liked art . . . [s]o I sat down with him at a big dinner . . . sort of a black tie event, and I said, "I really want to tell you about this exhibit that I saw recently when I was in New York." And all the other partners are looking around . . . [a]nd finally someone said, "I thought you were talking about a *trial* exhibit" and he says, "Oh no—she knows where my heart is really at; she's talking about an exhibit at the Metropolitan Museum of Art."[103]

This partner eventually became a valuable sponsor who greatly enhanced her experience at her firm.[104] Although her success in strategically availing herself of her cultural resources was particularly striking, a number of other interviewees also spoke of leveraging their prior interracial exposure more subtly.

Developing this type of acclimation will not be easy going for law firm associates, as the acculturation that helps some workers develop and sustain positive interracial relationships often reflects the embodied learning of many years of prior life experiences. Many of those associates who reach these law firms without such background exposure will find that it is too late for them to make up for lost time.

Therefore, efforts to promote this acclimation should begin before attorneys start their legal careers. "Pipeline" diversity efforts should seek to raise black students' awareness of the importance of developing relationship capital in predominantly white settings and the value of interracial acculturation in equipping them with resources that may enable them to do so. This information may induce aspiring black attorneys to more purposefully take advantage of the opportunities to develop greater interracial interactional comfort while still in college and law school.[105]

To be clear, this approach raises important normative problems and is not without its costs.[106] Even some of the interviewees whose backgrounds enabled them to develop rapport with white colleagues spoke with evident frustration of the psychological and dignitary costs of feeling perpetually forced to accommodate the cultural and social sensibilities of others while suppressing some of their own. Notwithstanding these legitimate concerns, given the magnitude of the stakes involved—the very careers of thousands of black attorneys—and the lack of viable alternatives, this strategy demands serious consideration.

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103. Interview with Attorney (Jan. 27, 2010) (emphasis added).

104. *Id*. She also explained that because this partner shared and respected her cultural tastes and interests, he in some instances even spared her from certain unpleasant assignments that would have prevented her from attending particular performances. *Id.*

105. Parents might also make more concerted efforts to ensure that their children develop acclimation to their white counterparts and the interactional comfort useful for navigating these predominantly white organizational settings.

106. *See* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL. L. REV. 1259, 1288–90 (2000) (discussing the potential dignitary and expressive harms of identity work); Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 397–99 (2008). The strategic acculturation that I advocate in this part does not call for the type of assimilationist conformity criticized in these works, but rather a cosmopolitanism in which associates of all races develop greater cross-racial acclimation.

CONCLUSION

The challenges of racial inclusion and diversity in America's largest, most prestigious law firms have produced a substantial and important body of legal scholarship. This Article contributes to this research by introducing an additional source of racial disadvantage that heretofore has been overlooked in commentary on this topic. This insight underscores that black associates face a number of subtle, complex difficulties in these firms, including some that are distinct from the more widely understood processes of racial bias and stereotyping. Acknowledging and addressing the detrimental impact of racial distance and cultural homophily on the careers of many black attorneys represents an important step toward facilitating greater racial diversity in the legal profession.