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COMMENTARY

THE IMPERIAL SCHOLAR: REFLECTIONS ON A REVIEW OF CIVIL RIGHTS LITERATURE

RICHARD DELGADO†

I. CIVIL RIGHTS SCHOLARSHIP—IDENTIFYING A TRADITION

When I began teaching law in the mid-1970's, I was told by a number of well-meaning senior colleagues to "play things straight" in my scholarship—to establish a reputation as a scholar in some mainstream legal area and not get too caught up in civil rights or other "ethnic" subjects. Being young, impressionable, and anxious to succeed, I took their advice to heart and, for the first six years of my career, produced a steady stream of articles, book reviews, and the like, impeccably traditional in substance and form. The dangers my friends warned me about were averted; the benefits accrued. Tenure securely in hand, I turned my attention to civil rights law and scholarship.

Realizing I had a great deal of catching up to do, I asked my research assistant to compile a list of the twenty or so leading law review articles on civil rights. I gave him the criteria you would expect: frequent citation by courts and commentators; publication in a major law review; theoretical rather than practical focus, and so on. When he submitted the list, I noticed that each of the authors was white. Each was also male. I checked his work myself, with the same result. Further, a review of the footnotes of these articles disclosed a second remarkable coincidence—the works cited were also written by authors who were themselves white and male. I was puzzled. I knew that there are about one hundred Black, twenty-five Hispanic, and ten Native American law professors teaching at American law schools.[1] Many of

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I acknowledge the careful criticism and constructive comments of Derrick Bell, Michael Olivas, and Henry McGee, professors of law, in the preparation of this manuscript. They gave new meaning to the term "colleague." An earlier version of this paper was delivered at Harvard Law School in April 1983.

[1] A directory of minority law professors listed 133 Black law professors, 22 Spanish-surnamed professors, and 4 American Indian professors for 1979-80. SECTION ON MINORITY GROUPS, ASSOCIATION OF AMERICAN LAW SCHOOLS, 1979-80 DIRECTORY OF MINORITY LAW FACULTY MEMBERS (D.Bell ed. 1980) [hereinafter cited as 1979-80 DIRECTORY]. The 1981-82 edition of this directory listed 198 Black law professors, 20 Chicano and Puerto Rican law professors, and 15 American Indian

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them are writing in areas about which they care deeply: antidiscrimination law, the equality principle, and affirmative action. Much of that scholarship, however, seems to have been consigned to oblivion.[2] Courts rarely cite it, and the legal scholars whose work *really* counts almost never do. The important work is published in eight or ten law reviews and is written by a small group of professors, who teach in the major law schools.[3]

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professors. These figures do not include administrators, librarians, or professors not on tenure tracks.

[2] *See* Bell, Bakke, *Minority Admissions and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3, 4 n.2 (1979) [hereinafter cited as Bell, *Price of Racial Remedies*] (listing minority scholarship overlooked by the Supreme Court in *Bakke*, including articles by Mildred Ravenell, Ralph Smith, Derrick Bell, Cruz Reynoso, Leo Romero, and Richard Delgado). See also D. BELL, JR., RACE, RACISM AND AMERICAN LAW (2d ed. 1980), the footnotes of which contain extensive reference to articles and books by minority legal scholars.

[3] The following are frequently cited authors, together with representative articles: Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245 (1974); Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387 (1962); Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Blasi, Bakke *As Precedent: Does Mr. Justice Powell Have a Theory?* 67 CALIF. L. REV. 21 (1979); Brest, *The Supreme Court, 1976 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Cox, *The Supreme Court, 1966 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966); Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 119 U. PA. L. REV. 351 (1970); Greenawalt, *Judicial Scrutiny of "Benign" Racial Preferences in Law School Admissions*, 75 COLUM. L. REV. 559 (1975); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Hellerstein, *The Benign Quota, Equal Protection, and "The Rule in Shelley's Case,"* 17 RUTGERS L. REV. 531 (1963); Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Horowitz, *Unseparate but Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 UCLA L. REV. 1147 (1966); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363 (1966); Karst, *The Supreme Court, 1977 Term—Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955 (1974); Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); O'Neil, *Racial Preference and Higher Education: The Larger Context*, 60 VA. L. REV. 925 (1974); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Sandalow, *Racial Preferences in Higher Education: Political Responsibilities and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975); St. Antoine, *Color Blindness but not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 MICH. L. REV. 993 (1961); Tribe, *Perspectives on* Bakke*: Equal Protection, Procedural Fairness, or Structural Justice?*,

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Most of this latter work, to be sure, seems strongly supportive of minority rights. It is all the more curious that these authors, the giants in the field, only infrequently cite a minority scholar. My assistant and I prepared an informal sociogram, a pictorial representation of who-cites-whom in the civil rights literature. It is fascinating. Paul Brest cites Laurence Tribe. Laurence Tribe cites Paul Brest and Owen Fiss. Owen Fiss cites Bruce Ackerman, who cites Paul Brest and Frank Michelman, who cites Owen Fiss and Laurence Tribe and Kenneth Karst . . . .

It does not matter where one enters this universe; one comes to the same result: an inner circle of about a dozen white, male writers who comment on, take polite issue with, extol, criticize, and expand on each other's ideas.[4] It is something like an elaborate minuet.

The failure to acknowledge minority scholarship extends even to nonlegal propositions and assertions of fact. W.E. DuBois, deceased Black historian, receives an occasional citation.[5] Aside from him, little else rates a mention. Higginbotham's monumental *In the Matter of Color*[6] might as well not exist. The same is true of the work of Kenneth Clark,[7] Black psychologist and past president of the American Psychological Association, and Alvin Poussaint,[8] Harvard Medical School professor and authority on the psychological impact of race. One searches in vain for references to the powerful book by physicians Grier and Cobbs, *Black Rage*,[9] or to Frantz Fanon's *The Wretched of the Earth*,[10] or even to writings of or about Martin Luther King, Jr.,[11] Cesar Chavez,[12] and Malcolm X.[13] When the inner circle writers need

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92 HARV. L. REV. 864 (1979); Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775 (1979); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). The list contains articles published during the last 24 years; an adjustment has been made for recency of publication; relatively recent articles were included in the list even though they had received fewer citations than older articles. Not all authors have been active at a given time.

[4] *Cf.* Bell, *Price of Racial Remedies*, *supra* note 2, at 3-4, 6 (discussion of dominant role of white professors in the minority admissions debate).

[5] *See, e.g.*, Bittker, *supra* note 3, at 1416 n.15 (citing DuBois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 331 (1935)).

[6] L. HIGGINBOTHAM, IN THE MATTER OF COLOR (1978).

[7] K. CLARK, DARK GHETTO (1965); K. CLARK, PREJUDICE AND YOUR CHILD (1955).

[8] J. COMER & A. POUSSAINT, BLACK CHILD CARE (1975).

[9] W. GRIER & P. COBBS, BLACK RAGE (1968).

[10] F. FANON, THE WRETCHED OF THE EARTH (C. Farrington trans. 1966).

[11] *E.g.*, M.L. KING, JR., WHY WE CAN'T WAIT (1964); M.L. KING, JR., STRENGTH TO LOVE (1963); M.L. KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? (1968).

[12] *E.g.*, J. LEVY, CESAR CHAVEZ: AUTOBIOGRAPHY OF LA CAUSA (1975); P. MATHIESSEN, SAL SI PUEDES: CESAR CHAVEZ AND THE NEW AMERICAN REVOLUTION (1969).

[13] A. HALEY & MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X (1964).

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authority for a factual or social scientific proposition about race they generally cite reports of the United States Commission on Civil Rights[14] or else each other.[15]

A single anecdote may help to illustrate what I mean. Recently a law professor who writes about civil rights showed me, for my edification, a draft of an article of his. It is, on the whole, an excellent article. It extols the value of a principle I will call "equal personhood." Equal personhood is the notion, implicit in several constitutional provisions and much case law, that each human being, regardless of race, creed, or color, is entitled to be treated with equal respect. To treat someone as an outsider, a nonmember of human society, violates this principle and devalues the self-worth of the person so excluded.

I have no quarrel with this premise, but, on reading the one hundred-plus footnotes of the article, I noticed that its author failed to cite Black or minority scholars, an exclusion from the community of kindred souls as glaring as any condemned in the paper. I pointed this out to the author, citing as illustration a passage in which he asserted that unequal treatment can cause a person to suffer a withered self-concept. Having just written an article on a related subject,[16] I was more or less steeped in withered self-concepts. I knew who the major authorities were in that area.

The professor's authority for the proposition about withered self-concepts was Frank Michelman, writing in the *Harvard Law Review.*

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[14] *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, REPORT ON HOUSING (1961), *cited in* Kaplan, *supra* note 3, at 397 n.67; U.S. COMM'N ON CIVIL RIGHTS, REPORT ON EDUCATION (1961), *cited in* Kaplan, *supra* note 3, at 399 n.75.

[15] *See supra* notes 3-4 and accompanying text. This phenomenon may be contrasted with that which prevails in social science research. It is my own experience that in this other body of scholarly writing, minority status constitutes virtually a presumption of expertise; Blacks writing about the Black community and Chicanos about the Chicano community are accepted as equal (perhaps more-than-equal) partners. Indeed, ethnic studies departments sometimes resist hiring Caucasian faculty members out of the belief that they are generally less qualified for the position than candidates who are members of the minority group in question. Telephone interview with Michael Olivas, Director, Institute on Law & Higher Education, University of Houston (September 14, 1983).

Why the ready acceptance of minority scholars in social science research dealing with minority issues when minority legal scholars receive quite different treatment? Social science research may be less threatening to the status quo than legal research; much social science research is descriptive rather than change-oriented. Also, social science research may be peripheral to fundamental reallocations of power and decision-making authority; in contrast, legal scholarship may portend drastic changes in the status quo. *See infra* notes 61-76 and accompanying text.

[16] Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling,* 17 HARV. C.R.-C.L. L. REV. 133 (1982).

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I pointed out that although Frank Michelman may be a superb scholar and teacher, he probably has relatively little first-hand knowledge about withered self-concepts. I suggested that the professor add references to such works as Kenneth Clark's *Dark Ghetto*[17] and Grier and Cobbs's *Black Rage*,[18] and he agreed to do so. To justify his selection of Frank Michelman for the proposition about withered self-concept, the author explained that Michelman's statement was "so elegant."

Could inelegance of expression explain the absence of minority scholarship from the text and footnotes of leading law review articles about civil rights? Elegance is, without question, a virtue in writing, in conversation, or in anything else in life. If minority scholars write inelegantly and Frank Michelman writes elegantly, then it would not be surprising if the latter were read and cited more frequently, and the former less so. But minority legal scholars seem to have less trouble being recognized and taken seriously in areas of scholarship other than civil rights theory.[19] If elegance is a problem for minority scholars, it seems mainly to be so in the core areas of civil rights: affirmative action, the equality principle, and the theoretical foundations of race relations law.

In 1971, Judge Skelly Wright wrote an article entitled, *Professor Bickel, the Scholarly Tradition, and the Supreme Court.*[20] In the article, Judge Wright took a group of scholars to task for their bloodless carping at the Warren Court's decisions in the areas of racial justice and human rights. He accused the group of missing the central point in these decisions—their moral clarity and passion for justice—and labelled the group's excessive preoccupation with procedure and institutional role and its insistence that the Court justify every element of a decision under general principles of universal application, a "scholarly

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[17] K. CLARK, DARK GHETTO (1965).

[18] W. GRIER & P. COBBS, *supra* note 9.

[19] Articles and books by Harry Edwards and William Gould on labor law are widely cited in that field. For example, Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40 (1969), has been cited in 7 cases and 34 law review articles. *See* SHEPARD'S LAW REVIEW CITATIONS (1979 & Sept. 1983). Similarly, Edwards, *Emerging Duty to Bargain in the Public Sector*, 71 MICH. L.REV. 885 (1973), has been cited in 41 cases and 30 law review articles. *See* SHEPARD'S LAW REVIEW CITATIONS (1979 & Sept. 1983). Henry McGee's articles and casebook on housing law are considered major works in the field. My own work is cited in such sundry places as M. FRANKLIN & R. RABIN, CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES 300 (3d ed. 1983); J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 944 (2d ed. 1983); R. PERKINS, CRIMINAL LAW 1074 (1982); M. SHAPIRO & R. SPECE, JR., CASES, MATERIALS AND PROBLEMS ON BIOETHICS AND LAW 18, 55, 100, 174, 278, 308, 451; L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-8, at 912 n.12 (1978).

[20] 84 HARV. L. REV. 769 (1971).

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tradition."[21]

I think I have discovered a second scholarly tradition. It consists of white scholars' systematic occupation of, and exclusion of minority scholars from, the central areas of civil rights scholarship. The mainstream writers tend to acknowledge only each other's work. It is even possible that, consciously or not, they resist entry by minority scholars into the field,[22] perhaps counseling them, as I was counseled, to establish their reputations in other areas of law. I believe that this "scholarly tradition" exists mainly in civil rights; nonwhite scholars in other fields of law seem to confront no such tradition.[23]

II. Defects in Imperial Scholarship

To this point, I have been making an empirical claim. A person who disagreed with my thesis could attempt to show that some white inner-circle authors do cite nonwhite scholars appropriately, perhaps by introducing a sociogram of his or her own. My examination of the literature in the field, while admittedly not a scientific study, leads me to believe this is a vain task. A second response would assert that the exclusion of minority viewpoints from white scholarship about civil rights is, as they say, harmless error; it doesn't matter *who* advocates freedom and equality, as long as they are advocated by someone.

In one sense, this assertion echoes the holding of *Trafficante v. Metropolitan Life Insurance Co.*,[24] which gave white tenants standing to challenge a building owner's racially discriminatory renting practices on the ground that these rendered the building a white ghetto and deprived the tenants of interracial contacts. Everyone, not just minorities, has an interest in achieving a racially just society, so why should not anyone be free to advocate it in print? Does a contrary policy not deny free speech and constitute a gratuitous rejection of a helping hand?

Put in simple terms, what difference does it make if the scholarship about the rights of group *A* is written by members of group *B*? Although Derrick Bell raised this question in a footnote,[25] no one seems to have addressed it directly. There are, however, legal doctrines and case law that may suggest answers by way of analogy. Relevant

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[21] *Id.* at 776-77 (tradition pursued by "self-appointed scholastic mandarins"); *id.* at 784, 789-92, 803 (further criticism of "scholarly tradition").

[22] *See infra* notes 64-70, 77 and accompanying text.

[23] *See supra* note 19 and accompanying text.

[24] 409 U.S. 205 (1972).

[25] Bell, *Price of Racial Remedies, supra* note 2, at 4 n.2.

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doctrines include standing,[26] real party in interest,[27] and *jus tertii*,[28] doctrines which in general insist that *B* does not belong in court if he or she is attempting, without good reason, to assert the rights of, or redress the injuries to *A*. We also have rules pertaining to joinder of parties,[29] intervention,[30] and representation in class suits,[31] all of which serve to assure that the appropriate parties are before the court. On a more general level, our political and legal values contain an antipaternalistic principle that forbids *B* from asserting *A's* interest if *A* is a competent human being of adult years, capable of independently deciding upon and asserting that interest.

Abstracting from these principles, it is possible to compile an *a priori* list of reasons why we might look with concern on a situation in which the scholarship about group *A* is written by members of group *B*. First, members of group *B* may be ineffective advocates of the rights and interests of persons in group *A*. They may lack information; more important, perhaps, they may lack passion, or that passion may be misdirected. *B's* scholarship may tend to be sentimental, diffusing passion in useless directions, or wasting time on unproductive breast-beating. Second, while the *B's* might advocate effectively, they might advocate the wrong things. Their agenda may differ from that of the *A's*;[32] they may pull their punches with respect to remedies, especially where remedying *A's* situation entails uncomfortable consequences for *B*. Despite the best of intentions, *B's* may have stereotypes embedded deep in their psyches that distort their thinking, causing them to balance interests in ways inimical to *A's*. Finally, domination by members of group *B* may paralyze members of group *A*, causing the *A's* to forget how to flex their legal muscles for themselves.

A careful reading of the inner circle articles suggests that many of the above mentioned problems and pitfalls are not simply hypothetical, but do in fact occur. A number of the authors were unaware of basic facts about the situation in which minority persons live or ways in

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[26] *See* J. COUND, J. FRIEDENTHAL & A. MILLER, CIVIL PROCEDURE: CASES AND MATERIALS 523 (3d ed. 1980) [hereinafter cited as COUND]. *See generally* Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601 (1968) (discussing relationship between standing and plaintiff interests in constitutional challenges to government expenditures by taxpayers).

[27] *See* COUND, *supra* note 26, at 522-26; *see also* FED. R. CIV. P. 17(a).

[28] *See* 11 AM. JUR. 2D *Bills and Notes* § 655 (1963).

[29] *See* COUND, *supra* note 26, at 522-53; *see also* FED. R. CIV. P. 18, 19.

[30] *See* COUND, *supra* note 26, at 625-42; *see also* FED. R. CIV. P. 24.

[31] *See* COUND, *supra* note 26, at 561-601; *see also* FED. R. CIV. P. 23(a)(4).

[32] For a discussion of the conflict between the traditional civil rights lawyer, the black litigants, and the white liberal financial supporters, see Clark, *The Lawyer in the Civil Rights Movement—Catalytic Agent or Counter-revolutionary?*, 19 U. KANS. L. REV. 459, 469 (1971).

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which they see the world. From the viewpoint of a minority member, the assertions and arguments made by nonminority authors were sometimes so naive as to seem incomprehensible and hardly merit serious consideration. For example, some writers took seriously the *reductio ad absurdum* argument about an infinitude of minorities (if Blacks and Hispanics, why not Belgians, Swedes, and Italians; what about an individual who is one-half Black, or three-quarters Hispanic?),[33] or worried about whether a white citizen forced to associate with Blacks has his or her freedom of association violated as much as a Black compelled to attend segregated schools.[34] One author reasoned that *Carolene Products* "footnote four" analysis is no longer fully applicable to American Blacks, because they have ceased to be an insular minority in need of heightened judicial protection.[35] Another placed the burden on proponents of preferential admissions to show that no nonracial alternative exists, because today's minority may become tomorrow's majority and vice versa.[36]

In addition to factual ignorance or naiveté, some of the writing suffered from a failure of empathy, an inability to share the values, desires, and perspectives of the population whose rights are under consideration. In his article, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation,*[37] Derrick Bell pointed out that litigators in school desegregation cases have often seemed unaware of what their clients really wanted, or have pursued one remedy (e.g., integration) out of ideological commitment, even though the client wanted something different (e.g., better schools).[38] A similar distancing of the scholar from the community he writes about was visible in the civil rights commentaries. The authors in the core group tended to be very concerned about *procedure.* Many of the articles were devoted, in various measures, to scholarly discussions of the standard of judicial review that should be applied in different types of civil rights suits.[39] Others were concerned with the relationship between federal and state authority in antidiscrimination law, or with the respective competence of a particular decisionmaker to recognize and redress racial discrimination.[40] One could easily conclude that the ques-

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[33] Graglia, *supra* note 3, at 352; Van Alstyne, *supra* note 3, at 804-07.

[34] Wechsler, *supra* note 3, at 34.

[35] Fiss, *supra* note 3, at 7.

[36] O'Neil, *supra* note 3, at 933-34; *cf. supra* note 33 and accompanying text.

[37] 85 YALE L.J. 470 (1976).

[38] *See id.* at 471-72, 482-87.

[39] *See, e.g.*, Ely, *supra* note 3, at 727; Fiss, *supra* note 3, at 7; Greenawalt, *supra* note 3, at 559; O'Neil, *supra* note 3, at 927; Tribe, *supra* note 3, at 865-67.

[40] *See, e.g.*, Gunther, *supra* note 3, at 43-46; Tribe, *supra* note 3, at 876-77;

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tion of who goes to court, what court they go to, and with what standard of review, are the burning issues of American race-relations law. Perhaps the emphasis on procedure and judicial role is harmless, just a peculiar kink lawyers get in law school; but, as I will argue later in this essay, there is more to it than that.[41]

Other peculiarities of perspective surfaced in connection with choosing a principle on which to base (or oppose) affirmative action. Measures to increase minority representation in education and the work force have been justified in three broad ways: reparations (or retribution);[42] social utility,[43] or distributive justice.[44] The reparations argument emphasizes that white society has mistreated Blacks, Native Americans, and Hispanics and now must make amends for that mistreatment. Utility-based arguments justify affirmative action on the ground that increased representation of minorities will be useful to society. The distributive justice rationale says that there is a certain amount of wealth available and argues that everyone is entitled to a minimum share of it. Many of the minority scholars emphasize the reparations argument and stress the inherent cost to Whites; the authors of the inner circle articles generally make the case on the grounds of utility or distributive justice.[45]

Wechsler, *supra* note 3.

[41] *See infra* text accompanying note 72.

[42] *See, e.g.*, D. BELL, JR., RACE, RACISM, AND AMERICAN LAW 44-47 (2d ed. 1980).

[43] *See, e.g.*, Karst & Horowitz, *supra* note 3, at 964-66.

[44] *See, e.g.*, Michelman, *supra* note 3, at 13.

[45] *Compare, e.g.*, D. BELL, JR., *supra* note 42, at 44-47 ("Reparations for Racism"); Bell, Brown v. Board of Education *and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (It follows that the "availability of fourteenth amendment protection in racial cases may not actually be determined by the character of harm suffered by blacks or the quantum of liability proved against whites." Instead racial remedies may be the "outward manifestations of unspoken . . . judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites.") *and* Burns, *Law and Race in America*, in THE POLITICS OF LAW 82 (D. Kairys ed. 1982) (historical examples of racially disparate treatment) *with* Brest, *supra* note 3, at 49-51 (rejecting group-based reparations and distributive justice); Ely, *supra* note 3, at 723 (concern with utility, curing society of the sickness of racism); Karst & Horowitz, *supra* note 3, at 964-66 (utility); Michelman, *supra* note 3, at 13 (distributive justice); Sandalow, *supra* note 3, at 673-74 (utility) *and* Van Alstyne, *supra* note 3, at 803-10 (social disutility: affirmative action will lead to competition and resentment among racial minorities). *But see* Black, *Civil Rights in Times of Economic Stress—Jurisprudential and Philosophic Aspects*, 1976 U. ILL. L.F. 559, 566 (1981); Black, *supra* note 3 (Black, a nonminority author derives duty to redress racial discrimination from society's past misconduct toward Blacks); Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 615-22 (1977) (nonminority author argues for affirmative action to correct injustices grounded in history and contemporary reality).

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Emphasizing utility or distributive justice as the justification for affirmative action has a number of significant consequences. It enables the writer to concentrate on the present and the future and overlook the past. There is no need to dwell on unpleasant matters like lynch mobs, segregated bathrooms, Bracero programs, migrant farm labor camps, race-based immigration laws, or professional schools that, until recently, were lily white. The past becomes irrelevant; one just asks where things are now and where we ought to go from here, a straightforward social-engineering inquiry of the sort that law professors are familiar with and good at. But just as the adoption of either of the two present-oriented perspectives renders the investigation comfortably safe, it robs affirmative action programs of their moral force in favor of a sterile theory of fairness or utility.[46] No doubt there is a great social utility to affirmative action, but to base it solely on that ground ignores the *right* of minority communities to be made whole, and the *obligation* of the majority to render them whole. Moreover, what if the utility calculus changes in the future, so that the programs no longer appear "useful" to the majority?[47] Can society then ignore those who still suffer the effects of past discrimination?

Distributive justice is a somewhat less objectionable ground for justifying affirmative action, but it too ignores history and makes for a rather weak, pallid case. It also invites the neutral-principles response:[48] if the idea is to start playing fair now, how can we achieve fairness by discriminating against whites? Moreover, the remedies espoused under both the social utility and distributive justice rationales are often justified because they have been voluntarily created by legislatures, employers, or schools.[49] A "we-they" analysis, espoused by several of the commentators,[50] justifies a disadvantage that *we* (the major-

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[46] In some guises, utility-based justifications are also demeaning. In law school admissions, for example, majority persons may be admitted as a matter of right, while minorities are admitted because their presence will contribute to "diversity." Diversity means that the minority admittees have different skin color, different life experiences, and bring different perspectives, for example perspectives on police conduct, to the classroom. The assumption is that such diversity is educationally valuable to the majority. But such an admissions program may well be perceived as treating the minority admittee as an ornament, a curiosity, one who brings an element of the piquant to the lives of white professors and students. Do not women treated in this manner complain, rightly, for the same reasons?

[47] *Cf.* Graglia, *supra* note 3, at 361 (affirmative admission of minorities doomed to fail; programs will only lead to frustration and failure and so are not socially useful).

[48] *See* Graglia, *supra* note 3, at 352; Van Alstyne, *supra* note 3, at 809-10. For a discussion of the neutral-principles theory, see generally Wechsler, *supra* note 3.

[49] *E.g.*, Ely, *supra* note 3, at 732-40 ("we-they" analysis shows that discrimination of majority against itself is benign, thus permissible).

[50] *Id.* at 732-38; Greenawalt, *supra* note 3, at 569-76; *see also* Brest, *supra* note 3, at 16-17 ("benign" racial discrimination benefitting minority at expense of society at

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ity) want to impose on ourselves to favor *them* (the minority). This type of thinking, however, leaves the choice of remedy and the time frame for that remedy in the hands of the majority; it converts affirmative action into a benefit, not a right. It neglects the possibility that a disadvantaged minority may have a moral claim to a particular remedy.

The inner-circle commentators rarely deal with issues of guilt and reparation. When they do, it is often to attach responsibility to a scapegoat, someone of another time or place, and almost certainly of another social class than that of the writer. These writers tend to focus on intentional and determinable *acts* of discrimination inflicted on the victim by some perpetrator and ignore the more pervasive and invidious forms of discriminatory *conditions* inherent in our society. This "perpetrator" perspective[51] deflects attention from the victim-class, the Blacks, Native Americans, Chicanos, and Puerto Ricans who lead blighted lives for reasons directly traceable to social and institutional injustice.

A corollary of this perspective is that racism need not be remedied by means that encroach too much on middle or upper-class prerogatives.[52] If racial inequality is mainly the fault of the isolated redneck, outmoded ritual violence, or even long abrogated governmental actions, then remedies that would encroach on simple "conditions" of life—middle-class housing patterns, for example, or the autonomy of local school boards—are unnecessary.[53] Many persons of minority race see racism as including institutional components that extend far beyond lynch mobs, segregated schools, or epithets like "nigger" or "spick."[54] Self-interest, mixed with inexperience, may make it difficult for the privileged white male writer to adopt this perspective or face up to its implications.[55]

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large).

[51] The term "perpetrator" perspective is used in Freeman, *Antidiscrimination Law: A Critical Review*, in THE POLITICS OF LAW 96, 98-99 (D. Kairys ed. 1982); Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-54 (1978). The perpetrator perspective has been embraced by authors in varying forms and to varying degrees. *See, e.g.*, Brest, *supra* note 3, at 2 (discussing the antidiscrimination principle which lies at the core of most state and federal civil rights legislation: "By definition the antidiscrimination principle applies only to race-dependent decisions and their effects." *Id.* at 5); Eisenberg, *supra* note 3, at 132-55 (motive analysis: to offer protection, the Court must be convinced that the decisionmaker's motives are illicit).

[52] *See supra* sources cited in note 51; Bell, *Price of Racial Remedies*, *supra* note 2, at 7-12, 19.

[53] For a discussion of the resistance of whites to any policy requiring them to pay for racial wrongs they did not themselves commit, see Bell, *Price of Racial Remedies*, *supra* note 2, at 3-4, 12, 16.

[54] On institutional racism, see Wasserstrom, *supra* note 45, at 596-603.

[55] Such persons rarely, if ever, experience group-based harm or confront social institutions that are systematically biased against them; all injurious treatment that

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The uniformity of life experience of the inner circle of writers may color not only the way they conceptualize and frame problems of race, but also the solutions or remedies they devise. Remedies pursued at "all deliberate speed"[56] or couched in terms of vague targets and goals entered the law when the legal system turned in earnest to problems of race. Their appearance is probably related to a utility-based perspective which ignores past injustices and simply seeks to engineer a solution with the most utility to society as a whole and the minimal amount of disruption. If the issue is not one of simple injustice requiring immediate correction, but merely an unfortunate and abstractly created problem requiring remedy, that leisurely treatment is not surprising.

Moreover, regardless of the scope and time frame of racial remedies, their costs are generally imposed disproportionately on minorities and lower-class whites.[57] Most university affirmative action programs, for example, pit minorities against each other and against low-income whites. The programs generate hostility among these groups,[58] while exempting from such unpleasantness the high-achieving white product of a private prep school and Ivy League college,[59] who can remain aloof from these battles. There is an alternative—an overhaul of the admissions process and a rethinking of the criteria that make a person a deserving law student and future lawyer. It would be possible to devise admission standards that would result in a proportionate number of minorities, whites, and women gaining admission. Minority commentators have suggested such an approach,[60] but it has been often ignored and never instituted.

Despite the potential bias of mainstream scholarship, it might be argued that law review writing is basically harmless. The reviews are almost never read by anyone outside a narrow readership and rarely have any impact on the real world. Since the genre is essentially innoc-

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comes their way is individually based, and comparatively infrequent. Why should not this same picture apply to minorities, who are simply subject to a somewhat more incessant version of it?

[56] Brown v. Board of Educ., 349 U.S. 294, 300-01 (1955). For a critique of the *Brown* remedy, see Wasserstrom, *supra* note 45, at 599-600; *see also* Bell, *Price of Racial Remedies, supra* note 2, at 11-12 (discussing that mainstream whites may support nondiscrimination in theory, but avoid or even oppose its remediation).

[57] *See* Bell, *Price of Racial Remedies, supra* note 2.

[58] *Id.* at 14-16, 19 (resistance of working class whites to affirmative action programs); Van Alstyne, *supra* note 3, at 803-10 (affirmative action leads to competition and resentment among racial minorities).

[59] *See* Bell, *Price of Racial Remedies, supra* note 2, at 14.

[60] *E.g.*, Romero, Delgado & Reynoso, *The Legal Education of Chicano Students: A Study in Mutual Accommodation and Cultural Conflict*, 5 N.M.L. REV. 177, 188-90 (1975). For a discussion of the need for more broad-based admission criteria, see Bell, *Price of Racial Remedies, supra* note 2, at 17.

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uous, why get excited if the authors of certain articles play by odd rules?

The game is not harmless. Courts do cite law review articles;[61] judges, even when they do not rely on an article expressly, may still read and be informed by it. What courts do clearly matters in our society. Moreover, what law professors say in their elegant articles contributes to a legal climate, a culture. Their ideas are read and discussed by legislators, political scientists, and their own students. They affect what goes on in courts, law classrooms, and legislative chambers. Ideologies—perspectives, ways of looking at the world—are powerful. They limit discourse. They also enable the dominant class to maintain and justify its own ascendancy. Law professors at the top universities are part of this dominant class, and their writings contribute to the ideologies that class creates and subscribes to. These writings are not harmless; they have clout.

My conclusion to this point is that there is a second scholarly tradition, that it consists of the exclusion of minority writing about key issues of race law, and that this exclusion does matter; the tradition causes bluntings, skewings, and omissions in the literature dealing with race, racism, and American law. What accounts for, what sustains this tradition? And, can it be defended or justified?

III. Imperial Scholarship—Explaining the Tradition

Studied indifference to minority writing on issues of race would be justified if the writing were second-rate, inelegant, unscholarly, or unimaginative. But, as was mentioned earlier, minority writers have had little trouble gaining recognition outside the core areas of civil rights.[62] Poor quality of the writing therefore seems an unlikely explanation. It could also be argued that minority authors who write about racial issues are not objective, that passion and anger render them unfit to reason rigorously or express themselves clearly, while white authors are above self-interest and thus capable of thinking and writing objectively. But this too seems implausible, for it presupposes that white writers have no vested interest in the status quo. Moreover, common experience suggests that most persons, including minorities, perform better, not worse, at tasks they care deeply about. And, even if minority authors were offering one-sided views, their suggestions are at least data, material that deserves mention for what it discloses; one would

[61] *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 288 n.25 (1978) (citing 10 law review articles by white male authors).

[62] *See supra* note 19 and accompanying text.

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not expect such telling data to be completely ignored. When discussing women's issues, white male elite writers more often seem to cite at least some white female writers (such as Kay, Weitzman, and Ginsberg).[63] These women write with passion and commitment, qualities that evidently do not render them unfit to be taken seriously. Lack of objectivity on the part of minority authors, then, seems an inadequate explanation for their treatment at the hands of leading white scholars.

In explaining the strange absence of minority scholarship from the t and footnotes of the central arenas of legal scholarship dealing with civil rights, I reject conscious malevolence or crass indifference. I think the explanation lies at the level of unconscious action and choice.[64] It may be that the explanation lies in a need to remain in *control*, to make sure that legal change occurs, but not too fast. The desire to shape events is a powerful human motive and could easily account for much of the exclusionary scholarship I have noted. The moment one makes such a statement, however, one is reminded that it is these same liberal authors who often have been the strongest supporters of affirmative action in their own university communities, and who have often been prepared to take chances (as they see it) to advance the goal of an integrated society. Perhaps the two behaviors can be reconciled by observing that the liberal professor may be pleased to have minority students and colleagues serve as figureheads, ambassadors of good will, and future community leaders, but not necessarily happy with the thought of a minority colleague who might go galloping off in a new direction.

Once, early in my career, I co-authored a law review article about Mexican-Americans (as they were called then) as a legally cognizable class, one that can sue in its own name for injuries to its members.[65] This was in the mid-1970's when the results of Chicano activism were just reaching the courts. At that time, a few decisions, notably *Lopez Tijerina v. Henry*,[66] had held that Chicanos could not sue collectively

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[63] *See, e.g.*, L. TRIBE, *supra* note 19, § 16-27, at 1072 n.16, § 16-28, at 1075 nn.4-5; Karst, *supra* note 3, at 11 n.56, 55 n.306, 56 n.310, 57 n.320.

[64] *See* Blumer, *Race Prejudice as a Sense of Group Position*, 1 PAC. L.J. 3,4 (1958) (racial prejudice inhering in a collective sense of group position); Brest, *supra* note 3, at 14-15 (discussing "unconscious racially selective indifference"); Lawrence, Book Review, 35 STAN. L. REV. 831, 841-43 (1983) ("Ideology as an Unconscious Defense Mechanism").

[65] Delgado & Palacios, *Mexican-Americans as a Legally Cognizable Class under Rule 23 and the Equal Protection Clause*, 50 NOTRE DAME LAW. 393 (1975).

[66] 48 F.R.D. 274 (D.N.M. 1969), *appeal dismissed*, 398 U.S. 916 (1970), *discussed in* Delgado & Palacios, *supra* note 65, at 398-404; *see also id.* at 398 n.43 (examples of cases in which it was held that Mexican-Americans are not considered a race for equal protection purposes.)

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because of problems with class definition.[67] Some Chicanos speak Spanish, some do not; some have Spanish surnames, some do not; some trace their ancestors to Mexico, some do not. Chicanos were thus held too amorphous a group to be permitted to sue for class-based relief.[68] My article explained several valid ways of getting around the class-definition problem and gave several reasons why this should happen. Shortly after the article appeared, I received a long letter from a white litigator at a public interest law firm that concerns itself with the legal problems of Mexican-Americans. The letter told me, in clear, terse language, of the disservice I had done to the cause of Chicano legal rights. Its essence was that the writer's organization had been successfully finessing the class-definition problem, and my article had instead focused attention on it, making matters worse. I suffered terrible remorse until the Supreme Court decided in the following term that Mexican-Americans are a legally cognizable class for the purpose of civil rights suits.[69]

Had the litigator, a former professor at a major law school, simply made a mistake in judgment? Or was there more behind the letter and its insistence that I stay out of the picture and leave things to persons who know better? I think many civil-rights activists and scholars derive a sense of personal satisfaction from being at the forefront of a powerful social movement.[70] Command and influence are heady things; it takes an alert person to realize when to step back, to know when his or her efforts have begun to interfere with the intended beneficiaries' effective engagement in their own affairs. The inner-circle authors' strong identification with their own role may prevent them from understanding when it is time for them to begin to leave it behind.

Another closely related motive is fear. Most of the white scholars who make up the inner circle spent some of their formative years of teaching during the late 1960's and early 1970's when a number of extraordinary things were happening in our society. Lawyers, and especially law professors, are deeply committed to the rule of law; but during those years the rule of law seemed to mean relatively little.

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[67] All suits must be brought in the name of an individual or a well-defined group. *See, e.g., Tijerina*, 48 F.R.D. at 276-78, *discussed in* Delgado & Palacios, *supra* note 65, at 399-401.

[68] *Tijerina*, 48 F.R.D. at 276-77.

[69] Castaneda v. Partida, 430 U.S. 482, 494-96 (1977); *see also* Keyes v. School Dist. No. One, 413 U.S. 189, 197 (1973), *discussed in* Delgado & Palacios, *supra* note 65, at 396.

[70] *Cf.* V. COUNTRYMAN & T. FINMAN, THE LAWYER IN MODERN SOCIETY 577-84 (1966) (In the early 1960's, lawyers for southern Black clients were difficult to find.); *id.* at 584-87 (Fear of verbal disapproval, adverse publicity, loss of prestige, and loss of clients may deter lawyers from accepting unpopular clients.); Lawrence, *supra* note 64, at 842-43 (psychology of white leader confronted with fact of racism).

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Events were out of control. Law seemed powerless to stop the popular tides that surged—the civil rights movement, inner city riots, draft resistance. The professors who now dominate legal scholarship and dictate legal styles saw what the excesses of passion can do. Perhaps, scarcely knowing it, they came to emphasize scholarship that is controlled, incremental, and seemingly nonideological, and to resist that of a more tempestuous, change-oriented nature.[71] The fear of losing control would explain a number of things—the emphasis on procedure and role, the downplaying of substance.[72] It would explain inattention to the reparations argument[73] and avoidance of issues of guilt and complicity.[74] It would explain the treatment of racism and discrimination as vestigial aberrant behavior not connected by any common thread, much less illustrating an implied social compact.[75] It would explain the lack of citation to minority writers, who have drawn attention to some of the thornier problems and conflicts in the area of race relations.[76]

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[71] *See* sources cited *supra* note 3; *cf. supra* text accompanying note 63, where it was observed that some inner-circle writers do cite feminist writers, even though the work of many feminist writers shows passion and commitment. Any apparent differences in these observations are reconcilable. On a general level, feminist literature may be less threatening to establishment male writers than militant minority literature because the latter, unlike the former, is identified with a movement that at times in its history has embraced violence or civil disobedience. Upon close examination, the difference in treatment of feminist and minority literature may be illusory. The more radical feminist writers, such as Katherine MacKinnon or Susan Brownmiller, seem to be cited less often than the more mainstream feminist authors, such as those mentioned in the text accompanying note 63. Like much minority literature, the generation of more radical feminists propose far-reaching changes in the ways in which society is constituted. The more mainstream feminists tend to be more assimilationist in their proposals. In contrast to the more radical, they are primarily concerned with expanding women's role within the existing societal framework. The writing of this latter group may thus strike a sympathetic chord with inner-circle writers, while the work of the more radical group may be ignored for reasons similar to those that explain the treatment of minority writers discussed in this Article.

[72] *See supra* notes 39-41 and accompanying text.

[73] *See supra* notes 44-45 and accompanying text.

[74] *See supra* notes 45-48 & 51-71 and accompanying text.

[75] *See supra* notes 51-55 and accompanying text.

[76] Minority writers who have focused on difficult problems overlooked by mainstream writers include Bell, *Price of Racial Remedies*, *supra* note 2, at 12 (discussion of mainstream opposition to any means to achieve racial equality that burdens the White majority); Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (conflicts between the goals of minority clients and their lawyers); Bell, *In Defense of Minority Admissions Programs: A Reply to Professor Graglia*, 119 U. PA. L. REV. 364 (1970) (criticism of the abandonment of efforts undertaken to remedy past racial injustices); Ravenell, DeFunis *and* Bakke . . . *The Voice Not Heard*, 21 HOW. L.J. 128 (1978) (proposal for achieving racial diversity in professional schools); Romero, Delgado & Reynoso, *supra* note 60 (attention to the shortage of minority professionals and the need to alleviate that shortage); Smith, *Reflections on a Landmark: Small Preliminary Observations on the Development and Significance of the University of California v. Allan Bakke*, 21 HOW.

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Whatever the explanation of the phenomenon, it has not gone unnoticed. Derrick Bell once observed that the exclusion of minority participants from litigation and scholarship about Black issues reminds him of traditional families of former years in which parents would tell their children, "Keep quiet. We are talking about you, not to you."[77]

What should be done? As a beginning, minority students and teachers should raise insistently and often the unsatisfactory quality of the scholarship being produced by the inner circle—its biases, omissions, and errors. Its presuppositions and world-views should be made explicit and challenged. That feedback will increase the likelihood that when a well-wishing white scholar writes about minority problems, he or she will give minority viewpoints and literature the full consideration due. That consideration may help the author avoid the types of substantive error catalogued earlier.[78]

But while no one could object if sensitive white scholars contribute occasional articles and useful proposals (after all, there are many more of the mainstream scholars), must these scholars make a career of it? The time has come for white liberal authors who write in the field of civil rights to redirect their efforts and to encourage their colleagues to do so as well. There are many other important subjects that could, and should, engage their formidable talents. As these scholars stand aside, nature will take its course; I am reasonably certain that the gap will quickly be filled by talented and innovative minority writers and commentators. The dominant scholars should affirmatively encourage their minority colleagues to move in this direction, as well as simply make the change possible.

Only such a transformation will end the incongruity of one group's maintenance of a failed ideology for another, an irony that Judge Wyzanski saw as clearly as anyone:

> To leave non-whites at the mercy of whites in the presentation of non-white claims which are admittedly adverse to the whites would be a mockery of democracy. Suppression, in-

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L.J. 72 (1978) (proposal to revamp current professional school admissions procedures to compensate for minority deprivation). *See generally Symposium, A Step Toward Equality: Affirmative Action and Equal Opportunity*, 4 BLACK L.J. 211 (1974).

[77] Bell, *Price of Racial Remedies, supra* note 2, at 4; *see also* R. WILKINS, A MAN'S LIFE 216-17 (1982) (author, a Black, attended a high level political strategy session of "White Brahmins" engaged in planning country's civil rights policy; expressed anger that minority representatives, except himself, were not present); Lawrence, *supra* note 64, at 846 ("Because virtually an entire community of thinkers share the privileged positions, the need for justifications, and the resulting distorted perceptions, those perceptions are mutually confirming and appear undistorted.").

[78] *See supra* text accompanying notes 33-60.

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> tentional or otherwise, of the presentation of non-white claims cannot be tolerated in our society . . . . In presenting non-white issues non-whites cannot, against their will, be relegated to white spokesmen, mimicking black men. The day of the minstrel show is over.[79]

The day of the minstrel show is, indeed, over.

[79] Western Addition Community Org. v. NLRB, 485 F.2d 917, 940 (D.C. Cir. 1973) (Wyzanski, J., dissenting), *rev'd*, 420 U.S. 50 (1975).

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