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NOTE

RACISM AND RACE RELATIONS IN THE UNIVERSITY

“White students say, ‘[the university] is great; it’s awesome’. . . . But I just want to get my education and get out of here. This is their place, not mine.”

—black student at a major state university, interviewed in wake of incidents of racial harassment and violence on campus¹

“It bothers us that we have to defend ourselves against racism when we know we are not racist.”

—white student at a major state university, responding to complaints that his fraternity’s poster was racially offensive²

American universities in recent years have endured a resurgence in racial tensions on their campuses, and the problem has manifested itself often in startlingly blatant racist incidents. At the same time, people of color continue to experience a racism that takes more subtle and elusive forms than in earlier eras, a racism that no longer manifests itself simply in the appearance of “white only” signs and the utterance of epithets such as “n-gger.”³ It is a racism that is a persistent and constituent part of the social order, woven into the fabric of society and everyday life.⁴ It is a racism frequently less

¹ Wilkerson, *Campus Blacks Feel Racism’s Nuances*, N.Y. Times, Apr. 17, 1988, § 1, at 1, col. 3; see *infra* note 87.

² *Cavalier Daily* (University of Virginia student newspaper), Oct. 4, 1988, at 1; see *infra* note 112.

³ See Wilkerson, *supra* note 1. See generally *infra* Part IV (potential strategies for addressing such subtle racism).

⁴ See Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317, 330 (1987). Professor Lawrence observes:

Racism is in large part a product of the unconscious. It is a set of beliefs whereby we irrationally attach significance to something called race. I do not mean to imply that racism does not have its origins in the rational and premeditated acts of those who sought and seek property and power. But racism in America is much more complex than either the conscious conspiracy of a power elite or the simple delusion of a few

intentional, and very often—at least to white people—less obvious.⁵ But its victims insist that it is no less real, harmful, or in need of remedy.⁶

Confrontation of such racism has led to debate over the very definition of racism.⁷ Consideration of the issue, however, has also engendered a significant “backlash,” premised on the assertion that all the racism that needs to be eradicated has been;⁸ that we have gone too far in recognizing,⁹ and still pay too much attention to, a phenomenon that is no longer a problem.¹⁰

ignorant bigots. It is a part of our common historical experience and, therefore, a part of our culture. It arises from the assumptions we have learned to make about the world, ourselves, and others as well as from the patterns of our fundamental social activities.

Id.

⁵ See, e.g., Wilkerson, *supra* note 1, § 1, at 34, col. 4 (survey of students at the University of Maryland revealed two-thirds of white students were unaware of racial incidents on their campus, but 80% of black students knew of such incidents).

⁶ The conflict over racism's form and existence implicates the entrenched American belief in equality of opportunity. The degree to which we believe in the existence of equality of opportunity informs antidiscrimination law and the assessment of racism's persistence, because truly equal opportunity would mean many social and economic disparities between racial groups are the result of something other than racism. If one assumes the existence of a functioning meritocracy, achievement and social condition are direct results of individual effort and ability. See Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *Harv. L. Rev.* 1331, 1380 (1988); see also Rhode, *Perspectives on Professional Women*, 40 *Stan. L. Rev.* 1163, 1199 (1988) (asserting that “[m]erit is a social construct that reflects a range of characteristics over which the individual has no control”). But if one sees the “thoroughly political—which is to say contestable—nature of ‘merit,’” then race becomes an appropriate and unavoidable consideration in that calculus. Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 *Harv. L. Rev.* 1327, 1333 (1986).

⁷ The conflict in perceptions and assessments of racial problems is evident in the as-yet-unresolved conception of equality in antidiscrimination law. There is still heated disagreement over whether our antidiscrimination law should be premised on equality as a process or equality as a result. Crenshaw, *supra* note 6, at 1336. In other words, if the definitional tension between such competing conceptions is recharacterized as a conflict between stated “goals” of antidiscrimination law, one asks: Is the goal procedural justice, meaning the elimination of formal racist processes such as school segregation, or substantive justice, meaning the elimination of the substantive inequality and subordination of blacks in this country? Id.

⁸ See M. Omi & H. Winant, *Racial Formation in the United States* 1-6 (1986).

⁹ Camper, *When Racism Goes to College*, *N.Y. Times*, June 10, 1988, at A30, col. 1 (noting federal government attempts to “turn back the clock on civil rights . . . combine with a backlash against affirmative action” among college students); Trescott, *Is Social Racism Now Becoming ‘Acceptable?’*, *L.A. Times*, June 12, 1981, § V, at 2, col. 1 (observing that “the veiled insult, contempt masquerading as a joke, [and] the direct slur . . . [are being] recycled as a protest against minority gains”).

¹⁰ See M. Omi & H. Winant, *supra* note 8, at 109-35 (focusing attention on three main “currents” of reactionary and conservative tendencies in the 1980's that share the “similar ambition” of “discredit[ing] the key ideas and objectives of the 1960's minority movements”); Kennedy, *supra* note 6, at 1344 (observing that the “Reagan Administration's policies reflect,

The argument is even extended to contend that the continuing remedial efforts themselves have become the problem,¹¹ as has the overuse of the label "racism."¹²

The dynamics of the problem of addressing racism and mediating race relations recur in universities across the country when students and faculty deal with racially tinged incidents, but an incident confronted by several University of Virginia law students serves as a paradigm.¹³ When students of color came together to complain to the administration about seemingly offensive remarks made in class by a professor, most white students in the class, as well as the professor himself, could find nothing offensive in the challenged remarks.¹⁴ Yet, black students (and some others) were overwhelmingly offended.¹⁵ Their options for recourse in the institution were few. Although the students were granted a few private meetings with the

reinforce, and capitalize on widespread feelings that blacks have received an undeserved amount of the nation's attention"); Kluegel, *If There Isn't a Problem, You Don't Need a Solution: The Bases of Contemporary Affirmative Action Attitudes*, 28 *Am. Behav. Scientist* 761, 770 (1985) (proposing that "whites will continue to believe that because they themselves are not prejudiced (in the traditional sense) and because racial prejudice seems to be diminishing in general, there is no longer a problem").

¹¹ See, e.g., M. Omi & H. Winant, *supra* note 8, at 1-6, 71, 134 (noting recent definition of "reverse discrimination," and observing that the biggest reversals have taken place in affirmative action policies such that now it "is the liberals who are guilty of racism"); Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 *Harv. L. Rev.* 1312 (1986) (arguing that the civil rights movement "should turn its attention back to first principles—the zealous regard for equal opportunity and the promotion of color-blind law and social policy—and away from color-conscious remedies that abandon principle and lead us further from a society free of the bane of racial discrimination"). But see Kennedy, *supra* note 6, at 1330-34 (finding unpersuasive the claim that affirmative action harms blacks).

¹² One scholar asserts that some of the new subtle racism on campuses "may be due to 'whites hearing all year they are racists,'" while another argues that the "word 'racism' itself has become loaded . . . and is often used irresponsibly." *School Colors: Uneasy Gray Between Black and White*, *Christian Sci. Monitor*, June 14, 1988, at 16-17 [hereinafter *School Colors*]; cf. Detlefsen, *White Like Me: Racism 101 at Harvard*, *New Republic*, Apr. 10, 1989, at 18, 21 (criticizing a series of seminars on institutional racism at Harvard University and noting that "to the extent that the charge of 'racism' is repeatedly and gratuitously tossed about . . . there is a danger that the evil of genuine racism will become trivialized and hence will be ignored").

¹³ See *Prof's Alleged Remarks Prompt Petition*, *Va. L. Weekly* (University of Virginia School of Law student newspaper), Apr. 15, 1988, at 1, col. 2.

¹⁴ See *Va. L. Weekly*, Apr. 22, 1988, at 2, col. 1 (student letter to editor expressing doubt that allegations of professor's discriminatory remarks were true, because student "never heard any discriminatory remarks from the man in his class last term"); *id.* at 3 (professor's open letter addressing specific allegations of racist and sexist remarks, commenting on each "incident" because professor felt he had "engaged in no conduct for which I need feel ashamed or apologetic").

¹⁵ See, e.g., *id.* at 5, col. 1 (letter from student observing that "many students (not just the minority students who receive affirmative action) are voicing concerns about the offensive statements").

administration and an eventual brief apology, they faced the indignant denials (in the student newspaper and elsewhere) by many white students and the professor that anything offensive ever occurred, as well as angry chastisement for inaccurately alleging such injurious charges.¹⁶

To most white students in that debate, racism was defined as an act of intentional maliciousness; if the professor intended no racial offense (or at most, if the offense was not so obvious to white people that the professor should have noticed it), then none occurred. Black students, by contrast, had a completely different idea in mind: They sought to express their deep dissatisfaction with "the substantive dynamics of the classroom."¹⁷

One of the problems underlying such debates over racism is epistemological: How do we know "racism"—what events, statements, behavior, and social conditions will "count" as racist? The definition of racism is a policy choice.¹⁸ The question of how we interpret—and whom we let interpret—social events and behavior in order to identify racism is the underlying struggle in the construction of our understanding of race.

A related problem is the racial distribution of power in carrying on such debates and in institutional life generally. The power to define racism, and more generally to determine what issues will be discussed in terms of race, is prerequisite to the power to shape institutional life. Thus, if universities will not acknowledge race as a relevant issue in any incidents except blatantly intentional ones, issues such as the substantive dynamics of classrooms for

¹⁶ See, e.g., *id.* at 1-2, 5-6 (letters declaring public petition initiated by several student organizations protesting professor's remarks to be "invidious," "reckless," and offensive to "basic notions of fairness and due process").

¹⁷ Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 *Nat'l Black L.J.* 1, 2 (1988-89). As Crenshaw notes, "[i]n many instances, minority students' values, beliefs, and experiences clash not only with those of their classmates but also with those of their professors." *Id.* at 2.

¹⁸ See M. Omi & H. Winant, *supra* note 8, at 57-66. The authors observe that "race has been a matter of *political* contention. This has been particularly true in the United States, where the concept of race has varied enormously over time without ever leaving the center stage of US history." *Id.* at 57. Indeed, race is "a pre-eminently *sociohistorical* concept. Racial categories and the meaning of race are given concrete expression by the specific social relations and historical context in which they are embedded." *Id.* at 60. Further, the "seemingly obvious, 'natural' and 'common sense' qualities which the existing racial order exhibits themselves testify to the effectiveness of the racial formation process in constructing racial meanings and racial identities." *Id.* at 62. "Racial ideology is constructed from pre-existing conceptual . . . elements and emerges from the struggles of competing political projects and ideas seeking to articulate similar elements differently." *Id.* at 64.

For a related argument on the struggle to define "desegregation," see Ravitch, *Desegregation: Varieties of Meaning*, in *Shades of Brown: New Perspectives on School Desegregation* 31 (D. Bell ed. 1980) [hereinafter *Shades of Brown*] (proposing that the changing meaning of terms such as "desegregation" is "merely the surface of larger issues" such as the question of what place blacks should have in American society).

students of color will be ignored, and the discomfort black students experience in many white-dominated classrooms will be denied.

As racist incidents and tensions have increased on college campuses in recent years,¹⁹ university administrations, state governments, and student and civil rights groups have searched for ways to combat racism in the university, as well as to improve campus racial climates.²⁰ At the same time, there is a seeming lack of recognition among some higher education officials that racist incidents occur on their campuses, even as reports of such incidents recur in the popular press.²¹

This Note aims to provide a description of racial dynamics on college campuses that will illuminate why institutional responses are needed to address racism, in its elusive and controversial forms as well as its blatant ones. First, the goal is to document that racism on campus is real and sub-

¹⁹ See *infra* Part III.

²⁰ Ad hoc student groups frequently have formed on individual campuses to combat racist incidents. A network of many such groups from colleges in the Northeast met at Yale University in the spring of 1988 to form the organization Campuses Against Racial Violence and establish a databank on racial incidents. See Grasso, *Racism on Campuses Discussed at Conference*, N.Y. Times, Apr. 24, 1988, § 23 (Connecticut Weekly), at 6, col. 5.

State government and university administration officials gathered in Oklahoma City in June 1989 for the Second Annual Conference on Racial and Ethnic Relations in American Higher Education. The New Jersey Department of Higher Education probably has given the most attention of any state agency to the problem of racism on campus. See Marcus, *infra* note 21 (listing responses by state governments to racial tensions at universities). Among government agencies and private groups that have gathered data and studied the issue of racism on campus are the National Institute Against Prejudice and Violence, the Southern Regional Education Board, and the U.S. Civil Rights Commission.

²¹ For example, in 1988 the New Jersey Department of Higher Education surveyed State Higher Education Executive Officials (SHEEO's) in every state about racial incidents occurring on their college campuses. Sixteen states reported no racial incidents in the last three years, and another 11 did not respond to that question on the survey. Yet, incidents of violence or allegations of racial prejudice, occurring in the spring of 1988 alone, were reported in the popular press in 10 of those 27 states. See Marcus, *State-Level Efforts to Improve Racial/Ethnic Harmony on Campus* 19 tables 1 & 2 (1989) (unpublished manuscript available from the Office of Institutional Affairs, New Jersey Department of Higher Education) (copy on file with the Virginia Law Review Association).

Marcus concludes from the survey that SHEEOs exhibit a tendency to underreport the incidence of racial tension, and that "it is clear that the number of incidents cited by the SHEEO's in the survey does not approach their actual level." *Id.* at 19-20. He points out that because the National Institute Against Prejudice and Violence gathers information for its listing from police and FBI reports, newspaper accounts, and records of public antidiscrimination agencies and civil rights commissions, "it is unlikely that many of the incidents that it lists for a given state would have escaped the attention of the state higher education agency." *Id.* at 19. Nevertheless, he finds the underreporting tendency understandable, because "[t]o call attention to such problems might tend to stigmatize certain institutions, and might make it more difficult for them to accomplish their goals of increased minority enrollment." *Id.* at 20.

stantial enough to require a remedy. Second, it is to argue that while sanctions against racist actions and speech, crafted within the parameters of current antidiscrimination law, can be helpful, a more fundamental restructuring of the institutional arrangements on integrated campuses may be the only way to ease racial tensions on such campuses. Underlying this Note's analysis is the assertion that the problem of combating racism on campus is not simply a question of correcting individual racist attitudes or punishing racist behavior versus protecting free expression; it is also a question of whose expression will be empowered by institutional structures and whether all racial groups will be allotted equal institutional power within universities.

To that end, this Note works from the realization that injury results not only from intentional racism, but also from conceptual, aversive, or unconscious racism and from the inevitable clash of perspectives among racial groups. Part I of this Note briefly summarizes a sociology of knowledge, in order to introduce the perspective that the Note utilizes on how we come to know and use abstract concepts such as racism in our interpretation of social events. Part II examines how a history of racism pervades understandings of social life because it has pervaded the lived experience of social life; this Part examines how our history of racism affects the things that we perceive as racism. Part III places such arguments in the context of the university setting, presenting a description of the contemporary academy that indicates the extent and effect of racism there and emphasizing the need for additional remedies. Part IV surveys remedial possibilities for universities as they formulate policies for addressing the problem of racism in the university setting.

I. RACISM AND THE SOCIOLOGY OF KNOWLEDGE

Even in the wake of antiobjectivist critiques, there persists throughout the sciences, humanities, and law a faith in the objective meaning of language and social events. Despite modernism's undermining of the faith in authoritative values and foundations that would allow us a constant framework within which to understand social life across time and context, people have difficulty relinquishing the Platonic belief that they can get to the true, real essence of things if they only look hard enough. One epistemological assumption of that belief is that the meaning of words and texts exists prior to their interpretation by individuals, that such words and texts have inherent content that is discerned rather than created. Truth, in other words, is out there to be discovered, and knowledge is "looked upon as the instrument

by which to take possession of the Absolute."²²

Likewise, meaning in social life is *experienced* as fixed, objective, or "really there" because our language, texts, and modes of behavior are "reified."²³ Our language and social practice construct and institutionalize what we think of as "obvious," "common sense," and "natural."²⁴

²² Hegel: The Essential Writings 44 (F. Weiss ed. 1974).

Traditional epistemology, which is the study of the nature of knowledge, entails "belief in the existence of transcendent, objective truth." Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. Rev. 429, 430 (1987). Professor Williams adopts Wittgenstein's label of the "picture theory" to refer to the traditional Platonic, objectivist view that language provides a picture of reality. *Id.* at 433-34 & n.21. According to this view, "human understanding is reached when language captures the 'glassy essence,' the [Platonic] Form, of a particular object. For example, the word 'tree' links an actual tree with the essence of what it means to be a Tree." *Id.* at 434 (footnotes omitted).

Professor Gary Peller has termed this premise "the assumption of positive content," which he defines as "the notion that the signifier, the representational term, acquires meaning because it is filled up by the content of the signified, which determines its meaning." Peller, *The Metaphysics of American Law*, 73 Calif. L. Rev. 1152, 1163 (1985). It is "[w]ithin this view of language as adequation of concept and representational term" that "the attribution of meaning is determinate and free from the mediation of interpretation." *Id.*; *sec id.* at 1168-69.

As Williams observes, the "picture theory can be seen as a search for foundations. The core Platonic impulse was . . . the need for human knowledge, perceptions, and values to achieve the kind of absolute certainty characteristic (so it was believed) of mathematical truth in general, and of Euclidean geometry in particular." Williams, *supra*, at 434 (footnotes omitted).

²³ "Reification" may be defined as "the apprehension of human phenomena as if they were things, that is, in non-human or possibly suprahuman terms":

[R]eification is the apprehension of the products of human activity *as if* they were something else than human products—such as facts of nature, results of cosmic laws, or manifestations of divine will The reified world . . . is experienced by man as a strange facticity, an *opus alienum* over which he has no control rather than as the *opus proprium* of his own productive activity.

P. Berger & T. Luckmann, *The Social Construction of Reality* 82-83 (1966); cf. M. Omi & H. Winant, *supra* note 8, at 57-66 (arguing that many racial theories seek "to remove the concept of race from fundamental social, political, or economic determination," and suggest instead "that the truth of race lies in the terrain of innate characteristics").

²⁴ See Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 Harv. L. Rev. 10, 11-15 (1987). Professor Minow observes that each year the Supreme Court and the nation itself confront dilemmas of difference in a heterogeneous society that arise out of "powerful unstated assumptions about whose point of view matters," assumptions that "work in part through the very structure of our language, which embeds the unstated points of comparison inside categories that bury their perspective and wrongly imply a natural fit with the world." *Id.* at 13. She argues that "[l]egal treatment of difference thus tends to treat as unproblematic the point of view from which difference is seen, assigned, or ignored, rather than acknowledging that the problem of difference can be described and understood from multiple points of view." *Id.* at 14. In this regard, "[e]xisting institutions and language already carve the world and already express and recreate attitudes about what counts as a difference, and who or what is the relevant point of comparison." *Id.* at 15; see also P. Berger

When this way of thinking is applied to the problem of racism, people start from the assumption that a phrase or event either is or is not racist, because racism either is or is not the inherent, positive content of the phrase. Disputes about meaning can degenerate into something like, "you say a remark is racist, but I know it is *really* not. If you understood its meaning *correctly*, you would agree."²⁵

Once one abandons traditional epistemology, the question of which social forces most influence the institutionalization of language and social experience becomes crucial; it leads to the examination of the relationship between knowledge and power.²⁶ Reliance on community agreement—e.g., "because

& T. Luckmann, *supra* note 23, at 55-58 (observing that "the objectivity of the institutional world . . . is a humanly produced, constructed objectivity," that "the externalized products of human activity attain the character of objectivity," and that "the paradox [is] that man is capable of producing a world that he then experiences as something other than a human product"); Fish, *Is There a Text in This Class?*, in S. Fish, *Is There a Text in This Class?* 309 (1980), *reprinted in* H. Adams & L. Searle, *Critical Theory Since 1965*, at 525, 527 (1986) (noting that "some institutions or forms of life are so widely lived in that for a great many people the meanings they enable seem 'naturally' available and it takes a special effort to see that they are the products of circumstances"). See generally Peller, *supra* note 22, at 1160-81 (discussing the social construction of knowledge, literary interpretation and original sources, and ideology and representation).

²⁵ Professor Fish explains:

[S]hared understanding is the basis of the confidence with which [people] speak and reason, but its categories are their own only in the sense that as actors within an institution they automatically fall heir to the institution's way of making sense, its systems of intelligibility. That is why it is so hard for someone whose very being is defined by his position within an institution . . . to explain to someone outside it a practice or a meaning that seems to him to require no explanation, because he regards it as natural. Such a person, when pressed, is likely to say, "but that's just the way it's done"

Fish, *supra* note 24, at 320-21, *reprinted in* H. Adams & L. Searle, *supra* note 24, at 532.

Berger and Luckmann note that there are certain "social circumstances that favor dereification," that is, that make it easier for one within an institution to see the contingent construction of the social order instead of seeing it only as "the way it's done." Such circumstances include "the overall collapse of institutional orders, the contact between previously segregated societies, and the important phenomenon of social marginality." P. Berger & T. Luckmann, *supra* note 23, at 85 (footnote omitted). The last two circumstances are particularly relevant for understanding American racism, because whites and blacks have had vastly different experiences under racist practices and ideologies. Whites in particular have little knowledge of how blacks' understanding of the social world is affected by that experience.

²⁶ Berger and Luckmann reason that "[i]f the integration of an institutional order can be understood only in terms of the 'knowledge' that its members have of it, it follows that the analysis of such 'knowledge' will be essential for an analysis of the institutional order in question." P. Berger & T. Luckmann, *supra* note 23, at 61. Primary knowledge about the institutional order "is the sum total of 'what everybody knows' about a social world, an assemblage of maxims, morals, proverbial nuggets of wisdom, values and beliefs, myths, and so forth." *Id.*

so many people agree that the remark is not racist, it must not be"—begs the question of the community's composition.

The communities that impose the prevailing understanding and interpretation of racism, particularly in the university, are clearly skewed in their membership. Major universities are dominated in their administrations, faculties, and student bodies by whites—and disproportionately those born into the comfortable classes. One purpose of this Note is to show that the way universities as institutions understand racism is affected by the composition of their membership, that such an effect underlies the institutional perpetuation or toleration of racism, and that such an effect is unavoidable because understandings of race vary according to the historical experience and current social position of racial groups.

If we acknowledge the divisions within a community, then consensus over what that community constructs as its shared assumptions becomes problematic. It is likely to be a consensus among only parts—the most powerful parts—of the community. In such a case, the presuppositions that serve as the unacknowledged starting points for interpretation are exercises of social power by the groups able to put them in place.²⁷ With particular attention focused upon the university setting, this Note suggests that on the issue of race, we must examine the history of “racial formation”²⁸ and the ideologies growing out of it in order to understand how differing racial identities and histories affect the interpretive understanding of—and remedial efforts to address—the problem of contemporary racism.²⁹

²⁷ Removing the implication of conspiracy, such presuppositions begin to look like Gramsci's notion of ideological hegemony. See generally J. Femia, *Gramsci's Political Thought: Hegemony, Consciousness, and the Revolutionary Process* 23-60 (1981) (discussing Gramsci's doctrine of ideological ascendancy or “hegemony,” essentially grounded in the idea that the dominant class must establish its own moral, political, and cultural values as the conventional norms of practical behavior).

²⁸ See M. Omi and H. Winant, *supra* note 8, *passim*.

²⁹ The hermeneutic strategy proposed here presupposes the inability to discover the “deep structure” of “what's really going on”; this is a necessary concession to abandoning truth as positive content. Rather, the strategy is a never-ending interpretive effort to get within a community (or text) and understand it on its own terms, as well as assess it from various points outside the system. The strategy borrows from the process of the “hermeneutic circle,” see, e.g., R. Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics and Praxis* 131-39 (1983), but departs from versions of that process that claim to result in a final, determinant understanding.

For the specific project of this Note, such a strategy might attempt to determine, for example, how whites have institutionalized a specific understanding of racism, and how that understanding is constructed through the reification of certain presuppositions and the repression of others. Such an examination can then be compared with blacks' conception of racism, which arises from a separate social experience that has led to alternative

II. RACISM AS AN INFLUENCE ON INTERPRETATION

A. Historical Origins

Racism so pervades our social history and cultural experience that it has fundamentally shaped our collective unconscious, with the result that "a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation."³⁰ As Professor Charles Lawrence has suggested, racism can be understood as an "illness [that] affects almost everyone,"³¹ but it might help to think of racism in a less aberrational sense as well. One's race gives one, almost unnoticeably, a perspective on racial issues different from people of other races. Such unconscious racial perspectives affect our definition and recognition of racism.³²

The disparity in perceptions between blacks and whites on issues of race continues to result in blacks and whites assessing incidents—even well-known public events—in radically different terms.³³ The history of racism

presuppositions (a more sophisticated analysis would include an analysis of the supposedly unified perspectives of "whites" and "blacks").

The same project could be done with forms of racism other than American black-white relations and for gender discrimination. Judging from accounts of gender bias in the university setting today, the effort would be very beneficial. See, e.g., Rhode, *supra* note 6, at 1191 (noting that the "same biases . . . that disadvantage women also operate against minorities"); Weiss & Melling, *The Legal Education of Twenty Women*, 40 *Stan. L. Rev.* 1299 (1988) (analyzing why many women find law school alienating). As occasional comparative citations to scholarship on gender discrimination should indicate, this Note will have some implications, by analogy, for such projects.

³⁰ Lawrence, *supra* note 4, at 322; see *id.* at 321-25.

³¹ *Id.* at 321.

³² See Brooks, *Anti-Minority Mindset in the Law School Personnel Process: Toward an Understanding of Racial Mindsets*, 5 *J. L. & Inequality* 1, 8-11 (1987). For example, whites generally think of racism as intentional belief in white supremacy, but Brooks points out that because "the state of mind of one who perpetuates minority subordination makes little difference to those who suffer from minority subordination—i.e., minorities—racism is defined by minorities to include minority subordination." *Id.* at 9. Thus, "[w]hen the term 'racism' is used in minority communities, it often refers *solely* to minority subordination. The harm is so discernible, so unmistakable, that the perpetrator's state of mind (or, as in the case of societal discrimination, the perpetrator's very existence) becomes irrelevant." *Id.*

³³ Judge Higginbotham notes how the divergent experience of blacks and whites results in the same cultural events taking on entirely different meanings:

From a predominantly white perspective, the Declaration of Independence is viewed as former President Nixon described it: "the greatest achievement in the history of man. We are the beneficiaries of that achievement." But who, until recently, did the "we" describe? Not black America. Frederick Douglass, a leading abolitionist who was born a slave, described Independence Day in 1852 from the perspective of blacks and slaves rather than whites and slaveholders: "This Fourth of July is *yours*, not mine. You may rejoice, I must mourn. To drag a man in fetters to the grand illuminated temple of liberty, and call upon him to join you in joyous anthems, were inhuman mockery and

helps to develop, and in turn is perpetuated by, a shared psychology and culture of which racially affected ideology is a constituent part.³⁴ One blatant aspect is a persistent set of images, myths, and stereotypes that historically constituted white and black racial identities: industrious/lazy, intelligent/unintelligent, moral/immoral, enabling culture/disabling culture, law-abiding/criminal, responsible/shiftless, virtuous/lascivious.³⁵ As Michael Omi and Howard Winant have explained, “[r]acial beliefs operate as an ‘anateur biology,’ a way of explaining the variations in ‘human nature,’”³⁶ and the “continuing persistence of racial ideology suggests that these racial myths and stereotypes cannot be exposed as such in the popular

sacriligious irony. . . . I am not included within the pale of this glorious anniversary”

A. Higginbotham, *In the Matter of Color* 5 (1978). Judge Higginbotham notes myriad instances in which such racially created gaps in perception kept whites oblivious to blacks’ circumstances and excluded from their recognition of oppression. See, e.g., *id.* at 375-77 (contrasting Rhode Island Governor Stephen Hopkins’ condemnation of “slavery” as the “heaviest curse that human nature is capable of” in describing the evils of the Sugar Act, an enactment that limited white colonists’ economic freedom of action, with the concurrent failure of whites to embrace arbitrary acts of physically enslaving blacks without black consent within the slavery definition used by whites to condemn the king’s abuses).

³⁴ As one author has observed, “[n]either the psychological nor the institutional definition is sufficient to account for racism, or, for that matter, any other cultural phenomenon”:

Culture is multi-dimensional and must be seen as the integral of all of the separate points of view that enter into our understanding. Although in practice we are forced to treat each separately, in principle no aspect of culture operates independently of any other. . . . The psychology of a culture is to a great extent a symbolic precipitate of the kinds of experience forced upon a group of people by their history. Thus what we call personality is a historically evolving system, and personality and culture may be considered congruent.

J. Kovel, *White Racism: A Psychohistory* 44 (1970).

³⁵ This list is taken largely from Crenshaw, *supra* note 6, at 1373. A more complete development of these traditional race characterizations appears in J. Kovel, *supra* note 34, at 51-92.

For a related discussion of the development of ideologies of racial identities, see M. Omi & H. Winant, *supra* note 8, at 57-69. For an explanation of the human tendency to create irrational categories of racial and ethnic characteristics, founded on selective evidence (if any), see G. Allport, *The Nature of Prejudice* 17-27 (1954). This landmark study also provides excellent analyses and theoretical explanations from a psychological perspective of the preferential thinking, creation, and perception of group differences, as well as sociocultural factors that are part of the complex process of forming prejudices.

³⁶ M. Omi & H. Winant, *supra* note 8, at 62-63 (footnote omitted). The authors continue: “Differences in skin color and other obvious physical characteristics supposedly provide visible clues to differences lurking underneath Skin color ‘differences’ are thought to explain perceived differences in intellectual, physical and artistic temperaments, and to justify distinct treatment of racially identified individuals and groups.” *Id.* at 63.

imagination."³⁷

The traditional formulation of racial identities serves to perpetuate what Professor Kimberlé Williams Crenshaw terms a "white race consciousness" that "legitimizes prevailing injustices and constrains the development of new solutions that benefit Black Americans."³⁸ Crenshaw traces the transformation of this consciousness into the unconscious "white norm" that is taken as a neutral standard even after the demise of explicit white supremacy ideology.³⁹

White race consciousness, experienced as neutral and practiced without malicious intent, defines whites' interpretation of racism and social life. Black Americans' understanding of race is similarly defined by historical experience; neither is neutral. Yet, one conception will be inevitably privileged in that it will be utilized as the basis for understanding and acting against racism, as well as serving as the basis for understanding written texts, legal doctrine, and social life generally.⁴⁰

³⁷ Although particular meanings, stereotypes, and myths can certainly change, the presence of a *system* of racial meanings and stereotypes, of racial ideology, nevertheless "seems to be a permanent feature of US culture." *Id.* Our society tends "to view race as something fixed and inmutable—something rooted in 'nature.' Thus we mask the historical construction of racial categories, the shifting meaning of race, and the crucial role of politics and ideology in shaping race relations." *Id.* at 63-64.

³⁸ Crenshaw, *supra* note 6, at 1369.

³⁹ She elaborates:

The end of Jim Crow has been accompanied by the demise of an explicit ideology of white supremacy. The white norm, however, has not disappeared; it has only been submerged in popular consciousness. It continues in an unspoken form as a statement of the positive social norm, legitimating the continuing domination of those who do not meet it. Nor have the negative stereotypes associated with Blacks been eradicated. The rationalizations once used to legitimate Black subordination based on a belief in racial inferiority have now been reemployed to legitimate the domination of Blacks through reference to an assumed cultural inferiority.

Id. at 1379. The "norm—although no longer explicitly white supremacist—remains, nonetheless, a white norm." *Id.* at 1380.

⁴⁰ Professor Wasserstrom provides an example of the way such a "conceptual racism" operated in *Brown v. Board of Educ.*, 349 U.S. 294 (1955). See Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 *UCLA L. Rev.* 581, 599-601 (1977).

Wasserstrom argues that most school districts could have been integrated—logistically, administratively—within a few days of the Court's decision. Most counties had two high schools, one white and one black, and "[t]here was nothing difficult about deciding that—as of the day after the decision—half of the children in the county . . . who lived in the southern part of the county . . . would go to [one high school] and all those who lived in the northern half would go to [the other]." *Id.* at 600. Yet the Court justified its order of desegregation "with all deliberate speed," *Brown*, 349 U.S. at 301, by citing "problems related to administration,

B. Implications of Interpretation Through Race Consciousness

Our society has established a national consensus against blatant, intentional racism and in the decades since *Brown v. Board of Education* has developed a sizable set of legal remedies to address it. Even when remedial mechanisms do not reach such racism—as, for instance, when black people cannot win tort actions for intentional racial slurs⁴¹—we at least have the conceptual apparatus to recognize that racism exists.

We have no such recognition, however, for more subtle racism—the unconscious, usually unintentional racial bias that infects the taken-for-granted concepts, categories, and assumptions with which we make sense of the world.⁴² Law and much of our social discourse recognize racism only in

arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts . . . and revision of local laws.” *Id.* at 300-01.

Wasserstrom’s point is that administrative problems (in many places) could be easily handled, and building conditions were only a problem because the Court could not envision ordering white children to attend school in the same substandard facilities black students had endured. The Supreme Court allowed an infamously slow remedial process because of an unacknowledged conclusion that white students could not be made to attend inferior black schools. Until all schools could be upgraded, black students would have to (continue to) endure inferior facilities. Wasserstrom asserts that because black lives were implicitly valued less than white ones, the Court ignored the more obviously just intermediate remedy: ordering white students, who had long had the benefit of better facilities, to use the inferior ones while black students, who had unconstitutionally been relegated to the poor schools for generations, gain the temporary benefit of better facilities. Wasserstrom, *supra*, at 600-01. Leaving students in their current facilities until all schools were improved seemed neutral.

An obvious factor—no doubt considered by the Court—complicates Wasserstrom’s thesis. Immediate integration simply would not have been carried out by local officials, and it might not have been enforced by the executive branch. The Court was at the limits of its institutional powers. Also, such a decision certainly would have ignited violent, life-threatening resistance from whites. While this point may undermine Wasserstrom’s assertion about the ease of immediate integration, it does not affect his insight that black children’s experience was valued less than white children’s.

⁴¹ See Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 *Harv. C.R.-C.L. L. Rev.* 133 (1982).

⁴² The problem is compounded by the inevitable racial dynamic that pervades a society with a centuries-old history of racism. Many blacks inevitably feel an anxiety in predominantly white institutions even though the institutions are now integrated and formally neutral in matters of race. Many whites feel a collective guilt for the sins of their ancestors, and for the dimly recognized possibility that their own social status is due partly to the historical subordination of blacks. See Steele, *The Recoloring of Campus Life*, *Harper’s Mag.*, Feb. 1989, at 47, 53-55 [hereinafter Steele, *Recoloring*]. This racial dynamic can be the cause of awkward situations in which race issues arise in integrated groups, not because an arguably offensive remark has been made, but because the tremendous disparity in the social histories of blacks and whites make efforts at empathy and understanding difficult, particularly for whites. For a description of such an incident and a development of this argument, see Steele, *I’m Black, You’re White, Who’s Innocent? Race and Power in an Era of Blame*, *Harper’s Mag.*, June 1988, at 45.

the form of an overt expression of white racial superiority and deliberate efforts to denigrate, segregate, or deny opportunity on the basis of skin color.⁴³ The law and popular understanding have incorporated into the idea of racism neither contemporary descriptions of the psychology of unconscious racism⁴⁴ nor recent theoretical thinking that has displaced traditional epistemology with a debate over hermeneutic approaches.⁴⁵ Neither have they acknowledged the importance of racial identity—of one's membership in a distinct racial group rather than a colorblind "humankind"—in the interpretation of racism. The result is racism—aversive,⁴⁶ conceptual,⁴⁷ and unconscious⁴⁸—that cannot yet be acknowledged, and thus not remedied.

Antidiscrimination law, and particularly equal protection doctrine, is formulated explicitly to address only intentional racism.⁴⁹ The landmark equal

⁴³ This type of racism is essentially what Kovel labels "dominative racism," which is embodied in "what we ordinarily think of as a prejudiced person," that is, one "who acts out bigoted beliefs," "represents the open flame of racial hatred," "openly seeks to keep the black man down, and . . . is willing to use force to further his ends." J. Kovel, *supra* note 34, at 54-55.

⁴⁴ See J. Kovel, *supra* note 34; Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 *Wis. L. Rev.* 1359, 1375-85; Lawrence, *supra* note 4, at 321-44; Lawrence, "Justice" or "Just Us": Racism and the Role of Ideology, 35 *Stan. L. Rev.* 831 (1983).

⁴⁵ For an excellent study of the "new epistemology" and how legal scholars have attempted to incorporate its insights, see Williams, *supra* note 22.

⁴⁶ Kovel defines the aversive racist as

[t]he type who believes in white race superiority and is more or less aware of it, but does nothing overt about it. An intrapsychic battle goes on between these sentiments and a conscience which seeks to repudiate them. . . . This often means . . . inaction serves as the only resolution of the inner conflict. Because of this, the person tends to behave in ways that avoid the issue: he tries to ignore the existence of black people, tries to avoid contact with them, and at most to be polite, correct and cold in whatever dealings are necessary between the races. . . . Within this type we find at one extreme those who, upon threat—such as when a black gets "too close"—lapse into dominative racism; and at the other, those who, impelled by a strong social conscience, consider themselves liberals and, despite their sense of aversion (which may not even be admitted inwardly) do their best within the given structure of society to ameliorate the conditions of [blacks].

J. Kovel, *supra* note 34, at 54-55.

⁴⁷ See Wasserstrom, *supra* note 40.

⁴⁸ See Lawrence, *supra* note 4.

⁴⁹ One of the most insightful (and influential) descriptions of antidiscrimination law is Professor Freeman's analysis of the "perpetrator perspective." See Freeman, *School Desegregation Law: Promise, Contradiction, Rationalization*, in *Shades of Brown*, *supra* note 18, at 71. Professor Freeman argues:

[R]acial discrimination [is seen] as something that is caused by individuals, or individual institutions, producing discrete results that can be identified as discrimination and thereafter neutralized. . . . The perpetrator perspective . . . presupposes that apart from the misguided conduct of particular actors the rest of our

protection decision of *Washington v. Davis*⁵⁰ is exemplary in this respect. In *Davis*, the Court ruled that state action is not unconstitutional “solely because it has a racially disproportionate impact.”⁵¹ Rather, discrimination “must ultimately be traced to a racially discriminatory purpose.”⁵² In other words, the perpetrator’s intent, and not the victim’s injury, is the law’s concern. If an identical racial harm were caused unintentionally, the equal protection clause would offer no remedy. The principle was quickly extended by the Court to other equal protection claims.⁵³

Such a conception of racism might be adequate if perpetrators always made manifest a racist intent. But not only does such a theory privilege the perpetrator’s experience of racism over the victim’s, it also does not begin to aid in recognizing more subtle, aversive racism.⁵⁴ The perpetrator perspective sheds no light on a situation in which a black person feels the injury of a racist remark or action, yet the white “perpetrator” intends or recognizes no racism.⁵⁵ Similarly, the law’s perpetrator perspective conceptualizes racism as a discrete and specific act, an act committed by one individual, group, or institution against another whose injury can be identified. It ignores the pos-

society is working All we need do is root out the villains. Having done so, we can say with confidence that it was all their *fault*.

Id. at 74-75. For a longer version of the article, see Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *Minn. L. Rev.* 1049 (1978).

⁵⁰ 426 U.S. 229 (1976).

⁵¹ Id. at 239.

⁵² Id. at 240.

⁵³ See, e.g., *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977) (segregation of schools must be shown to be the intent of the school board); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (housing segregation must be racially motivated).

⁵⁴ Cf. Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 *Signs: J. Women in Culture & Soc’y* 421, 439 (1987) (concluding that “[t]hrough antidiscrimination law may have produced positive social change, legal strategies put unacceptable burdens on disadvantaged groups with little promise of success”; the “inability of civil rights strategies to fulfill their promise appears to have left many who experience discrimination on uncertain ground between public and private action where they are without faith in themselves or the law”); Rhode, *supra* note 6, at 1193 (observing that “the limitations of conventional legal strategies have become increasingly apparent,” and that although “they have been effective against the most overt forms of gender discrimination, traditional equal opportunity frameworks have not confronted the deeper institutional and ideological forces that contribute to gender disadvantage”).

⁵⁵ See Brooks, *supra* note 32, at 9-10 (noting that “whether the harm is backed by a racial animus does not change its existence or ameliorate the pain suffered by its victims,” that “when individuals and institutions having ‘good’ intentions engage in a pattern or practice of granting low priority to matters of keen importance to minorities—such as real access to quality jobs, education, and housing—that is subordination and, hence, racism, as far as minorities are concerned” (footnote omitted)).

sibility that "race" is structural and interstitial, that it can be the root of injury even when not traceable to a specific intention or action.

A large body of sociological research on law has found overwhelming evidence that legal institutions discriminate against blacks in ways that cannot be explained on the facts of the cases or through legal doctrine. It is well known, for instance, that death penalty sentences are given more often to black defendants than to whites, and more often to the killers of white victims than to those of black victims.⁵⁶ That racial disparity holds up across the handling of lesser crimes as well.⁵⁷ Intentional prejudice cannot explain that data. But the realization that race affects thought and experience in things seemingly unrelated to race (such as whether a particular act constitutes an "aggravating circumstance" sufficient to justify the death penalty over life imprisonment) sheds light on such disproportionate results.

Such racism requires attention, for it is a manifestation and perpetuation of a race consciousness that results in real injury. White race consciousness informs and helps constitute the existing social conditions that whites are able to reconcile with processes of formal equality and the belief that racism is no longer a significant problem in the United States.

Outside the law, the absence of a recognition of race consciousness, which is in part an understanding of racism limited to the perpetrator perspective, helps to explain vocal resentment of whites to charges of racism⁵⁸ and pro-

⁵⁶ See Bowers & Pierce, *Arbitrariness and Discrimination in Post-Furman Capital Statutes*, 26 *Crime & Delinquency* 563 (1980). Since the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972) (holding that state death penalty statutes were unconstitutionally "arbitrary" and "discriminatory"), states have been required to eliminate the bias in death penalty sentencing with "individualized" justice and specific sentencing guidelines that limit sentencing discretion and guarantee appellate review. See *Gregg v. Georgia*, 428 U.S. 153 (1976).

But even under post-*Furman* laws, death penalty sentences are given foremost in cases in which a black has killed a white, next most often when a white has killed a white, then when a black has killed a black, and least often when a white has killed a black. See D. Black, *Sociological Justice* 61 (1989). Bowers and Pierce note that "in the first five years after *Furman*, race of both offender and victim had a tremendous impact on the chances that a death sentence would be handed down." Bowers & Pierce, *supra*, at 596-97. Further,

[i]n the first five years after the *Furman* decision, racial differences in the administration of capital statutes have been extreme in magnitude, similar across states and under different statutory forms, pervasive over successive stages of the judicial process, and uncorrected by appellate review. Moreover, these differentials have been fully consistent with the pattern of racial disparity occurring under capital statutes invalidated by the *Furman* decision.

Id. at 629.

⁵⁷ See D. Black, *The Behavior of Law* 17, 21-22, 24-25 (1976).

⁵⁸ See, e.g., School Colors, *supra* note 12, at 17 (White MIT student complains, "[H]alf my buddies on the football team were black, and I come here and read every other day in the paper that I'm a racist. It irritates me.").

vides insight into allegations that the term "racism" has been so misused and overused that it has lost its meaning. When whites conceive of "racism" as requiring an intentional racist motive for which they deserve personal blame for a personal fault, they get angry because they know they had no racist intent. They plead that they were misunderstood, or that blacks are "oversensitive."

This misunderstanding of the nature of racism is the basis of a problematic confrontation in black-white relations: a nonmalicious remark or action by a white person to which black people take offense or feel injury. A white speaker's reaction, in turn, is either uncomprehending puzzlement ("How could that possibly be seen as racist?") or some mixture of vocal denial and backlash ("I didn't *mean* any harm, and it angers me that you accuse me of it."). The dilemma hinges on differing interpretations of the cultural or symbolic value of social events.

Consider the debate over the Confederate flag. Black students at schools where white fans wave the flag and sing "Dixie" during football games⁵⁹ see the Confederate emblems as symbols of an era in which their ancestors were enslaved by whites.⁶⁰ Many white students, on the other hand, seem to take the flag as representative merely of their Southern heritage, a cultural identity distinct from Northern or urban lifestyles.⁶¹ Such whites do not see themselves as endorsing, through the flag, a return to slavery.⁶² They simply do not see what the big deal is about celebrating the Confederate flag once

⁵⁹ See, e.g., Aitken, *Racism on Campus: Beyond the Citadel*, *People Mag.*, Dec. 15, 1986, at 58, 66 (white students and alumni wave Confederate flags at Citadel football games). Black groups have made efforts in recent years to have the Confederate flag removed from Southern state houses and other public buildings. See, e.g., *Confederate Flag in Norfolk Draws Protests*, *Wash. Post*, Feb. 14, 1988, at B2, col. 6 (reporting on an attempt to remove the flag from Norfolk City Council chambers); Rowan, *Take That Confederate Flag Down*, *Wash. Post*, Feb. 9, 1988, at A23, col. 1 (commenting on Alabama governor Guy Hunt's rejection of pleas to remove Confederate flag from Alabama state capitol); Hill, *Symbol of Dixieland Has Blacks Seeing Red*, *Wash. Post*, Jan. 15, 1988, at A3, col. 1 (Alabama state capitol). But see *The Stars and Bars Is Not A Racist Symbol*, *Wash. Post*, Feb. 13, 1988, at A17, col. 1 (justifying display of the flag).

⁶⁰ See Eubanks, *Ole Miss Is Still Torn 25 Years After Meredith*, *Wash. Post*, Sept. 27, 1987, at D1, col. 4 (Confederate flag for black students at Ole Miss "represented Mississippi's racist past").

⁶¹ Note, however, that there are certainly still some overtly racist uses of the flag, even by students. See, e.g., Aitken, *supra* note 59, at 65 (recounting Citadel football game where "brand-new rebel flags were waved defiantly by white students and alumni" three weeks after white students there dressed in white sheets had burned a cross in the room a black student, with one alumnus observing that the action was tantamount to chanting "n-gger, n-gger"). And, of course, the Confederate flag regularly appears at Ku Klux Klan rallies.

⁶² See Eubanks, *supra* note 60, at D2, col. 2 ("I naively believed that the rebel flag was just as [sic] harmless symbol of a bygone era, rather than the active source of racial division on campus that I soon found it to be.").

one concedes that violent racial subjugation is a bad thing. As defined by their intentions, many whites do not view their use of the Confederate flag as problematic, despite the flag's frequent display by white supremacists at Ku Klux Klan rallies.

The problem is that white students interpret through the only lens of understanding they have available: a set of assumptions and metaphors, arising from a specific sociohistorical context, which constrains what interpretations will seem "obvious."⁶³ Such constraints are contingent and could be ameliorated with a broad-based commitment that began with the recognition that such attitudes are racially based even when not racially motivated.

III. RACISM IN THE UNIVERSITY

A. *The Evidence and Experience of Racism*

Race is particularly problematic in the context of higher education.⁶⁴ In

⁶³ Cf. Magner, Blacks and Whites on the Campuses: Behind Ugly Racist Incidents, Student Isolation and Insensitivity, Chron. Higher Educ., Apr. 26, 1989, at A1. One professor suggests that indifference may be the largest problem in addressing racial tensions:

Most [students] would like to ignore the subject [of racism], just like most of society. That attitude is at the source of the racial incidents. The average student doesn't feel responsible for the racial climate or civil rights. They don't feel responsible for anything that they don't have direct knowledge of. They have been taught systematically to ignore race as a subject.

Id. at A29 (statement of Jacqueline Fleming).

⁶⁴ Educational institutions have been the primary context in which our judicial system has grappled with the problem of crafting remedies for the historical subordination of black people, most notably in *Brown v. Board of Educ.*, 349 U.S. 294 (1955), and continuing through *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978).

In addition, the extent to which racism persists in the academy today is important because in many respects universities have equaled or surpassed other institutions in efforts to remedy the effects of past racism in a variety of ways, including affirmative action admissions policies, minority scholarship programs, Afro-American and other non-European courses of study in the curriculum, and minority cultural centers on campuses.

Nevertheless, universities exhibit the shortcomings of existing remedial efforts: Some universities have not met court orders for enrollment of minority students. See, e.g., Vobejda, *School Integration: 4 States Pass, 6 Fail*, Wash. Post, Feb. 11, 1988, at A3, col. 1. Many do not have minority student bodies equivalent to the minority population of their states, and figures for minority faculty lag even further behind. See *infra* note 98.

As in the rest of society, formal barriers and symbolic manifestations of black subjugation in the university setting are virtually gone. I say "virtually" rather than "completely" because, although formal barriers such as white-only admissions policies or officially segregated dormitories no longer exist, some symbolic manifestations of institutional racism linger. See, e.g., Gilliam, *Crushing Tolerance for Racism at University of Kentucky*, Wash. Post, Apr. 11, 1988, at D3, col. 5 (observing that the song, "Ol' Kentucky Home," sung at major University of Kentucky campus events, includes the lyrics, "'Tis summer, the darkies are gay," and "The head must bow and the back will have to bend / Wherever the darkie may go").

its most limited definition, to which many whites still subscribe, racism is an attitude held mostly by the unenlightened or uneducated, that is, an isolated position peculiar to the culture of Afrikaners, some Southern state officials, or some working class white ethnics in the outer boroughs of New York. Given that definition, it is difficult to admit the presence of racism among society's most sophisticated and intellectually gifted.⁶⁵

The university is also a singularly powerful institution in the distribution of wealth. Its primary products, credentials in the form of college degrees, are limited and valuable commodities. Most students, especially those ambitious enough to compete for admission to top-ranked schools, are aware of this fact. Those who go to college make more money, on average, than those who do not; those who graduate from elite institutions probably make more than those who earn diplomas from second- and third-tier schools. White students who believe that admissions criteria based on grades, test scores, and the status of one's high school are objective, fair, and neutral indicia for college admissions resent scarce (and valuable) seats being filled by minority students⁶⁶ admitted through affirmative action policies.⁶⁷ Both faith in the

⁶⁵ A common assumption is that members of the university community (students and faculty), representing the best educated segment of society, are likely to be the least influenced by irrational prejudice. Indeed, despite persistent problems, many blacks find college campuses better in comparison to most other social spaces in society. See, e.g., Steele, *Recoloring*, supra note 42, at 47. The author reminisces:

Of course, universities are not where racial problems tend to arise. When I went to college in the mid-Sixties, colleges were oases of calm and understanding in a racially tense society; campus life—with its traditions of tolerance and fairness, its very distance from the “real” world—imposed a degree of broadmindedness on even the most provincial students. If I met whites who were not anxious to be friends with blacks, most were at least vaguely friendly to the cause of our freedom. In any case, there was no guerilla activity against our presence, no “mine field of racism” (as one black student at Berkeley recently put it) to negotiate. I wouldn't say that the phrase “campus racism” is a contradiction in terms, but until recently it certainly seemed an incongruence.”

Id. at 48. Still, many black students experience campus life as a disturbing, hostile atmosphere that at a minimum creates a distraction of attention and energy from academic pursuits. See *infra* note 94 and accompanying text.

⁶⁶ Note, however, that one rarely hears objections to affirmative action for the children of alumni, or even to scholarships for athletes who do not meet normal admissions criteria.

⁶⁷ See, e.g., *Wrong Message from Academe*, *Time*, Apr. 6, 1987, at 57 [hereinafter *Academe*] (statement of Adele Terrell, program director of the National Institute Against Prejudice and Violence) (contending that students “are competing for scholarships and grants that are drying up” . . . with a resulting reaction by whites against perceived rivals”); Mangan, *At Texas: An Undercurrent of Hostility Amid Efforts to Promote Multiculturalism*, *Chron. Higher Educ.*, Apr. 26, 1989, at A29, col. 1 (statement of Michael L. Davis, director of Minority Information Center, University of Texas-Austin) (noting that “[t]here is an undercurrent of

meritocratic processes⁶⁸ that are supposed to govern the university's intellectual task and the self-interest that intensifies competition for the university's key commodity mesh with a particular racial ideology to contribute to questioning by whites of the legitimacy of black students' presence in academia.⁶⁹

In addition, the current divisions in the understanding of racism on university campuses serve as an accurate paradigm for race issues in the larger, national context. Today's white students missed most of the civil rights movement and legally enforced segregation. Many feel no direct responsibility for institutionalized racism⁷⁰ and believe that with formal legal barriers to integration now dismantled, students of color stand on an equal footing with them. As with most white people generally, white students' conception of racism is constructed from the images that the civil rights movement confronted: enforced segregation, physical violence, blatant hateful epithets, and an overt, conscious denial of racial equality.

With such barriers now either gone or greatly diminished, many whites tend to think that racism has largely disappeared, at least in any form that could serve as an impediment to opportunity and achievement. White students have a very hard time understanding how their predominantly white campuses can seem hostile to people of color; how their campus social life is a distinctly "white culture," even when the major institutions within it are not explicitly labeled the "white student union," "white student newspaper,"

antagonism, maybe even frustration, with programs and moneys specifically set aside for minorities, especially when money is tight").

The same competition and resentment resurfaces again at the end of college, when students compete for an analogous limited commodity—good jobs.

⁶⁸ White acceptance of the ideology of equal opportunity and unproblematic meritocracy helps eliminate the need to see racism as a key factor in an economy and social structure that distributes rewards with tremendous disparity:

Believing both that Blacks are inferior and that the economy impartially rewards the superior over the inferior, whites see that most Blacks are indeed worse off than whites are, which reinforces their sense that the market is operating "fairly and impartially"; those who should logically be on the bottom are on the bottom. This strengthening of whites' belief in the system in turn reinforces their beliefs that Blacks are *indeed* inferior.

Crenshaw, *supra* note 6, at 1380 (footnote omitted).

⁶⁹ Kennedy notes that many beneficiaries of affirmative action recognize that "merit" is "a malleable concept, determined not by immanent, preexisting standards but rather by the perceived needs of society," and rightly insist that "considering a black's race as part of the bundle of traits that constitute 'merit' is entirely appropriate." Kennedy, *supra* note 6, at 1333.

Nevertheless, affirmative action opponents frequently assert the related objection that such policies aid "those blacks who need it least and who can least plausibly claim to suffer the vestiges of past discrimination—the offspring of black middle-class parents seeking preferential treatment in admission to elite universities." *Id.* (footnote omitted).

⁷⁰ See *supra* note 63.

or "white debating club." It does not occur to most white students that their indifference or hostility to the Martin Luther King national holiday, for example, is evidence of attitudes on racial issues that differ tremendously from their black colleagues.⁷¹ It does not occur to most white students that the major, campus-sponsored concerts of white music groups constitute distinctly *white* cultural events.

The hostility, or at least puzzlement, one hears among many white students toward distinctly black cultural centers, student groups, and social events arises from white students' lack of recognition that the overwhelmingly white campuses themselves are in some sense large white cultural centers—ones in which black students are likely to have difficulty feeling at home.⁷² Thus, white students' assertions that they only want all people treated the same, without the separatism of institutions such as black cultural centers, are often experienced by minority students as demands that they assimilate into white-dominated institutions and culture. That white norm extends even into the classroom.⁷³

The reports of racist incidents on college campuses recur continually in the popular press. The National Institute Against Prejudice and Violence collected reports of seventy-eight incidents of racial violence or allegations of prejudice that occurred in the spring semester of 1988 alone, and that did not purport to be a comprehensive survey.⁷⁴ The recurrence of old-fashioned intentional racism on campuses is the most obvious form of hostility, and a sampling demonstrates the ferocity of some such incidents, which have variously involved: graffiti containing swastikas and antiblack epithets;⁷⁵ cross-burning;⁷⁶ the protesting of an all-white fraternity's "White History

⁷¹ Cf. B. Blauner, *Black Lives, White Lives: Three Decades of Race Relations in America* 3 (1989) (observing that although an "extremely significant achievement," the national celebration of Dr. King's birthday "makes it easier to avoid facing squarely the evils of racism, economic injustice, and war that he struggled against").

⁷² See Mangan, *supra* note 67, at A29, col. 2 (student saying "I don't like a black-student center any more than I would like a white-student center"); Magner, *supra* note 63, at A30, col. 1 (white students at Temple University form a "White Student Union," created "to oppose affirmative action and encourage white pride").

⁷³ See Crenshaw, *supra* note 17, and incident described *supra* notes 13-16 and accompanying text.

⁷⁴ Marcus, *supra* note 21, at 19.

⁷⁵ See Academe, *supra* note 67, at 57 (black academic counselor finds words "death n-gger" scratched on office door); *Racism Flares on Campus*, *Time*, Dec. 8, 1980, at 28 (black students at Williams College received messages such as "stinking black n-ggers"; Harvard University black student leader found racist phrases written on her office calendar; letter sent to a black student dormitory at Wesleyan University urged "wip[ing] all g.d. n-ggers off the face of the earth").

⁷⁶ At The Citadel, a South Carolina military college, white students, dressed in white sheets, entered the room of a sleeping black student and burned a cross in his room. Aitken, *supra*

Week" party;⁷⁷ the shouting of racial slurs;⁷⁸ the distribution of openly hostile leaflets;⁷⁹ racial brawls;⁸⁰ and black student class boycotts⁸¹ and protests.⁸² The comprehensive list of such incidents is much longer,⁸³ and that list does not include unreported incidents, which may well be the majority.⁸⁴

Such blatant incidents frequently meet with some form of condemnation from college administrators, even though there is often disagreement on the appropriate punishment or remedial action when (and if) the perpetrators are caught.⁸⁵ Such events are less problematic as an interpretive matter because they usually have clear perpetrators and obvious racist intent. Whites usually accept such incidents as racist, though they often differ from African Americans in their assessment of the incidents' effect, importance,

note 59, at 58. At Purdue, a wooden cross doused with fuel was found in front of the Black Cultural Center. *Academe*, supra note 67, at 57.

⁷⁷ The party was thrown during Black History Month, prompting protests from black students. Horwitz, *Black Students Protest GWU Party*, *Wash. Post*, Feb. 8, 1987, at A15, col. 1; see also Fisher, *Blacks Seek Visibility on GWU Campus*, *Wash. Post*, Mar. 23, 1987, at D1, col. 1 (*Black People's Union* president at GWU gets hate mail after criticizing "White History Week" party).

⁷⁸ As a crowd assembled on the Northern Illinois University campus to hear the Rev. Jesse Jackson speak, whites shouted racial slurs. *Academe*, supra note 67, at 57; Fisher, supra note 77, at D1, col. 2.

⁷⁹ At the University of Michigan, leaflets appeared with the message "Get your black asses back to Africa," *Academe*, supra note 67, at 57, as well as leaflets referring to black students as "saucer lips, porch monkeys, and jigaboos." *Doe v. University of Mich.*, 721 F. Supp. 852, 854 (E.D. Mich. 1989).

⁸⁰ At the University of Massachusetts, about 1,500 milling students "swirled into a white-black brawl" after the last game of the World Series. *Academe*, supra note 67, at 57.

⁸¹ See, e.g., *Black Students in Ohio Boycott Classes*, *Wash. Post*, Apr. 12, 1988, at A14, col. 2 [hereinafter *Boycott*] (*black Denison University students boycott classes to protest what they perceived as lenient treatment of white students involved in a racial incident*).

⁸² Students at Penn State, Hampshire College, and the University of Massachusetts have occupied college buildings in attempts to win redress for a variety of racial problems on their campuses. See *91 Protestors Arrested*, *Wash. Post*, Apr. 10, 1988, at A4, col. 5 (*Penn State sit-in*); *Students to Continue Racism Protest*, *Wash. Post*, Feb. 25, 1988, at A16, col. 4 (*occupation of campus building at Hampshire College*); *Protesting Students To Meet with Chancellor*, *Wash. Post*, Feb. 16, 1988, at A10, col. 1 (*occupation of campus building at University of Massachusetts*).

⁸³ See Marcus, supra note 21, at 19 & table 2; Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 *Mich. L. Rev.* 2320, 2333 n.71 (1989) (collecting a variety of incidents and examples of "hate speech"); Shenk, *Young Hate*, *CV Mag.*, Feb. 1990, at 34, 36-39 (chronicling 30 days of racial incidents in a "month in the life of campus bigotry"); supra notes 75-82 and accompanying text.

⁸⁴ "Clearly the barrage of news reports reveals only the tip of a thoroughly sour iceberg." Shenk, supra note 83, at 36. Howard Erlich of the National Institute Against Prejudice & Violence observes that "'up to 80 percent of harassed students don't report the harassment.'" *Id.*

⁸⁵ See, e.g., *Boycott*, supra note 81, at A14, col. 2.

and need for remedy.⁸⁶ As to forms of racism that are more widespread—the subtle manifestations of attitudes and preconceptions shaped by white race consciousness that materially affect institutional practices and interpersonal relations—there is even less recognition;⁸⁷ there is disagreement over whether racism exists or has any effect at all.⁸⁸

The phenomenology of black students' experience with racism on white campuses leaves no doubt of the existence and effect of subtle (or unconscious) racism. One does not have to talk to many black college students before hearing stories about some suspicious official asking them to show ID's at the entrance of their own campus buildings because he suspected they did not belong there;⁸⁹ of white students moving to a new seat when a black classmate sat too close;⁹⁰ of black students rarely being invited to join

⁸⁶ While many blacks tend to see racial incidents as evidence of a recurrent problem, and as the most overt manifestation of an attitude that takes many subtler forms, many whites tend to see such incidents as isolated aberrations that can be dismissed as the actions of kooks who should be ignored. They tend to view racial incidents on campus the way a federal judge described such incidents on the University of Michigan campus: "There was no evidence to suggest that these were anything other than *isolated and purposeless* acts." *Doe v. University of Mich.*, 721 F. Supp. 852, 854 (E.D. Mich. 1989) (emphasis added).

Regardless of what makes a series of events "isolated," acts such as distributing a flier declaring "'open season' on blacks," in which it referred to blacks as "saucer lips, porch monkeys, and jigaboos," *id.* at 854, were not purposeless. The clear intent was to demean and threaten black students, creating a hostile environment that they would want to leave, and an understanding that they were unwelcome if they chose to stay.

⁸⁷ See Wilkerson, *supra* note 1 and accompanying text. Wilkerson reports that "[s]everal days spent with black students and faculty members at the University of Michigan showed that racism is a constant in their lives and takes an enormous psychic and emotional toll." *Id.* § 1, at 1, col. 4. For example, she summarizes the experience of one black student, who complained of being "reminded every day" that he was different, that he didn't really belong: "People tell him he speaks well for a black. 'They're always shocked when I say something intelligent or meaningful,' he said. 'It's as if they're saying, 'What are you doing knowing that?'" *Id.* § 1, at 34, col. 1.

Wilkerson confirms that "[b]lacks and whites show wide disparities in their awareness of racial problems on campus": "According to a recent study by Dr. [Howard] Erlich of students at the University of Maryland in Baltimore County, two-thirds of white students said they had not heard about certain racial incidents on campus, while 80 percent of black students said they had." *Id.* § 1, at 34, col. 4.

⁸⁸ See, e.g., *supra* notes 14 & 58 and accompanying text.

⁸⁹ See, e.g., Aitken, *supra* note 59, at 58 (black student at Yale says he is regularly stopped on campus and asked for identification, and comments "I expect it, but I don't accept it").

⁹⁰ See Fisher, *supra* note 77, at D1, col. 1 (quoting a black student at George Washington University who observed, "You can walk into a classroom here and there are [white] people who will move to the other side of the room"); Wilkerson, *supra* note 1, § 1, at 34, col. 1 (University of Michigan student notes, "Sometimes [white students will] walk to the other side of the street if they see you coming, or they don't want to sit next to you in class"); see also Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 *Rutgers L. Rev.* 673, 689 (1985) (reporting that "[r]esearch on nonverbal behavior shows that white

study groups with whites;⁹¹ of white fraternity members handing out invitations on a campus sidewalk but not offering them to minority students.⁹² Despite formal equality and race neutrality in institutional policy as well as law, American universities are still infested with myriad, recurrent reminders of racism.⁹³

The complaints of minority scholars who experience racism as they try to forge careers in a university setting from which they have traditionally been excluded also belies the assumption that racism has been effectively eliminated among the enlightened elite of the academy, especially the faculty.⁹⁴ A group of leading minority law professors has argued in an "Open Letter to

college students often sit further away, use a less friendly voice tone, make less eye contact and more speech errors, and terminate the interview faster when interacting with a black rather than a white") (citation omitted); Weitz, Attitude, Voice and Behavior: A Repressed Affect Model of Interracial Interaction, 24 J. Personality & Soc. Psychology 14-20 (1972) (noting that in a study of behavior of whites interacting with blacks, "[e]xtremely favorable verbal attitudes were coupled with subtle signs of rejection of blacks"); Word, Zanna & Cooper, Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction, 10 J. Exp. Soc. Psychology 109, 111-19 (1974) (arguing that a white person's expectations about a black person may influence the white's actions, and in turn induce the black to behave in a way that confirms the original false definition).

⁹¹ Wright, Black History Month: Unconscious Racism at UVa Law, Va. L. Weekly, Feb. 10, 1989, at 3, col. 3 (suggesting that whites' frequent categorization of all blacks as affirmative action beneficiaries, i.e., unqualified to be in law school, along with the reluctance of many blacks to speak up in class, results "in fairly common exclusion of blacks from white study groups").

⁹² See Maguer, *supra* note 63, at A32, col. 1.

⁹³ See Wright, *supra* note 91 (black student writing about "unconscious and subtle" racism among white students in her law school); Collison, Black Students Cite Finances as Chief Reason for Dropping Out, Oberlin Study Finds, Chron. Higher Educ., Sept. 28, 1988, at A34 (citing Oberlin College study in which black students said "racial prejudice and discrimination inhibit[ed] their success as students," and was one reason for dropping out).

Commenting on the Oberlin study, one college administrator noted:

[Black] [s]tudents are hard put to give you a specific, overt incident [of racial prejudice]. But what they share is their subtle experience of rejection based on color that many professors and white staff may not be aware that they are sending to the student. If students tell you they're experiencing this, and they can't prove it by giving you a particular date, you shouldn't reject their experiences or perceptions. You need to accept reality and start doing something about it.

Id. at A34, col. 4; cf. Lacayo, Between Two Worlds, Time, Mar. 13, 1989, at 58-68 (chronicling the subtle racial slights black professionals face in white-dominated middle-class life).

⁹⁴ See Kennedy, *supra* note 6, at 1338-39. Kennedy argues:

The conventional portrait [of the scholarly debate over affirmative action] . . . concedes the presence of prejudice "out there" in the workaday world of ordinary citizens. But it assumes that "in here"—in the realm of scholarly discourse and the creation of public policy—prejudice plays no role. In other words, conventional scholarship leaves largely unexamined the possibility that the campaigns against affirmative action now being waged by political, judicial and *intellectual* elites reflect

Our Colleagues of the Majority Race" that "racial indifference or insensitivity, if not more overt racist motives, not only *exists* among white law professors, but is increasing"; most of the cosigners stated that they had "experienced indignities at the hands of their white colleagues."⁹⁵ Correspondingly, Professor Roy Brooks has asserted that an "anti-minority mindset"⁹⁶ is present among some white law professors⁹⁷ to the extent that it affects hiring and advancement of minority scholars, as well as the hospitality of both the institutions and profession in which they work.⁹⁸

racially selective indifference, antipathy born of prejudice, or strategies that seek to capitalize on widespread racial resentments.

Id. (emphasis added); see also Lacayo, *supra* note 93, at 66 (observing that "[a]t some colleges, black faculty feel so isolated that they have negotiated telephone allowances into their job contracts to help them stay in touch with blacks teaching at other campuses around the country"); *supra* note 65.

⁹⁵ Brooks, *supra* note 32, at 11. The letter expressed the professors' sense of "decreasing institutional support and increasing challenges to our legitimacy as teachers in the classroom." Letter from Minority Law Professors to White Law Professors (Aug. 1986), quoted in Brooks, *supra* note 32, at 11. The letter was inspired particularly by an incident involving Professor Derrick Bell's visiting professorship at Stanford Law School in 1986. After white students complained that Bell's constitutional law course lacked "balance" because of the attention Bell gave to issues of race and slavery, the faculty organized several "enrichment" lectures to "supplement" Bell's teaching. Bell was not informed of the student complaints nor of the purpose of the lecture series, which was canceled after Stanford's black law student group protested. For a more detailed account of the incident, see Brooks, *supra* note 32, at 1-2.

⁹⁶ See Brooks, *supra* note 32, at 2-3. Brooks defines "anti-minority mindset" as "a set of negative biases held against minorities either consciously or unconsciously," which involves "a predisposition to assess minority performance in a negative or hypercritical fashion, an intolerance for even small mistakes committed by minorities, a proclivity toward denying minorities the deference or presumption of competence normally accorded to white male law professors." Id.

⁹⁷ Brooks cautions, "It should be understood that I am not suggesting that all white male law professors are anti-minority." Id. at 7.

⁹⁸ "The fact is . . . that from my observations and discussions with minority *and* white male and female law professors, there is little doubt that some white male law professors seem preset to react negatively toward minority candidates for appointment, promotion, or tenure." Id.; see also Blum, *Tenure Rates for Black Professors Found to Lag at White Institutions in 9 Southern States*, *Chron. Higher Educ.*, Sept. 21, 1988, at A13, A13-14 (reporting that "[i]n overwhelmingly large percentages, black faculty members felt that there was insufficient minority faculty representation on faculty search committees, in their academic departments, and at their institutions as a whole"). For law schools in particular, of 6,660 fulltime law professors in the 1985-86 academic year, only 433, or approximately 6.5%, were minorities. Brooks, *supra* note 32, at 5 (citing Memorandum 86-57 from Association of American Law Schools Executive Director to Deans of Member Schools (Sept. 5, 1986)). Also, those professors had an unusually high attrition rate. Id. at 5.

Professor Delgado makes the related argument that elite white professors have made little use of civil rights scholarship written by minorities, members of the very groups that are the *raison d'être* for such legal doctrine. Delgado's survey revealed that minority scholars are rarely cited by the most prominent white professors whose work dominates the field. Delgado,

The difficulty of dealing with racism experienced by black students that arises from a white professor's antiminority mindset, selective indifference, and insensitivity is exacerbated by the tendency of university administrators to acknowledge more quickly racially offensive behavior by students than by their colleagues.⁹⁹ Also, the distribution of power between students and faculty compounds the problem; students fear retaliation in the form of classroom hostility, bad grades, poor recommendations, or worse, for confronting or reporting professors who make offensive remarks. That undoubtedly results in underreporting of racial tensions in the classroom.¹⁰⁰

In numerous subtle ways, professors can demonstrate in the classroom an insensitivity that is experienced as hostility.¹⁰¹ In some situations, letting

The Imperial Scholar: Reflections on a Review of Civil Rights Literature, 132 U. Pa. L. Rev. 561 (1984). Professor Bell earlier observed that of symposia on affirmative action and minority admissions published in five "mainstream" law reviews in the mid-1970's, none had a single article by a minority scholar. Bell, *Bakke*, Minority Admissions and the Usual Price of Racial Remedies, 67 Calif. L. Rev. 3, 4 n.2 (1979).

Delgado does not attribute exclusion of minority scholarship to "conscious malevolence or crass indifference," but rather suspects a variety of explanations for "unconscious action and choice." Delgado, *supra*, at 574; cf. Dalton, *Discrimination in Academe: The Personal is Political Too*, Newsl. of the Conf. on Critical Legal Stud., July 1988, at 7. Professor Dalton gives a hypothetical description of how a male law professor, without any conscious intent or deliberate bias, may come to vote against tenure for a woman colleague primarily because of her gender. *Id.* at 8. Dalton's model, which explores the assumptions one makes about an individual based on preconceptions of and experiences with the group of which that individual is a member, could similarly work to describe racial bias.

⁹⁹ But this is not always the case. See *infra* note 139.

¹⁰⁰ See D. Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (1983) (containing analysis of unequal institutional power between students and law faculty and the corresponding effect on student-teacher relationships); Bell, *Black Students in White Law Schools: The Ordeal and the Opportunity*, 1970 U. Tol. L. Rev. 539, 547 (noting that "[r]acial slights, no matter how subtle or unintentional are recognized. . . . Even faculty status may not save an offender from an on-the-spot confrontation, although more frequently an insensitive teacher's remarks and conduct are borne in silent resentment"); cf. Matsuda, *supra* note 83, at 2370 n.249:

The typical university student is emotionally vulnerable for several reasons. College is a time of emancipation from a pre-existing home or community, of development of identity, of dependence-independence conflict, of major decision making, and formulation of future plans. The move to college often involves geographic relocation—a major life-stress event—and the forging of new peer ties to replace old ones. All of these stresses and changes render the college years critical to development of one's outlook on life. . . . A negative environmental response during this period of experience could mar for life an individual's ability to remain open, creative, and risk-taking.

¹⁰¹ Some of the more blatant incidents of academic institutional insensitivity have been aired in the national press. At the University of Michigan, a college dean publicly stated that although he agreed that the school should pursue affirmative action goals, such efforts should avoid creating an institution to which "minorities would naturally flock in much greater numbers." Dean's Remark Protested, *Wash. Post*, Jan. 15, 1988, at A18, col. 5. It is hard

pass without comment material such as old court cases in law school casebooks that contain racist language and assumptions can be offensive.¹⁰² Introducing the race of a defendant in a rape case¹⁰³ or of the victimized party in an unconscionable contracts case who is illiterate and on welfare¹⁰⁴

not to see such statements as implying black students are undesirable. Indeed, such a statement is an example of precisely the attitude Professor Bell identified on the faculty front when he asserted that white faculty are amenable to hiring a few minority faculty members, but at some point—six black professors? seven? eight?—an invisible ceiling would be met and more minorities would mean harm to the school's reputation and the faculty's collective quality. See D. Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (1987).

In addition to administrators or teachers who make such remarks, minority students may also be faced with professors who publish papers that claim scientific proof of the intellectual inferiority of blacks, such as Jensen's infamous *Harvard Education Review* article, or a more recent one by a City University of New York professor. See Jensen, *How Much Can We Boost IQ and Scholastic Achievement?*, 39 *Harv. Educ. Rev.* 1 (1969); Mooney, *Controversial Professor Says CUNY Pressure to Quit Course Violated Academic Freedom*, *Chron. Higher Educ.*, Nov. 23, 1988, at A11, col 1 (noting philosophy professor Michael Levin's article in the *Australian Journal Quadrant*, which asserted that "'there is now quite solid evidence . . . that the average black is significantly less intelligent than the average white'").

See also Hentoff, *Wash. Post*, Nov. 11, 1988, at A21 (op-ed page), col. 1 (University of Pennsylvania professor observed to his students that "we have some ex-slaves in this class," referring to black students); *Ex-Baseball Official Slur Protested*, *Wash. Post*, Apr. 7, 1988, at A11, col. 3 (University of Kentucky trustee observed in a board meeting considering the school's divestment from South Africa that "Zimbabwe is all n-gger now"); *Feinberg, Student Loan Crackdown Defended*, *Wash. Post*, Mar. 25, 1988, at A22, col. 1 (federal education official defends remark concluding that historically black colleges with higher-than-average student loan default rates "'contain a high level of thieves'").

¹⁰² The racism need not be as blatant as the frequently taught nineteenth-century cases of *Plessy v. Ferguson*, 163 U.S. 537 (1896) or *State v. Mann*, 13 N.C. (2 Dev.) 263 (1829). Black students are less likely than whites to feel disconnected from (or not even to notice) actions in cases (described in inoffensive language) that are clear examples of racial bias. See, e.g., *Davis v. Mississippi*, 394 U.S. 721, 722 (1969) (recounting police roundup, without warrants, of at least 24 black youths—and interrogation of 40 or 50 others—after a rape victim "could give no better description of her assailant than that he was a Negro youth"). Similarly, the language of the opinion itself can be subtly racist. See, e.g., *Smith v. State*, 229 So. 2d 551, 553 (Miss. 1970) (repeatedly describing the defendant and other alleged assailants as "[t]he largest negro" and "the negroes"). Professor Crenshaw gives an insightful description of black students' experience of classroom discussion of racially tinged court cases. See Crenshaw, *supra* note 17.

¹⁰³ Cf. *Monture, Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah*, *Canadian J. Women & Law* 159, 164 (1986). Monture, a Native (or Indian) Canadian scholar, recalls an instance of a law school class in which a court opinion described a criminal defendant: "'He is an Indian and he is drunk and he is illiterate,' and all of that belongs in one mouthful." Yet the professor did not acknowledge the racist stereotype. *Id.* She noted that the professor made an effort in discussions of rape not "to inflict any harm on any women in the class. . . . Yet, when we deal with the issue of racism, very much so do we allow ourselves to be blind to the further pain we are inflicting." *Id.*

¹⁰⁴ See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), an unconscionability case involving a poor woman buying on credit. At the University of Virginia, for example, students in a professor's contracts class were concerned about the

can palpably play on traditional racial mythologies of black sexuality and violence¹⁰⁵ or ignorance and irresponsibility.¹⁰⁶ It may or may not go unrecognized by the speaker, but such insensitivity results in the experience of racial subordination for the minority students.¹⁰⁷ When black students complain of racism by professors or the hegemony of a white racial perspective in the classroom, and neither white students nor professors recognize remarks or treatment of material as problematic, the conflict arises from the same, fundamental difference in understanding of race issues that affects other racial debates in the university setting, such as the need for curriculum diversity and black cultural activities.¹⁰⁸

professor's classroom treatment of the *Walker-Thomas Furniture* case, particularly the identification of the woman as "probably black," when her race was nowhere mentioned in the decision. Va. L. Weekly, Apr. 22, 1988, at 1, col. 1.

It is possible that a defendant's race could be relevant to explain the potential, unstated motivations of a particular decisionmaker; nevertheless, it seems that the mention of race in conjunction with other explicitly stated facts, such as impoverishment, illiteracy, or living on public relief, will be viewed inevitably in the context of mythical race identities that label blacks as ignorant, lazy, and irresponsible. See supra note 35 and accompanying text. In such instances, an individual, the party in the case, is recognized primarily as a member of a group, and, therefore, linked to all of the historically reified symbolism that the group's race identity has traditionally engendered. The stereotype is perpetuated as individuality is diminished. See supra note 23 and accompanying text.

¹⁰⁵ When a law professor gratuitously notes that a rape defendant is black, the comment is inevitably grounded in the historical context of a white racist mythology that feared black men's sexuality forced upon (or even consensually welcomed by, in the case of antimiscegenation laws) white women. See J. Kovel, supra note 34, at 67-79 (discussing the roots of the myth of black sexuality).

¹⁰⁶ See supra note 35 and accompanying text.

¹⁰⁷ See Brooks, supra note 32, at 9-10 (concluding that when "individuals or institutions having 'good' intentions engage in a pattern or practice of granting low priority to matters of keen importance to minorities . . . that is subordination, and, hence, racism as far as minorities are concerned" (footnote omitted)).

¹⁰⁸ See supra note 72 and accompanying text.

One of the central premises of this Note is that the sincerity of white students and teachers is not always the issue. Many times, whites' denial that they see racism in a situation where blacks complain of it is genuine. It is simply an interpretation of a social situation that has been formulated from a "second-hand" knowledge of racism, from the position of a group that has never experienced racial prejudice. It should be uncontroversial to assert that many whites have made little effort to understand the experience of their black counterparts. I do not argue here whites' incapacity for empathy that could lead to a congruence of vision with people of color. One purpose of this Note is to encourage universities to foster such empathy. But because many whites have not made much effort toward such an understanding, their protestations of innocence when blacks complain of racism receive a chilly reception.

What blacks ask for when they complain of racism in the classroom or elsewhere in the university is not only prevention of similar incidents and perhaps punishment for past ones, but also for recognition of their experience of racism, for their understanding of racism that arises from being on its "receiving end."

B. *The Effects of Racism in the University*

The daily repetition of subtle racism and subordination in the classroom and on campus can ultimately be, for African Americans, more productive of stress, anxiety, and alienation than even blatant racist acts.¹⁰⁹ The subtle institutional racism and white cultural bias that pervades the campus infringes on black students' right to equal enjoyment of their civil right to an education.

When racially insensitive behavior occurs in the classroom or elsewhere in the university, black students¹¹⁰ are deprived of the opportunity to receive an education in an environment free of harassment, hurt, and humiliation. The perpetual lack of awareness that, for example, a "White History Week Party"¹¹¹ or a Black Sambo caricature on a white fraternity's poster¹¹² is offensive to black students is a clear indication that black perspectives are not part of the campus culture or community consciousness. Black students attend class (and take exams) often having just confronted offensive reminders of either overt racial hostility or subtle racial insensitivity—perhaps in the campus newspaper, on posters at the bus stop, the structure of classroom discussion—that serve as distractions from academic performance that white students do not endure. Institutions premised on a white norm must be continually reminded, on occasions when the white norm manifests itself too

¹⁰⁹ Wilkerson, *supra* note 1, § 1, at 34, col. 1 (statement of Dr. Howard Ehrlich, psychologist and director of the National Institute Against Prejudice and Violence) (observing that "[a] broken bone can heal in a few months, but psychological injuries are more intense and longer lasting"); see also Lederman, *On a Campus That's Almost All White, Black Athletes and Non-Athletes Struggle to Cope with Isolation*, *Chron. Higher Educ.*, Feb. 15, 1989, at A33, A35 (statement of black student at the University of Colorado) ("When I go to class, . . . I'm never just a student. I'm always a *black* student. If a black issue comes up, I have to represent the black people." (emphasis added)); *The Pull of Black Colleges*, *Wash. Post*, Nov. 11, 1988, at B2, col. 4 (statement of American Council on Education Official) ("What concerns [black] students is the day-to-day hostility. When you are in a dorm and the white students don't speak to you. When you go to class, you become invisible, and then you answer a question and they ask, how did you know that. It leaves the students exhausted."); *School Colors*, *supra* note 12, at 17, col. 3 (statement of professor of Afro-American Studies) ("I feel racism all around me. . . . But it's hard to pin down. It's like AIDS. Ask most people if there's an AIDS problem, and they'll say they don't feel it. But people who have AIDS say otherwise."); *supra* note 100 (Matsuda quotation).

¹¹⁰ The harm can, of course, occur to other racial or ethnic minority groups as well, just as sexist remarks amount to the same injury against women and homophobic remarks amount to the same injury against gay and lesbian students.

¹¹¹ See *supra* note 77 and accompanying text.

¹¹² See *Cavalier Daily*, *supra* note 2, at 1, col. 3. An all-white fraternity advertised a party using a poster illustrated with a "Fiji islander" caricature (resembling Black Sambo art) standing near a sign warning that no "short wops" and "nega babes" would be allowed into the party. After black students complained, the fraternity president lamented, "It bothers us that we have to defend ourselves against racism when we know we are not racist." *Id.*

blatantly, that their lack of awareness is not harmless. Language has the power to cause injury.¹¹³ Language and behavior that demonstrate an obliviousness to minority communities stigmatize those communities and marginalize individuals' value as community members.¹¹⁴ As institutional practices they marginalize black concerns and perspectives and hinder black students' participation in community life because they are implicitly excluded from fully contributing to the creation of community norms, values, and ideals. Toleration of racial insensitivity "den[ies] recognition to sensibilities essential to [black students'] identities [and] fails to respect their personhood."¹¹⁵ Racial insensitivity diminishes the equal standing of some community members and thereby diminishes the ideal of equality that is the community's foundation.¹¹⁶

The racial dynamic—arising out of occasional blatant racism, recurrent subtle remarks or unconscious behavior, and an ever-present white norm

¹¹³ See Fraser, *What's Love Got to Do With It?: Critical Legal Studies, Feminist Discourse, and the Ethic of Solidarity*, 11 *Harv. Women's L.J.* 53 (1988) ("Control over language is power in our culture. The ability to create, disseminate and alter discourse is essential to the exercise of hegemonic power. A group can control experience by controlling discourse and language for through language we understand, articulate and indeed experience experience." (footnote omitted)); Matsuda, *supra* note 83, at 2335 ("From the victim's perspective, [a variety of overt and covert means of expressing racism, including sanitized racist comments] inflict wounds, wounds that are neither random nor isolated.").

¹¹⁴ See the description of the minority experience at a leading national university given by one black student:

[T]here is a white Yale and a black Yale. There are positive attitudes I have toward black Yale in terms of social aspects, friendships, about what we do, about some of the fun and some of the real hard struggles that we've had. Then there is the other Yale which is white, which is the academic side of it. I don't intend to tell anybody that this is a haven for black students, that this is where you should come.

Yale Alumni Mag., May 1969, quoted in 1 *The University Crisis Reader* 385-86 (I. Wallerstein & P. Starr eds. 1971). Another student suggests, "Yale can do some things for blacks; one thing Yale *can't* do is provide inspiration for blacks." *Id.* at 386. For evidence that times have not changed, see Wilkerson, *supra* note 1 and accompanying text.

¹¹⁵ Note, *A Communitarian Defense of Group Libel Laws*, 101 *Harv. L. Rev.* 682, 691 (1988). This note develops an argument that a communitarian theory, unlike the prevailing liberal individualist conception, provides a compelling justification for group libel laws, in part because it allows recognition of the harms that result from verbal group vilification:

[P]ermitting group vilification causes significant harms both to individuals and to the political community as a whole. Toleration of group vilification injures individuals because it fails to respect fully the personhood of its targets. Religious and racial affiliations are central to the identities of many individuals. . . . Thus, the offense that the members of these groups take at group vilification reflects a constitutive component of their identities. It is not possible . . . to disregard such sensibilities while still respecting the personhood of the individuals who experience them.

Id. at 690 (footnotes omitted).

¹¹⁶ *Id.* at 691.

that is the foundation of institutional racism—conspires to create a cognizable injury to black students in predominantly white schools. It alters students' conditions of education just as courts have recognized racial harassment on the job alters conditions of employment.¹¹⁷ Racism adds to the stress and anxiety that diminish any person's ability and desire to excel in an academic environment, especially one leading to a professional world known to contain further racial roadblocks to career advancement and hospitable working conditions. The racial dynamic¹¹⁸ to which black students are subjected at predominantly white colleges contributes to stress that has a detrimental effect on personal well-being as well as academic performance.¹¹⁹

¹¹⁷ Racial harassment that creates a hostile work atmosphere has been found to alter the terms or conditions of employment in violation of Title VII. See, e.g., *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

¹¹⁸ One of the most revealing descriptions of the operation and effects of such a racial dynamic is related by Patricia Monture recounting her experiences in the law classroom and at a legal conference. The subtle racism that Natives in Canada face is very similar in its operation and structure as that faced by blacks in the United States. Monture describes her experience at the 1987 Critical Legal Summer Camp in Ontario, Canada, in which she relates the pain of working through various racial twists on a hypothetical involving a black policeman shooting an old black woman:

By the time I spoke I was almost in tears. What it was that I had identified was that we were talking about my life. . . . *This is my life*. I do not have any control over the pain and brutality of living the life of a dispossessed person. I cannot control when that pain is going to enter into my life. I had gone away for this conference quite settled with having to deal with racism, pure and simple. But, I was not ready to have my pain appropriated.

Monture, *supra* note 103, at 163. Monture's experience testifies to the difficulty of eradicating racism: "[I]ntent does not excuse somebody from racism. Racism is racism, and racism stings. All the good intentions in the world do not take away the sting and do not take away the pain." *Id.* at 166.

¹¹⁹ See Fleming, *Stress and Satisfaction in College Years of Black Students*, 50 *J. Negro Educ.* 307, 318 (1981):

The results [of a study designed to locate some of the sources of black students' stress and satisfaction] suggest that students in a white urban university may divert energy away from intellectual mastery toward filling the interpersonal void created by the alienation and loneliness of being black on a white college campus.

See also Fleming, *Blacks in College* (1984), cited in *Wash. Post*, Nov. 11, 1988, at B2, col. 4 (study concluded black students show more intellectual growth and do better at black colleges than at predominantly white schools); cf. Rhode, *supra* note 6, at 1195 (pointing out that "victims of discrimination may not recognize themselves as such or may develop coping mechanisms that legitimate their treatment" (footnote omitted)).

As a result, black students are likely to develop defense or survival mechanisms that, as Professor Bell has noted in the context of law schools, are not "conducive to the intensive, purposeful effort needed to succeed in law school. These attitudes are actually detrimental, constituting the most serious deprivation the black student faces," a handicap "growing out of the black student's highly developed sensitivity to racist viewpoints from which law faculties

Such an injury is exactly the one found cognizable under Title VII¹²⁰ for employees who endure racial harassment on the job; psychological well-being is statutorily protected.¹²¹ It is also in effect the same injury that the United States Supreme Court found to be caused by segregation in *Brown v. Board of Education*: “a feeling of inferiority as to their status in the community,” which may “affect[] the motivation of [black students] to learn . . . and to deprive them of some of the benefits’ ” they would enjoy in an educational setting free of racial harassment and subordination.¹²²

are far from free.” Bell, *supra* note 100, at 548. Professor Bell notes elsewhere in this article that “the fear of separation through education from family, childhood friends, and neighborhood peers has posed a threat sufficient to cause many black students to do much less well academically than their abilities would have permitted.” *Id.* at 549. Low expectations of minority students from faculty and other students can lead, for a variety of reasons, to self-fulfilling prophecies. See generally R. Rosenthal & L. Jacobson, *Pygmalion in the Classroom: Teacher Expectation and Pupils' Intellectual Development* (1968) (discussing how teachers' expectations for students affect student performance).

One of my law school classmates—a black woman who was high school valedictorian before distinguishing herself at Harvard University—related to me how, midway through her first semester in law school, she simply gave up trying to excel in the classroom. The reluctance of one law professor to call on black students who sought to participate in class discussion, combined with other subtle signs of racial insensitivity she perceived from faculty and students, produced an experience of alienation and frustration that led her to conclude: “Why bother?” The problem thus comes full circle as minority student performance is scrutinized under the pressure of a special spotlight to discover whether they will defy stereotypical expectations, cf. Brooks, *supra* note 32, at 6 (noting that many minority law professors perceive a “double standard” under which they are assessed “more harshly,” perhaps because white professors believe “only a ‘superstar’ minority should be hired, promoted, or tenured”); Rhode, *supra* note 6, at 1191 (“[womens’] work is heavily scrutinized and often assessed under especially rigorous standards”), or whether one will prove to be, in the words of one white professor, another affirmative action “horror story.” See Mooney, *supra* note 101, at A13 (White college professor contends, “Clearly, incompetent blacks are getting favors. Everyone in academe has 50 horror stories.”).

¹²⁰ 42 U.S.C. §§ 2000e-2000e-17 (1981).

¹²¹ See, e.g., *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971):

[T]oday employment discrimination is a . . . complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues. . . .

. . . [E]mployees' psychological as well as economic fringes are statutorily entitled to protection from . . . a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and . . . Title VII was aimed at the eradication of such noxious practices.

cert. denied, 406 U.S. 957 (1972); see also Davis, *Race Harassment Discrimination: A Problem that Won't Go Away?*, 10 *Empl. Relations L.J.* 415, 418 (1985) (concluding that “[r]ace harassment in the employment context can, therefore, form a ‘condition’ of employment entitled to statutory protection” (citations omitted)).

¹²² 347 U.S. 483, 494 (1954).

Language and behavior that are unaware of their basis in a particular racial perspective (within a larger institutional white norm that denies its own racial nonneutrality) hinders minority students' participation and opportunity in the university. The resulting racial tension and occasional hostility preclude the possibility, for all races, of race-neutral behavior.¹²³ Institutional racism requires an institutional commitment to recognition and remedy.¹²⁴

IV. POSSIBILITIES FOR REMEDIAL ACTION

A. *Strategies to Sanction Racist Speech and Behavior*

The most egregious forms of racist language and behavior—the forms closest to traditional intentional racism—can be combated with traditional legal sanctions.¹²⁵ One promising route for expansion of existing options would be legislation covering university students and mirroring Title VII imposition of liability for contributing to racially hostile environments.¹²⁶ Students are, in all relevant respects, in an identical situation to employees. They are subordinates with an economic need to remain in the institution

¹²³ Delgado, *supra* note 41, at 137; Matsuda, *supra* note 83, at 2339 (“[R]acist propaganda forces victim-group members to view all dominant-group members with suspicion. It forces well-meaning dominant-group members to use kid-glove care in dealing with outsiders.” (footnotes omitted)).

¹²⁴ See Matsuda, *supra* note 83, at 2371, who comments:

Official tolerance of racist speech in [the university] setting is more harmful than generalized tolerance in the community-at-large. It is harmful to student perpetrators in that it is a lesson in getting-away-with-it that will have lifelong repercussions. It is harmful to targets, who perceive the university as taking sides through inaction, and who are left to their own resources in coping with the damage wrought. Finally, it is a harm to the goals of inclusion, education, development of knowledge, and ethics that universities exist and stand for.

(footnote omitted).

¹²⁵ For an excellent summary of existing legal remedies available to combat racial harassment on campus, see Note, Student Discriminatory Harassment, 16 J.C.U.L. 311, 314-19 (1989) (identifying the utility of federal statutes including 18 U.S.C. § 245 (1982) and 42 U.S.C. § 1985 (1982)).

¹²⁶ The Supreme Court and several lower courts have held that a claim of “hostile environment” caused by racial or sexual harassment is a form of race or sex discrimination actionable under Title VII. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (sexual harassment); *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (Title VII violation for “a working environment heavily charged with ethnic or racial discrimination. [This environment could] destroy completely the emotional and psychological stability of minority group workers”), cert. denied, 406 U.S. 957 (1972).

Liability can be found for “toleration and tacit encouragement of racial harassment,” see *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987), in which a union was found to have “an affirmative duty to combat employer discrimination in the workplace,” and was held liable for “ignor[ing] grievances based on instances of harassment which were indisputably racial in

(on the job), are vulnerable to dismissal from superiors, and have little power within the institution to react against racial harassment from coequals or superiors. Their only recourse when confronted with problems is to quit, to use institutional policies, or to seek legal remedy. The scope of such a remedy, however, would be limited. For the university to be liable for student behavior under a Title VII model, the administration would have to be aware of, and yet not have tried to stop or punish, racial harassment.

Another option would be sanctions for intentionally racist insults, such as those proposed by Professors Richard Delgado and Mari Matsuda. Professor Delgado's proposal for a tort action imposing liability for intentional racial insults would be as feasible a tool to fight campus-based racism as it would be against racism generally.¹²⁷ And Professor Matsuda has recently argued for a narrow criminal statute to punish intentionally racist speech, specifically citing the increase of malicious racial incidents on campus to demonstrate the need for such a law.¹²⁸

Finally, there is the option of institutional remedies for racially offensive speech and behavior, an option with which several universities are now struggling.¹²⁹ In *Doe v. University of Michigan*, a federal district court struck down the University of Michigan's policy to combat campus racial

nature." *Id.* at 666-67. The mere existence of a grievance procedure does not insulate an employer from Title VII liability for harassment by supervisors. *Meritor*, 477 U.S. at 72.

Walter B. Connolly, Jr., an attorney speaking to the National Association of University Attorneys, warned that universities could be held liable under recent Supreme Court Title VII doctrine for not effectively combating racial harassment on campus. Fields, *Colleges Advised to Develop Strong Procedures to Deal With Incidents of Racial Harassment*, *Chron. Higher Educ.*, July 20, 1988, at A11. Connolly "insists that it's quite proper for schools to act to protect the victims of discrimination as long as the restrictions stay out of the classroom." *Shenk*, *supra* note 83, at 37.

¹²⁷ The seminal study of this cause of action is Delgado, *supra* note 41. Professor Delgado concludes from a survey of state and federal case law that a tort action for racial insults is permissible, see *id.* at 133-34, 149-65, and he collects a wide array of evidence to suggest that such insults produce psychological, sociological, and political harms that merit legal protection, and that they are at least on par with other cognizable inflictions of severe emotional distress. *Id.* at 135-49.

As he defines it, the cause of action would require the plaintiff to prove that "[l]anguage was addressed to him or her by the defendant that was intended to demean through reference to race; that the plaintiff understood as intended to demean through reference to race; and that a reasonable person would recognize as a racial insult." *Id.* at 179.

¹²⁸ Matsuda, *supra* note 83, at 2356-58, 2370-73. Professor Matsuda would limit liability to cases in which "[t]he message is of racial inferiority[,] . . . is directed against a historically oppressed group[,] . . . [and] is persecutorial, hateful, and degrading." *Id.* at 2357.

¹²⁹ In addition to the University of Michigan policy discussed *infra* notes 130-36, policies debated or enacted at Stanford University, the University of Wisconsin, and at the State University of New York-Buffalo Law School are on file with the Virginia Law Review Association.

harassment, finding that it violated the first amendment on vagueness and overbreadth grounds.¹³⁰ The court's reasoning suggested the constitutional limits of any university policy, and thus the limited utility of such a policy for addressing the varieties of racial tension on campuses.

First, any limitation on speech that includes the threat of formal, institutional sanctions cannot be applied to speech that "disseminates ideas" or to statements that are made in the course of classroom academic discussions.¹³¹ The *Doe* court cited Michigan's resolution of complaints against students making offensive remarks in the classroom as examples of the policy's overbreadth and infringement on protected speech (even though the University did not apply formal sanctions in any of the three cases cited by the court).¹³² Thus, a university could not formally punish statements motivated by racism when they are purportedly part of a serious idea or theory offered in the university classroom or other formal forum.¹³³ The *Doe* court implied, however, that a university might be able to sanction "conduct such as racial slurs and epithets in the classroom directed at an individual victim."¹³⁴

Second, the *Doe* court ruled that the Michigan policy was too vague, saying "it was simply impossible to discern . . . any conceptual distinction between protected and unprotected conduct."¹³⁵ The court found the policy's requirements that sanctionable language "stigmatize" or "victimize" an individual, and "involve an express or implied threat to an individual's academic efforts," to be unconstitutionally vague.¹³⁶

¹³⁰ *Doe v. University of Mich.*, 721 F. Supp. 852, 861-67 (E.D. Mich. 1989) (Cohn, J.).

¹³¹ *Id.* at 864-66.

¹³² *Id.* The plaintiff in *Doe* was a graduate student in "biopsychology," whose study focused on "controversial theories positing biologically-based differences between sexes and races [that] might be perceived as 'sexist' and 'racist' by some students, and he feared that discussion of such theories might be sanctionable" under the university's antidiscrimination policy. *Id.* at 858. Such offensive but academically oriented discussion is clearly what the court was most interested in excluding from any chilling effects of an antidiscrimination policy.

¹³³ The University of Michigan policy excluded from regulation anything published in university-sponsored publications such as the *Michigan Daily* and the *Michigan Review*. *Id.* at 856.

¹³⁴ *Id.* at 868. The court seemed to reject the university's argument that such a limited category of speech was all that the policy would be applied to because it believed that limited application was a "revisionist view of the Policy" concocted to defend the policy in court. *Id.* One implication of such reasoning is that if the court believed that the antidiscrimination policy really would be given such narrow application, it could uphold the policy.

¹³⁵ *Id.* at 867.

¹³⁶ *Id.* at 867 ("stigmatize" and "victimize" are "general" terms that "elude precise definition," and "[i]t is not clear what kind of conduct would constitute a 'threat' to an individual's academic efforts").

Thus, if *Doe* represents the interpretation of current first amendment doctrine that universities will face in combating racist conduct, it is clear that even a revised, more carefully crafted antiracism policy could not reach more subtle forms of racism with formal sanctions, especially in the classroom. Universities, then, will have to develop two-part policies: one part to address egregious, blatant speech and conduct that is legally sanctionable under the first amendment;¹³⁷ the other for nonsanctionable and more subtle conduct that is nevertheless offensive, i.e., behavior that will never be reached by formal adjudication but which the university needs to recognize, condemn, and discourage.¹³⁸

The development of this second aspect of an antiracism policy will be the more difficult to formulate. Yet, to recognize only deliberate, intentional racism is to deny the injurious force of subtle racism and an institutional white norm. The absence of such a policy signals that the community—more specifically the dominant forces within it—does not care about other forms of racism that continue to permeate university life and subordinate minority interests.

¹³⁷ Universities have taken a variety of actions to discipline racially offensive behavior by students, including suspensions, mandatory community service, and mandatory attendance at racial sensitivity seminars, that could be incorporated into such a policy. When dealing with student groups such as fraternities, a university could revoke charters or deny privileges granted by the university, such as permission to use campus meeting rooms and other facilities.

In comparatively rare cases, academic institutions have reprimanded such behavior by faculty as well, with public reprimands, prohibitions on teaching certain courses, and even suspension. At the City University of New York, for example, the Faculty Senate of City College (at which 40% of the students are black) passed a resolution “disavow[ing] and reject[ing] the abhorrent sentiments” of a professor who published an article asserting that “there is now quite solid evidence . . . that the average black is significantly less intelligent than the average white.” See Mooney, *supra* note 101, at A11. The professor’s department also barred him from teaching required courses. *Id.*

In addition to public reprimands and suspensions from teaching certain classes, universities have available a variety of sanctions for faculty who commit punishable offenses, including temporary suspensions for egregious cases, a letter noting the incident placed in the professor’s permanent file, a mandatory apology, and temporary ineligibility for research funding, sabbaticals, or merit-based salary increases. See, e.g., Raphael, T.A.’s ‘Racist’ Remark Results in Firing, *Nat’l C. Newspaper*, Oct. 1989, at 2 (University of Maryland teaching assistant fired for describing student’s classroom performance as “typically black”); cf. *Winfrey v. Metropolitan Util. Dist.*, 467 F. Supp. 56, 60 (D. Neb. 1979) (letter placed in file of foreman by employer as part of sanction for racially insensitive remark to an employee), cited in Davis, *supra* note 121, at 431-32.

¹³⁸ One function of such a policy would be to serve the same educative function that the criminal law does: It would express a societal judgment on the inappropriateness of some behavior, and define such behavior as beyond collective norms. See generally E. Durkheim, *The Division of Labor in Society* 39 (W.D. Halls trans. 1984) (stating that “an act is criminal when it offends the strong, well-defined states of the collective consciousness”).

Universities can formulate a wide variety of responses to nonsanctionable behavior. A "minority concerns" committee could, for instance, approach a professor or student whose conduct in the classroom had offended a community member, make the offender aware of the offense while preserving the complainant's anonymity, and ask to meet with the offender. It could ask for an apology or voluntary attendance at a racial awareness seminar.¹³⁹ Such a committee could also periodically and publicly report the *type* of offensive incidents and behavior that minority community members experience, in an effort to raise awareness and spark discussion of the type of offenses minorities suffer on campus.¹⁴⁰

Finally, universities can make—and in some cases have made—affirmative use of their first amendment prerogatives, publicly and officially condemning offensive behavior that they are otherwise unable to sanction.¹⁴¹ Universities

¹³⁹ There will no doubt be charges that drawing attention to and institutionally responding to subtle, racially charged remarks made during the course of classroom discussion will "chill" discussion of sensitive topics by students and faculty. But such a concern must be weighed in light of the fact that the discourse of black students and other offended groups who suffer the offense of such remarks and endure an uncomfortable or hostile classroom and campus atmosphere is already being chilled. Their participation, their points of view—including the view that certain remarks are offensive—are marginalized, devalued, made more difficult and less legitimate to express. The issue is not simply one of punishing offensive behavior versus free expression; it is whose expression will be most empowered by institutional structures.

¹⁴⁰ The University of Michigan created (and later withdrew) an "interpretive guide" to supplement its antidiscrimination policy. But the court in *Doe* condemned the examples of sanctionable conduct contained therein as inclusive of constitutionally protected behavior. Under *Doe*, it seems that a university would have to develop two such guides: one with examples of sanctionable conduct that the university would punish, and the second with examples of offensive but nonsanctionable conduct that the university would like to encourage its members to forgo and condemn. The second could still include many of the examples included in the Michigan guide, such as:

A male student makes remarks in class like "Women just aren't as good in this field as men," thus creating a hostile learning atmosphere for female classmates.

Students in a residence hall have a floor party and invite everyone on their floor except one person because they think she might be a lesbian.

. . . .

You display a confederate flag on the door of your room in the residence hall.

Doe, 721 F. Supp. at 857-58.

The list could include other items of offensive behavior documented in this Note and elsewhere, such a teacher's "compliment" to a student in class that he has "good diction for a black person" or an insensitive discussion of a party's race in a manner potentially relevant but derogatory.

¹⁴¹ See, e.g., *Brown U. to Strengthen Rules Against Racism*, N.Y. Times, Sept. 27, 1989, at B8, col. 1 (describing Brown University president's response to racist incidents on campus, which included a promise to strengthen policies against racism, a public condemnation of "those who would attempt to disrupt our university and poison our community," and a letter sent to all parents of Brown students promising to prosecute and expel students responsible for racial harassment if caught).

make decisions about the value of speech and ideas every day in their decisions to hire and tenure some faculty members rather than others, to fund some research and teaching programs rather than others. Choosing to fund, say, an early American history program instead of an African-American history program means that the university considers the former to be more valuable. But there is no reason an institution cannot similarly express its disdain for expression by faculty and students that is racially offensive.

Such an affirmative strategy to make racist expression unwelcome and uncomfortable could work in conjunction with the many other educative efforts aimed at eliminating white cultural hegemony on campus. A sampling of such efforts might include: working toward curriculum diversity and the inclusion of minority writers in "core" reading lists; periodic programs to promote racial awareness, as well as cultural sensitivity seminars for students *and* faculty;¹⁴² and permanent campus hotlines to which students and others can report racially offensive incidents.¹⁴³ All that, however, is likely to bring about fundamental change in university race relations only in concert with a more basic restructuring that empowers the black community to define a portion of institutional life according to its own racial norm and perspective.¹⁴⁴

¹⁴² See Detlefsen, *supra* note 12 (chronicling, though commenting negatively upon, Harvard University's "Actively Working Against Racism and Ethnocentrism" (AWARE) week); Mangan, *supra* note 67, at A32, col. 3 (noting that the University of Texas plans to offer a program of multiculturalism for all entering freshmen during orientation session); Fields, *supra* note 126, at A12, col. 5 (attorney specializing in equal-employment litigation recommends "yearly training programs for administrators, faculty members, and students to raise people's awareness and sensitivity about racial harassment").

¹⁴³ Cf. Fields, *supra* note 126, at A11 (universities should develop informal procedures as well as specific grievance procedures to deal with incidents of racial harassment).

¹⁴⁴ That is the central purpose of predominantly black colleges, and of Professor Lawrence's endorsement of Vincent Harding's proposal for "The Institute of the Black World." See Lawrence, *Education for Black Power in the Eighties: Present Day Implications of the Bakke Decision*, 10 Nat'l Black L.J. 58, 62-63 (1987). The institute would be a response to "brain drain" from historically black colleges and the sight of "our own institutions being destroyed, our own ability to come together as a people and struggle as a group . . . being undermined." *Id.* at 62. "The Institute . . . would be a place where Black students and professors who went to [elite, predominantly white universities] could spend a year in a predominantly Black academic setting." *Id.* at 63.

The preservation of a distinctly black academic environment was also the evident aim of students at North Carolina Central University who wrote an editorial in their campus newspaper entitled "Is NCCU Still a Black School," opposing the "rapidly growing white population on our campus." The paper's editors argued, "[b]lack students on this campus have never made it clear . . . that we are indeed separate from [white students] . . . and [u]ntil we assume the role of a strong, proud people we will continue to be co-opted." The university administration sought to deny funding to the newspaper in response to the editorial, and the dispute ended up in federal court. See *Joyner v. Whiting*, 477 F.2d 456, 458 (4th Cir. 1973).

B. An Alternative Strategy

Punitive strategies such as sanctions on speech do not address the root of racial tensions in that they react to racial incidents without challenging the causes. There is an obvious need to do more than simply punish blatant racist behavior and mediate less blatant controversies. If white universities will recognize why black students feel that white universities are not "their place," and if they can recognize complaints about classroom dynamics and the need for black cultural institutions on campus, universities can go a lot further toward structuring themselves in a manner that gives black students an educational experience equivalent to that of white students.

Change based on such recognition, however, is only part of the equation. The academy must also address why many white students themselves have so little understanding of the need for distinctly black institutions and why some white students feel so threatened by such institutions that they want to form "white student unions," fly Confederate flags, or voice resentment of affirmative action plans and black students' complaints about classrooms.

As Professor Crenshaw notes, black students requesting more minority professors and curricula adjustments are voicing a deeper dissatisfaction with their experience in white institutions.¹⁴⁵ Black students do not want black professors simply to satisfy a need for role models, though that is important. Black professors, along with substantive curriculum changes and African-American social institutions, are likely to create a classroom experience that even well-intentioned white teachers often cannot.¹⁴⁶ That is because the cultural assumptions and lived experience that go into forming the presuppositions and perspectives on classroom issues are not largely matters of intention. They are matters of culture, of social history, of whatever the descriptive term that characterizes the difference between white and black experiences in America such that the races receive disparate interpretations of the same event.

It is up to our universities to help white students realize that *their* institutions are not culturally and racially neutral and that minority students have an equal right to institutional structures and practices informed by their own experience and history. At the same time, however, it will not be a sustainable arrangement to force whites into a posture of perpetual guilt and contrition; such a development would likely result either in a barrier to interracial communication, because well-intentioned whites would be overcautious in

¹⁴⁵ Crenshaw, *supra* note 17, at 1-2.

¹⁴⁶ Bell, *The Price and Pain of Racial Perspective*, Stan. L. Sch. J., May 9, 1986, at 5 (describing the unfavorable reaction of students and faculty to Professor Derrick Bell's teaching, in which he "tr[ie]d to bring to my classrooms . . . my experience and perspective as a black man in this country").

broaching any racially tinged topic, or in further backlash by those who feel no *personal* guilt. Efforts are needed by white students and faculty to reformulate white self-awareness toward a more secure identity that is not threatened by black cultural institutions and that can recognize the racial nonneutrality of the institutions whites dominate.

Thus, an alternative strategy for combating racial tension on campuses would include a restructuring of the university to give minority students as much of a feeling of belonging, as much of a feeling that the university is "their place," as white students usually experience. The strategy would include substantially increasing the number of black faculty members so that the experience in many classrooms is no longer premised on an unspoken norm of white race experience. It would likely include increasing other minority-focused institutions on campus, such as cultural centers and events, African-American study programs, and perhaps even separate disciplinary procedures, since it is a common complaint from minority students that official (even student-run) disciplinary systems disproportionately and unfairly sanction minority students.¹⁴⁷ It would include, in short, the power to define a portion of institutional life by a black norm, a black race consciousness, concomitant to the white norm with which white students and teachers now (mostly unconsciously) infuse campus and classroom experience.

V. CONCLUSION

Racism must be struggled against not only through the formal procedure of a committee for complaints (although establishing a committee will serve as a signal of institutional commitment). Universities must grapple with racism through the recognition of the distinct groups within the community and of their struggles for power, including the power to define racism and its injury—and to impose a cultural norm that will be the premise of classroom debate as well as social life. Universities must also acknowledge the relevance of race to aspects of the institution (such as classroom pedagogy) in which it is currently denied.¹⁴⁸

Competing conceptions of what racism is and efforts to structure institutional and social life around one or more of those conceptions are arenas of struggle. With a normative commitment to empower those whose experience has not previously informed university life, the dominant group—here,

¹⁴⁷ See, e.g., Honor Seeks More Diversity, *Cavalier Daily*, Oct. 10, 1989, at 1 (reporting on Honor Committee's Minority Concerns Team status report and efforts "to improve and establish a more positive [minority] presence" in the honor system).

¹⁴⁸ See Crenshaw, *supra* note 17, at 2-3. Professor Crenshaw argues that law classrooms are taught based on a "norm of perspectivelessness" that denies the relevance of "individual values, experiences, and world views" to pedagogy and class discussions. *Id.* at 2.

whites—can achieve a better understanding of others' experience.¹⁴⁹ The project will require a dialogue free from suspicion and committed to empathy—"a sentiment of community strong enough to enable each group to entrust its fate to the good faith and decency of the other."¹⁵⁰

Recognizing that the issues of race do not always accuse the individual of deliberate racist intent, we can begin to reform institutions in which the repression of race-specific experience will be replaced by acknowledgement and empowerment of it. By granting black people the power to shape, influence, and control university life in the same way whites now do, black students will not have to depend solely on the good faith and commitment of whites to enforce antiracism policies as the primary remedy of racial tension. By acknowledging and fostering distinct, multiple racial perspectives instead of seeking a nonexistent neutral, race-free perspective as the premise of institutional life, minority students will be able to participate in a university that is as much theirs as it is their white counterparts'.

Darryl Brown

¹⁴⁹ See generally Crenshaw, *supra* note 6, at 1370-76 (discussing "the Politics of Otherness").

¹⁵⁰ Kennedy, *supra* note 6, at 1345.

