Measuring the Penetration of Outsider Scholarship into the Courts: Indifference, Hostility, Engagement

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Many people have complained lately about the increasing irrelevance of legal scholarship.[1] More often than not, emerging schools of legal scholarship are the specific targets of these complaints. "[P]ostmodern jurisprudence is characterized by an enormous disjunction between theory and practice, between the legal academy and the judiciary."[2] But others, in turn, complain that these emerging schools of legal scholarship, especially the scholarship of "outsiders" is not taken seriously enough by the academic, legal and political communities in the United States.[3] These complaints, in turn, have given rise to another area of legal scholarship, schol-

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[1] *See, e.g.*, Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 56 (1992) (stating that, "I believe that 'practical' scholars serve our whole legal system: judges, legislators, and administrators, as well as practitioners, both private and public"). *See generally* Owen M. Fiss, *The Law Regained*, 74 CORNELL L. REV. 245 (1989); Alvin B. Rubin, *Does Law Matter? A Judge's Response to the Critical Legal Studies Movement*, 37 J. LEGAL EDUC. 307 (1987).

Traditionalist commentators in the popular press have also had their say on the matter. *See, e.g.*, Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40; Jeffrey Rosen, *The Bloods and the Crits: O.J. Simpson, Critical Race Theory, the Law, and the Triumph of Color in America*, NEW REPUBLIC, Dec. 9, 1996, at 27; Alex Kozinski, *Bending the Law*, N.Y. TIMES, Nov. 2, 1997 (book review).

[2] Robert L. Hayman, Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 HARV. C.R.-C.L. L. REV. 57, 58 (1995).

[3] *See, e.g.*, Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996); Milner S. Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855 (1990); Richard Delgado, *Rodrigo's Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545 (1995); Martha L. Fineman, *Challenging Law, Establishing Difference: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25 (1990); Berta Esperanza Hernández-Truyol, *Borders (En)Gendered Normativities, Latinas, and a Lat-Crit Paradigm*, 72 N.Y.U. L. REV. 882 (1997); Jean Stefancic, *The Law Review Symposium: A Hard Party to Crash for Crits, Feminists and Other Outsiders*, 71 CHI-KENT L. REV. 989 (1996); Jean Stefancic, *Listen to the Voices: An Essay on Legal Scholarship, Women and Minorities*, 11 LEG. REF. SERV. Q. 141 (1991).

arship about scholarship.[4] As a result, there seems to be much truth to the observation made recently by a student of legal scholarship that "an ongoing Kulturkampf presently exists within the legal academy regarding both the direction and meaning of legal scholarship."[5]

Not only have some proclaimed that legal scholarship has been losing its power to help officers of the court and the laity understand law, but they have also announced that, in the hands of some, scholarship has become dangerously nihilistic or subversive.[6]

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[4] Mary Beth Beazley and Linda Edwards defend this emerging area of scholarship on two grounds, stating that "it renders the scholarly life more accessible to newcomers to the academy, and it sustains a conversation that can identify and question assumptions that might otherwise hold the academy captive." Mary Beth Beazley & Linda H. Edwards, *The Process and the Product: A Bibliography of Scholarship About Legal Scholarship*, 49 MERCER L. REV. 741 (1998); *see also* Jean Stefancic, *Latino and Latina Critical Theory: an Annotated Bibliography*, 85 CAL. L. REV. 1509 (1997), 10 LA RAZA L.J. 423 (1998).

[5] Ronald J. Krotoszynski, *Legal Scholarship at the Crossroads: On Farce, Tragedy, and Redemption*, 77 TEX. L. REV. 321, 322 (1998) (commenting on satiric article by Professor Dennis Arrow published in *Michigan Law Review*). This so-called culture war has become fashionable indeed. Recently *Harvard Magazine* ran a cover story in which one faculty member after another told stories of the hard time each had, and the amount of social disapprobation they endured, at the hands of the liberal establishment at Harvard University. One person at the Divinity School was quoted as complaining that the Divinity "School requires that one subscribe to radical feminism, to inclusive language, to their views on homosexuality and affirmative action — there are probably more things that one has to subscribe to now than there were 50 years ago." Janet Tassel, *The Thirty Years' War: Cultural Conservatives Struggle with the Harvard They Love*, HARVARD MAGAZINE, Sept.-Oct. 1999, at 61.

This difference of opinion within the legal academic community has produced a wave of heavily emotional argument, some of which has been quite cantankerous and rude. *See, e.g.*, Richard Delgado, *Rodrigo's Book of Manners: How to Conduct a Conversation on Race — Standing, Imperial Scholarship and Beyond*, 86 GEO. L.J. 1051 (1998); Nancy Levitt, *Critical of Race Theory: Race, Reason, Merit, and Civility*, 87 GEO. L.J. 795 (1999).

The level to which debate sometimes sinks may be due to the fact that more than *mere* ideas are at stake among the combatants. Careers in academia have been advanced propelled or destroyed on the basis of judgments based on the merits of the scholarship pursued. In this sense, perhaps, one can think of traditionalists as a body holding a monopoly on a product (scholarship) and erecting barriers to entry (through the hiring process) and technical specifications designed to produce a predetermined result (defining scholarship to include only what they produce) in an effort to maintain a dominant position in the market for faculty positions and the production of scholarship worthy of the name. A comprehensive law and economics study of this phenomenon is probably long overdue.

[6] *See, e.g.*, Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984) (stating that Critical Legal Studies writers are preaching antilaw and, to be consistent with their own premises, they should leave academy). Influential academics have attempted to discredit the more "radical" or "transformative" of the new scholarship. *See, e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 128 (1997) (stating that "[a]ny story that is inconsistent with multiculturalist views can be knocked out — either the storyteller is not an authentic member of the group, or his perceptions have been warped by the dominant culture"). Some of this scholarship, it has been asserted, also resurrects ancient hatreds against other traditional outsiders, primar-

So labeled, such scholarship is condemned en masse. "Labeling is a big part of the criticism of all critical race scholars. The label anarchist has a political undercurrent, a not so subtle reference to the consequences of anarchy, to the fate of the political dissidents in the time before the Cold War and communism."[7]

Recent scholarship by traditional outsiders to the legal academy, and principally people of color[8] and women,[9] appears especially threatening. These writers reject cultural conformity. They reject the notion that there is such a thing as a dominant normative ideal to which people can or ought to subscribe.[10] They understand that

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ily Jewish people. *See id.*; Edward L. Rubin, *Jews, Truth, and Critical Race Theory*, 93 NW. U. L. REV. 525 (1999) (reviewing DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997)).

[7] Deborah Waire Post, *The Salience of Race*, 15 TOURO L. REV. 351, 378-79 (1999).

[8] Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39; Alex M. Johnson, Jr., *Scholarly Paradigms: A New Tradition Based on Context and Color*, 16 VT. L. REV. 913 (1992); Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989).

[9] For now near classic statements of the feminist project, see Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 58-60 (1988). Professor West explained that:

> By the claim that modern jurisprudence is "masculine," I mean two things. First, I mean that the values, the dangers, and what I have called the "fundamental contradiction" that characterize women's lives are not reflected at any level whatsoever in contracts, torts, constitutional law, or any other field of legal doctrine. The values that flow from women's material potential for physical connection are not recognized as values by the Rule of Law, and the dangers attendant to that state are not recognized as dangers by the Rule of Law.

Id. at 58; *see also* Martha Minow, *The Supreme Court, 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 61-62 (1987). Professor Minow has noted that:

> If, at times, feminists appear contradictory in this sense — if feminists argue that women have both the right to be regarded and treated as men and the right to have special treatment or valorization of women's differences — we have an explanation. The inconsistency lies in a world and set of symbolic constructions that have simultaneously used men as the norm and denigrated any departure from the norm. Thus, feminism demands a dual strategy. First, feminism must challenge the assumptions of female inferiority — the belief that women fall too short of the unstated male norm to enjoy male privileges and that women's own traits make male privileges or benefits inappropriate for them. Second, feminism must challenge the assumption of separate but equal spheres.

Id. at 62; Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 831 (1990) (stating that "[m]ethod matters also because without an understanding of feminist methods, feminist claims in the law will not be perceived as legitimate or 'correct.' I suspect that many who dismiss feminism as trivial or inconsequential misunderstand it").

[10] *See, e.g.*, Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231 (1992); Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA

the notion of conformity within the dominant group is elusive and ultimately unattainable. They grasp all too well that even (and perhaps especially) liberal or progressive members of the dominant group essentialize them, decharacterize them and then judge them as unworthy. As Gwendolyn Mink has accurately observed in connection with recent changes in American welfare law: "Pegging equality to cultural conformity while withholding the tools and choice of conformity from African Americans, liberal racism marked the Black mother, worker and child as unassimilable."[11]

Within the academic legal community in the United States, the result has been to either shun or demonize such writing. Richard Delgado, for example, has demonstrated how a small closed community of white male scholars monopolized elite civil rights scholarship. This closed group of scholars all resembled each other in writing, but did not appear to acknowledge scholarship other than their own or that of their circle. Especially ignored was the work of people of color within the academy.[12] In revisiting his original work ten years later, Professor Delgado noted that:

> With a few notable exceptions both the original group and the newcomers rely on a panoply of devices, ranging from the dismissive Afterthought to the wishful Translation, to muffle and tame the new voices. . . . Some of the resistance may be intentional, but I believe most of it results from quite ordinary forces: preference for the familiar, discomfort with impending change, and a near-universal disdain for an account or "story" that deviates too much from one upon which we have been relying to construct and order our social world. Cultural momentum tends to be preserved. All discourse marginalizes. We resist

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RAZA L.J. 1 (1996); Francisco Valdes, *Under Construction: LatCrit Consciousness, Community, and Theory*, 10 LA RAZA L.J. 1 (1998).

[11] GWENDOLYN MINK, THE WAGES OF MOTHERHOOD: INEQUALITY IN THE WELFARE STATE, 1917-1942, at 120 (1995).

[12] Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561-63 (1984). He noted that:

> [T]he important work is published in eight or ten law reviews and is written by a small group of professors, who teach in the major law schools. . . . . It is fascinating. Paul Brest cites Laurence Tribe. Laurence Tribe cites Paul Brest and Owen Fiss. Owen Fiss cites Bruce Ackerman, who cites Paul Brest and Frank Michelman, who cites Owen Fiss and Laurence Tribe and Kenneth Karst . . . .

Id. at 562-63; *see also* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 48 (1991); Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 30 (1991).

> transformative thought until it has lost the power to transform us.[13]

The institutional practice norms that Professor Delgado describes serve primarily to magnify the force of assimilation within the legal academy. Legal scholarship, like other spheres of public expressions of norms, is subject to the operative command of our social ordering — conform or be punished.[14] The most utilized punishment, or mechanism for the enforcement of conformity, is shunning.[15] The most effective means of formal shunning requires little more than that a work or author not be cited. Shunning a work or author, or citing such work or author dismissively, is itself a formal acknowledgement that this scholarship is neither an important source of information nor authority for the court. Thus, ignoring scholarship has serious repercussions in the citation obsessed American intellectual environment of the late twentieth and

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[13] Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349, 1372 (1992). Dennis Arrow, however, wryly observes that such bad behavior may not be the sole province of white male elites. *See* Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated*, 96 MICH. L. REV. 461, 689 n.30 (1997). Arrow wrote:

> But for what it's worth, I notice that Richard Delgado, Derrick Bell, Patricia Williams, and Mari Matsuda, all of whom now teach in the major law schools, seem to cite each other a lot (along with Cornel West, now at Harvard), and that Erin Edmonds likes citing all of them except West (give her time), along with bell hooks, also a favorite of the others, but cf. bell hooks & Cornel West, Breaking Bread 36-37 (1991) (quoting hooks complaining that white scholars sometimes steal her ideas without enough "acknowledgment," and that black scholars don't get cited enough).

Id.; *see also* ARTHUR AUSTIN, THE EMPIRE STRIKES BACK (1998). *But see* Richard Delgado, *The Colonial Scholar: Do Outsider Authors Replicate the Citation Practices of the Insiders, but in Reverse?*, 71 CHI.-KENT L. REV. 969 (1996).

[14] I have argued that assimilation is among the basic positive defense mechanisms of culture. "Change in social practice is internalized within dominant norm setting institutions through its assimilation of cultural minorities." Larry Catá Backer, *Queering Theory: An Essay on the Conceit of Revolution in Law*, *in* LEGAL QUEERIES 185 (Leslie J. Moran et al. eds., 1998). The most extensive studies of this effect has been in connection with the interaction of marginal people, the poor, and sexual, racial and ethnic minorities, with the rest of "us." On the importance of the assimilation imperative in welfare law, see Larry Catá Backer, *Poor Relief, Welfare Paralysis, and Assimilation*, 1996 UTAH L. REV. 1, 39 [hereinafter Backer, *Poor Relief*], stating that: "[o]vert cultural assimilation acts positively, imposing unpleasant effects on deviant social classes and racial and ethnic groups. Trivialization is an important tool of assimilation."

[15] *See* Arthur Austin, *Evaluating Storytelling as a Type of Nontraditional Scholarship*, 74 NEB. L. REV. 479, 481 (1995) ("Many traditionalists do not know about the new writings, or ignore them. To some professors, nontraditional work is the practice of politics rather than legal scholarship.").

early twenty-first centuries.[16] These notions have not just been borne out within the American legal academy as Richard Delgado has sought to show. Citation madness affects the judiciary as well, where we have begun to measure the influence of particular judges through studies of citation patterns.[17]

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[16] *See* Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 752 (1996). Shapiro wrote:

> Citations are strings of names and numbers incorporating the language and power of one source in another source. . . . Links between documents . . . are more important in law than in any other discipline. . . . In judges' opinions in the common-law system, citation links, which carry the weight of precedent and legislative mandate, are more significant than the words that surround the citations.

Id. In this sense, courts act like autopoietic systems. Autopoiesis refers to systems, in particular legal and social systems, which produce and reproduce their own elements by the interaction of their elements. *See* Gunther Tuebner, *Introduction to Autopoietic Law, in* AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 1, 3 (Gunther Tuebner ed., 1987). Citations are the means of self-referencing communication within the courts, when courts cite to other opinions. Citation to legal scholarship provides this closed system with a means of indirect communication with other, and especially related, systems. *See* GUNTHER TUEBNER, LAW AS AN AUTOPOIETIC SYSTEM 87 (Anne Bankowska & Ruth Adler trans., Zenon Bankowski ed., 1993). Tuebner stated:

> Social subsystems use the flow of social communication, and extract from it special communications as new elements. They use social structures (expectations) for the construction of legal norms and social constructions of reality for the construction of "legal reality." They do not need to create these from scratch, merely to imbue them with new meaning.

Id. Thus, the simultaneous independence and dependence of law. *See* Niklas Luhmann, *Law as a Social System*, 83 NW. U. L. REV. 136, 139-40 (1989). The autonomy of these systems, however, permits *indirect* communication with other systems of society and culture. *See* Heinz von Foerster, *On Constructing a Reality, in* OBSERVING SYSTEMS 288, 306 (1981); Luhmann, *supra.*

Inputs from outside the system must be digested and translated into a form that the system can utilize. The manner in which these communications are digested determines the degree of power of such scholarship to participate in the production of legal culture. To use the language traditionally used by the courts to express these notions: "While we are aware of no Texas case dealing with the interests of a participant in the collateral securing of a participated loan, we find guidance in legal scholarship and in the opinions of courts in other jurisdictions." Asset Restructuring Fund, L.P. v. Liberty Nat'l Bank and Resolution Trust Corp., 886 S.W.2d 548, 551 (Tex. App. 1994).

[17] *See, e.g.*, William M. Landes et al., *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271 (1998). The abstract to this article states that:

> This article uses citations to the published opinions of judges on the federal courts of appeals who had 6 or more years tenure at the end of 1995 to estimate empirically the influence of individual judges. We rank judges on the basis of both total influence (citations adjusted for judicial tenure and other variables) and average influence (citations per published opinion).

Yet outsider scholarship *does* seem to serve an important purpose for traditionalists. To the practitioners of the dominant form of academic legal scholarship, this sort of scholarship serves as a warning, the exemplar, of the types of work which are deemed "bad."[18] Richard Delgado's point, then, might be well taken, if with a bit of irony: "If I am right, imperial scholarship will continue to be with us a long time."[19]

We might assume that courts, like dominant group academics, give short shrift to emerging scholars of color and to "outsider" scholarship. This Article tests the theory that current legal scholarship, and especially the "outsider" scholarship of people of color, is either shunned or demonized in the courts. This Article examines the reception of outsider scholarship in the courts, which along with the legislatures, constitute the formal institutional vehicles for "altering the existing legal landscape" in the United States.[20] For

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Id.; *see also* Deborah J. Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?*, 71 CHI.-KENT L. REV. 871 (1996) (comparing citation patterns of judges and law professors).

[18] *See, e.g.*, Carrington, *supra* note 6, at 222. The scholarship of narrative has come under significant attack in this respect, especially as practiced by people of color. *See, e.g.*, RICHARD A. POSNER, OVERCOMING LAW 372-98 (1994) (attacking objective and subjective truths of famous story in PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 44-45 (1991)); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 832-35 (1993) (arguing that storytelling cannot be judged like traditional scholarship even when stories are presented as fact); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 277 (1992) (suggesting that storytelling should be viewed as inherently fictional and treated as such).

[19] Delgado, *supra* note 13, at 1372 (stating that, "[h]ere, as in other areas of academic life, the absence of full public discussion of innovation tends to favor those forms of scholarship that are already established, with palpable consequences for the professional lives of innovators"); *see also* Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 977 (1991); *cf.* Stephen L. Carter, *Academic Tenure and "White-Male" Standards: Some Lessons from the Patent Law*, 100 YALE L.J. 2065 (1991).

[20] Krotoszynski, *supra* note 5, at 327. Professor Krotoszynski was at least partially right when he asserted that "at the risk of appearing terminally naive, I have always assumed that legal scholarship, in whatever form, had as its object influencing the direction of law — ideally by moving judges, lawyers, legislators and bureaucrats to rethink or reconsider a particular problem." *Id.* Yet it has seemed to me that this very visible and formal manifestation of institutional change is both the tip of the iceberg and the last event in the process of norm or behavior "making." Certainly in the case of sexual minorities, cultural judgments of what is normal and what is not have helped create visions of the characteristics of sexual minorities that create the normative archetypes on which courts base their legal judgments. *See* Larry Catá Backer, *Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 TUL. L. REV. 529 (1996) [hereinafter Backer, *Constructing a "Homosexual" for Constitutional Theory*]. Moreover, court and legislative pronouncements form only part of a complex web of cultural dialogue producing changes in norms. Legal scholarship, like advocacy of new ideas before courts and legislatures, functions as culturally prophetic. *See* Larry Catá Backer, *Chroniclers in the Field of*

this purpose, the Article reviews the opinions of state high courts and federal appeals courts for citations to "outsider" scholarship.[21] To focus the examination, the article limits the survey to judicial citation of what has been chosen as a fairly representative sample of well-known scholars who epitomize major strands of critical, minority, and feminist scholarship in the legal academy.[22] These scholars include: Harlon Dalton, Stanley Fish, Richard Delgado, Catherine McKinnon, Patricia Williams, Lani Guinier, Derrick Bell,

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Cultural Production: Interpretive Conversations Between Courts and Culture, 20 B.C. THIRD WORLD L.J. (forthcoming 2000) [hereinafter Backer, *Chroniclers in the Field of Cultural Production*]. The author stated:

> In this culturally prophetic sense alone do courts exist as the place for the struggles and contestations which may produce cultural movement. It is the site where "losing" arguments are articulated and memorialized. Thus produced, the prophetic find their way back into non-judicial social discourse. In this function, and in this function only, might courts *indirectly* serve as a means of cultural movement. A good American example is Justice Harlan's voice of dissent in *Plessey v. Ferguson*. Once articulated, this argument became a part of the cultural dialogue suggesting an alternative vision of "what is." When that vision changed, the problem of the articulation of accepted social norms of race relations returned to the court. But now, invoking its oracular voice in *Brown v. Board of Education* the Court identified as norm the cultural construct rejected in *Plessey*. It did so not because the *Plessey* dissent now won the day as a matter of logic or jurisprudence, but because the popular culture had embraced the notions articulated in the opinion as their own. Thus, the *Plessey* dissent produced culture which produced law.

Id.

[21] There has been growing attention to citation rates of academics in the courts. *See* Richard G. Kopf, *Do Judges Read the Review? A Citation-Counting Study of the* Nebraska Law Review *and the Nebraska Supreme Court, 1972-1996*, 76 NEB. L. REV. 708 (1997); Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659 (1998) (arguing that citation rates are generally decreasing, on basis of review of citation patterns by federal courts and state supreme courts of law journal rated as "leading" by *Chicago-Kent Law Review* in 1996). A number of more focused studies exist. *See, e.g.*, *McClintock, supra*, at 695 n.142; Louis J. Sirico & Beth A. Drew, *The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis*, 45 U. MIAMI L. REV. 1051, 1057 n.2 (1991). According to McClintock, "the idea to study the use of law review articles as judicial precedent appeared as early as 1930." McClintock, *supra*, at 660; *see also* D.B. Maggs, *Concerning the Extent to Which the Law Review Contributes to the Development of the Law*, 3 S. CAL. L. REV. 181 (1930).

[22] Clearly no list, other than a listing including all scholars writing in the field, can either be truly representative of the diverse voices within each of these schools, or complete. I have no doubt that I have included people whom others might have chosen to leave out, and have failed to include people whom others would deem important. To those in each camp, my apologies. However, I have not sought to be comprehensive here. My object is to investigate court behavior generally — for that purpose an "atmospheric" study will do to illustrate the interaction of courts with this more innovative and challenging scholarship. I would thus posit that, substitute however you will, the basic results will remain substantially unaffected and my conclusions unchanged.

Charles Lawrence III, Duncan Kennedy, Mari Matsuda, Gerald López, Kimberlé Crenshaw, Janet Halley, Ruthann Robeson, Jerome Culp, Gary Peller, and Neil Gotanda. To further focus the examination, the Article limits the survey to the ten-year period, from June 1989 through June 1999. This ten-year period marks the time when these scholars achieved academic success, as conventionally measured, and their scholarship achieved a fair measure of circulation in the highest organs of the dominant culture set aside for that purpose.[23]

Part I of this Article examines the way in which courts have cited these representatives between 1989 and 1999. The initial focus is on rates of citation. Citation rates indicate the scope of the "normalization" of outsider scholarship within the process of the production of law, that is, the extent to which it has been accepted as a part of what passes as normal or conforming academic scholarship.[24] The second focus is on the nature of the citations. The way outsider scholarship is used provides a better indication of the seriousness with which it is taken by the courts than does mere number counting. The manner of use is also a good indication of the utility of the scholarship for purposes other than for the ideas presented in the works cited. Thus, outsider scholarship is valued quite differently, depending on whether the courts engage the ideas developed in the cited pieces or whether the pieces cited

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[23] *Cf.* Delgado, *supra* note 13, at 1350-51 (noting that by 1992 critical race theorists and "radical feminists" had achieved fair measure of formal incorporation within legal academia).

[24] Foucault has popularized an understanding of the power of the normal, and its manipulation through the infinite ways that a "standardized" behavior is coerced. "The perpetual penalty that traverses all points and supervises every instant in the disciplinary institutions compares, differentiates, hierarchies, excludes. In short, it *normalizes*." MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 183 (Alan Sheridan trans., 1978) (1975). Coming within the acceptable parameters of a standard normalizes. Foucault stated:

> The Normal is established as a principle of coercion in teaching with the introduction of a standardized education and the establishment of the *écoles normals* (teachers' training colleges). . . . In a sense, the power of normalization imposes homogeneity; but it individualizes by making it possible to measure gaps, to determine levels, to fix specialties and to render the differences useful by fitting them one to another.

Id. at 184. The normal has been a powerful force within legal academia. Indeed, that this article is written at all is evidence of the power of the normal to create hierarchy within the acceptable (normal) and to define a boundary beyond which what is produced does not belong.

were used as a boundary marker between the "normal" and everything else.

Part II then draws generalizations from the data examined in Part I. First, the Article considers the citation patterns in cultural context from the outside in, examining the reasons courts may respond to outsider scholarship as either threat or as irrelevant. Second, the Article considers the patterns from the inside out, suggesting reasons for, and the consequences of, the tense relationship between traditional and "outsider" scholarship as reflected in the courts. Finally, the Article examines the patterns in terms of the general debate over the utility and effect of federalism.

The results of the examination of the citation patterns were a bit surprising and somewhat counterintuitive. One would have expected that federal courts would be the more likely place where the sophisticated and norm challenging work of these authors would get the greatest airing as well as the most sympathetic reading. However, this study shows that more state courts, rather than federal courts, are listening, and learning.

What stands out most, however, at both the state and federal level, is the silence. Courts, even hostile courts, rarely take the time to cite, much less ridicule, demean or demonize the work of these scholars. To that extent, the ideas propounded by those scholars, for the most part, have not yet failed to become a well-established part of the dialog of formal law making in America.[25]

The pattern of judicial indifference would appear to paint a rather bleak picture of the possibilities of outsider scholarship in the courts. Yet this is not entirely the case. Thus, this study ends with an irony. The great hope for the normalization[26] of outsider

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[25] The point here is not just that the lack of citation of outsider scholars somehow mirrors the decline generally in law review citation by the courts. For that analysis, see McClintock, *supra* note 21. Rather, even in a period of general citation decline, the work of emerging outsider scholars, influential within their communities (at the very least), have failed to make any significant appearance at all. For an illustration of the notoriety of these emerging thinkers, see Rosen, *supra* note 1, at 27, and Heather MacDonald, *Law School Humbug*, WALL ST. J., Nov. 8, 1995, at A21.

[26] At some point, embrace of the "outsider" brings her "inside." To participate or dominate a conversation dealing with the application of the coercive power of the state to regulate behavior or distribute political power makes the participant part of the normal, the regular, the permitted. Perhaps as a result less is excluded, or some other part of what once had been "normal" is excluded. Perhaps as a result, the normal appears composed of greater variety. Either way, participation adds the outsider voice to the construction of the normal, the acceptable, the standard by which things are judged and disciplined. The boundaries of the normal may change with the addition, but the boundaries remain all the

scholarship within formal lawmaking institutions lies with those very concepts of strong federalism that were championed by southern intellectuals and anti-Federalists before the American Civil War. Among the most important lessons of this study is the continued utility of the American federal system in which semi-sovereign states share power, including judicial power, with the central government. Strong states sometimes serve best the interests of outsiders. Federalism works, and has created those few places where the voices of "outsiders" can be considered, can change the legal landscape, and by so doing, provide a beacon and example for those others who would follow.

I. CITATION PATTERNS

A. Methodology

The principal object of the search was to identify the cases in which federal or state courts cited one of the people making up my representative sample of well known outsider scholars, principally women and people of color. First, this study limited the pool of cases to those cases in which the court published a written opinion. Second, for reasons of time and economy, this study further limited the pool of cases to those published cases available on *Westlaw*, the electronic database maintained by West, Company.

To obtain the citation database, I simply broadly searched for the occurrence of each author's name in the *Westlaw* files for court cases.[27] I eliminated the cases in which the author appeared as counsel in the case,[28] or where the reference was to an individual other than the author. On the other hand, cases in which a repre-

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same. *See* Backer, *supra* note 14, at 199-200 (stating that: "The consequence of my analysis of revolutionary transformation is an unhappy one, both for traditionalists hoping to hold on to that which is being lost, and for those who work for the change which may be coming. There is no such thing as revolution or repose in these matters.").

[27] The primary database used was the WESTLAW database "ALLCASES."

[28] For example, this was the case with Derrick Bell. Prior to his life as an active academic, Professor Bell was at the forefront of a great number of civil rights cases in his capacity as counsel. Ironically, as the discussion below suggests, Professor Bell might well have been substantially more influential as a litigator than as an academic in presenting his ideas to the courts. Neil Gotanda also appeared in several cases as counsel in civil rights and immigration cases reported in the database. For a discussion of the utility of impact litigation, see JACK GREENBERG, CRUSADERS IN THE COURTS (1994), ANDREW J. KOSHNER, SOLVING THE PUZZLE OF INTEREST GROUP LITIGATION (1988), and John Denvir, *Towards a Political Theory of Public Interest Litigation*, 54 N.C. L. REV. 1133 (1976). *But see* Backer, *Chroniclers in the Field of Cultural Production*, *supra* note 20.

sentative author was cited by name were retained even if the court made no reference to a particular work of the individual cited.

In addition I conducted searches for the use of the terms "critical race,"[29] "critical legal theory,"[30] radical feminism,[31] and "multiculturalism."[32] The purpose of these searches was to construct a proxy for other outsider scholars by looking for those cases in which courts made general references to "outsider scholarship" movements using identifiers typically associated with what has sometimes been described as the more "extreme" elements of those movements.[33] In addition, these general references might provide valuable information about judicial attributes towards schools of outsider scholarship absent a specific reference to an author or a work. Moreover, these general references could provide more information about the quality of the citation patterns in the courts and help signal aberrational citations to a particular named author.

Some caveats are in order at this point.[34] First, a general caution on the approach underlying this study. The primary purpose of this study is qualitative, not quantitative. This study did not set out to determine an actual definite rate of citation. Instead, this study places more importance on qualitative analysis. The roughly accurate citation rates themselves suggest the quantum of the effect discussed, but the specific and particular numbers themselves are not the object of the study.[35]

Second, following other studies,[36] this survey notes five additional cautions that must be kept in mind as one reviews the results of the survey. First, one should be wary of drawing statistical significance from small samples.[37] Second, the study does not measure how

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[29] For this search I used the term "critical race" in the ALLCASES database.

[30] For this search I used the search terms "critical legal theor!" and "critical legal stud!" in the ALLCASES database.

[31] For this search I used the search term "radical feminis!" in the ALLCASES database.

[32] For this search I used the search term "multiculturalis!" in the ALLCASES database.

[33] I did not use other terms, particularly "LatCrit Theory," for example, on the assumption that these movements, coalescing in the mid 1990s, were too new to have any impact on the courts. I assume for purposes of my survey that there is a significant time lag between the emergence of movements within academia and their translation to the courts.

[34] *See* Kopf, *supra* note 21, at 713-14 (setting forth the caveats listed, and the citations therein).

[35] For a contrasting approach, see William H. Manz, *The Citation Practices of the New York Court of Appeals, 1850-1993*, 43 BUFF. L. REV. 121 (1995).

[36] *See* Kopf, *supra* note 21, at 713-14.

[37] *See id.* at 713.

scholarly work, not cited in opinions, influences the thinking of judges.[38] Third, judges are not the only group involved in the process of law. As such, citation-counting exercises do not expose the utility or impact of such scholarship on lawyers, the press, legislators, or the general public.[39] Indeed, it was only relatively recently that the work of one of the scholars in the sample, Lani Guinier, was instrumental in blocking her confirmation to a highly visible position in the U.S. Department of Justice.[40] Fourth, courts cite scholarly work as less useful or authoritative than case law or legislation — such work *is* less authoritative for courts.[41] And fifth, scholarly work has utility outside the courtroom.[42] As such, the failure to cite should not necessarily form the basis of an opinion that the work lacks merit or use.

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[38] *See id.* at 713-14.

[39] *Id.* at 713; *see also* Backer, *Poor Relief*, *supra* note 14, at 6 (stating that "[t]he broad outlines of the paradigm within which all forms of social structuring occur . . . consist of a number of assumptions about the way society operates and about individuals' relationship to each other"). Indeed, to the extent courts function as a vehicle for confirming established social norms, it is more likely that structural changes in social and legal norms urged in especially outsider scholarship will first gain currency within the political culture before it can be expressed by the courts. *See* Backer, *Chroniclers in the Field of Cultural Production*, *supra* note 20.

[40] Lani Guinier had been nominated for the post of Assistant Attorney General for Civil Rights in the Justice Department. Her nomination was ultimately withdrawn in the context of a bitter campaign centering on the meaning of her scholarly work. She was portrayed as un-American and as a reverse racist through a deliberate campaign to exaggerate, simplify, and ultimately distort her work. She was dubbed a "Quota Queen." The term was meant to allude to former President Reagan's description of some women who he alleged took advantage of the welfare system as "Welfare Queens." *See* Clint Bolick, *Clinton's Quota Queen*, WALL ST. J., Apr. 30, 1993, at A12 (articulating distortions and criticisms of Professor Guinier's work); *see generally* Lally Weymouth, *Lani Guinier: Radical Justice*, WASH. POST, May 25, 1993, at A19; Neil A. Lewis, *Clinton Faces Battle Over a Civil Rights Nominee*, N.Y. TIMES, May 21, 1993, at B9.

Traditional outsiders on the Left are not the only people whose works are absorbed and used in this way. Robert Bork's Supreme Court nomination was defeated, in part, because of adverse reaction to his scholarship as reported to Congress and by the popular press. *See* STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS (1994) (discussing ways in which Block Bork Coalition manipulated public opinion by portraying Bork as un-American).

[41] *See* Kopf, *supra* note 21, at 713-14. Indeed, the discussion below highlights a case in which a dissenting opinion takes the majority to task for relying on the work of Mari Matsuda, rather than on more authoritative sources. *See* Aguilar v. Avis Rent-A-Car Sys., Inc., 50 Cal. App. 4th 28, 53 Cal. Rptr. 2d 599 (1996), *aff'd*, 21 Cal. 4th 121, 980 P.2d 846 (1999).

[42] *See* Kopf, *supra* note 21, at 714. Indeed, I suggest that scholarship, and especially outsider scholarship, may well serve a variety of useful purposes which have little to do directly with the process of adjudicating individual cases. *See infra* Part II.

B. Citation Quantity

1. General Terms: Critical Race Theory, Critical Legal Theory, Radical Feminism, Multiculturalism

The terms "critical race theory," "critical legal theory," "radical feminism" and "multiculturalism" have become household fetishes within legal academia. In the minds of traditionalists these terms are vested with near magical power, the power to corrupt society. Each term is blindly regarded as representing forms of extreme non-traditional legal scholarship movements. Each had been roundly condemned by major spokes-people who claim to speak for, or who may be influential with, traditionalists or political conservatives in America.[43] Each of these terms have received sufficient circulation through established institutional vehicles for the transmission of cultural information so that most judges would be generally aware of and have some sense of the ideas to which these terms referred, whether or not such understanding is distorted. The references in reported decisions to these terms are summarized below.

a. Critical Race Theory

Perhaps the most surprising result was that there was no mention of critical race theory by name.[44] Given the large number of race and ethnicity based cases percolating through the courts between 1989 and 1999, this is indeed unexpected. To check the result, I also ran searches using the terms "minority /2 scholar!" and "black african /2 american /2 scholar!".[45] The former search turned up twenty-four cases, most involving the validity of minority based scholarships for students. The latter search turned up four cases, most identifying particular people as fitting within this "category."

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[43] *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980 (1984); Kozinski, *supra* note 1; Posner, *supra* note 1, at 40; Rosen, *supra* note 1, at 27.

[44] Two state cases actually turned up. One spoke of a critical (horse) race. *See* Pletcher v. Illinois Racing Bd., 372 N.E.2d 1075 (Ill. App. 1978); *see also* Nevius v. Warden, Nevada State Prison, 960 P.2d 805, 808 (Nev. 1998) (describing "very critical race discrimination issue" at heart of case).

[45] In Westlaw search jargon, a space between words signifies "or" and a "!" is a root expander. To translate the search, I was looking for "black" OR "African" WITHIN TWO WORDS OF "American" WITHIN TWO WORDS OF ANY WORD BEGINNING WITH "scholar."

To the extent that the ideas of critical race theory have made their way into the courts, it seems to have entered the courts by another name — multiculturalism, which is discussed later.[46]

b. Critical Legal Theory

The search turned up four federal cases[47] and four state cases.[48] All of the citations related to issues of ambiguity in the interpretation of writings. One case quoted an article from a symposium on critical legal studies as support for a "but see" cite to the court's statement that, "In fact, most words, sentences and documents have a plain meaning."[49] Here critical legal theory is used to support the statement that not everybody believes in a plain meaning for words — though the court, in the case reported, does.

Three of the four federal cases originated in the Sixth Circuit. One of those cases uses critical legal theory for essentially aesthetic purposes; its use is meant to serve principally as a literary ornament wafting the very noticeable aroma of contempt and disdainful

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[46] *See* Knight v. Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991) (quoting extensively from testimony of Dr. James Blackwell touching on some central ideas of critical race theory); *see also infra* notes 63-67.

[47] *See* Wiltz v. M/G Transport Servs., Inc., 128 F.3d 957 (6th Cir. 1997) (adjudicating suit under Worker Adjustment Retraining Notification Act for failure to notify employees of sale of company subject to WARNA); Stupak-Thrall v. United States, 89 F.3d 1269 (6th Cir. 1996) (interpreting phrase "subject to valid existing rights"); Lattimer-Stevens Co. v. United Steelworkers of Am., (6th Cir. 1990) (reviewing arbitrator's decision concerning worker entitlement to longevity wage increases under existing contract); Winningham v. Sexton, 820 F. Supp. 338 (S.D. Ohio 1993) (interpreting terms of insurance policy).

[48] *See* Earthinfo, Inc. v. Hydrosphere Resource Consultants, Inc., 900 P.2d 113 (Colo. 1995) (deciding computer software developer's action to rescind development contracts based on buyer's failure to make royalty payments); Knight v. Moore, 574 So. 2d 662 (Miss. 1990) (ruling on state attorney general's claim that bingo was form of lottery prohibited under state constitution); Biggins v. Shore, 565 A.2d 737 (Pa. 1989) (affirming ruling allowing widow of former partner to enforce her rights as donee beneficiary of partnership agreement); Union Pump Co. v. Allbritton, 898 S.W.2d 773 (Tex. 1995) (denying employee's product liability action against manufacturer of pump).

[49] *Winningham*, 820 F. Supp. at 342 (citing Stephen Brainerd, *The Groundless Assault: A Wittgensteinian Look at Language, Structuralism, and Critical Legal Theory*, 34 AM. U. L. REV. 1231 (1985)). The *Winningham* court quoted this portion of Brainerd's article:

> Critical Legal Studies (CLS) has effectively drawn all forms of discourse that claim the support of a single prioristic "rationality" into an uncomfortable light — a light that reveals the pale and confused concept of reason squirming to crawl back into the well shaded crevasses of 'the way things should be.

Id. at 342 (quoting Brainerd).

irony. Yet, even serving as mere literary device, it seems an awkward if not altogether inapt reference to quantum theory.[50]

In the other two cases from the Sixth Circuit, the opinions with references to critical legal theory sprung from the pen (or word processor) of Judge Boggs, both times writing in dissent. In the first, Judge Boggs dissented from a decision of the panel holding an arbitrator's decision immune from judicial review. Judge Boggs suggested greater latitude for review if the judge is convinced that the arbitrator's result does not rationally derive from the agreement, arguing that "One does not have to be a complete devotee of the Critical Legal Studies School to believe that there are degrees of ambiguity and clarity in most language."[51] In the second, an equally divided court of appeals affirmed a decision of the district court in a water rights case involving the construction of an ambiguous phrase.[52] The case is particularly interesting because it is one of the relatively rare instances in which judges indulged in a "weight of secondary authorities" game.[53] Here again, Judge Boggs' opinion of critical legal studies is not positive: "Thankfully, we have

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[50] *See Wiltz*, 128 F.3d 957. In *Wiltz*, a suit under the Worker Adjustment Retraining Notification Act for failure to notify employees of the sale of a company subject to WARNA, the court sought to define a "site" under WARNA. The court explained:

> The district court found it was not controlling because the towboats here were essentially floating "branch offices." But given the obvious comparison to a train, plane or car, it is difficult to simultaneously conceive of a towboat as a "site" (unless one subscribes to the wave/particle theory of quantum mechanics). The district court's characterization of tugboats as floating "sites" or branch offices cannot be reconciled with the common sense meaning of "site" or subpart (6).

Id. at 962. The reference to the wave/particle theory was footnoted to K. Scott Hamilton, Comment, *Prolegomenon to Myth and Fiction in Legal Reasoning, Common Law Adjudication and Critical Legal Studies*, 35 WAYNE L. REV. 1449, 1455 (1989) (describing wave/particle paradigm of light).

[51] Judge Boggs would have applied greater latitude to a reviewing court to overturn an arbitral decision where the judge is firmly convinced. *See Lattimer-Stevens*, 913 F.2d at 1171 (citing Anthony D'Amato, *Aspects of Deconstruction*, 84 NW. U. L. REV. 250 (1989)).

[52] *See Stupak-Thrall*, 89 F.3d 1269.

[53] *See id.* at 1302-03. The *Stupak-Thrall* court stated:

> First, Judge Moore tells us that the phrase "valid existing rights" must be ambiguous because "The University of Kentucky . . . has devoted an entire 375 page issue to trying to untangle the phrase. . . ." By my count, the articles containing arguments that this provision in the Constitution is ambiguous total at least 308 pages. If one adds the articles arguing that the provision is unambiguous, then the total number of pages attempting to "ambiguate" or to "dis-ambiguate" this phrase reaches at least 682.

Id.

not reached the stage where [a] law review article rather than Article III judges determine when ambiguity is present in a provision of law. Law review commentators, especially those of the '"critical legal studies'" school, are notorious for thinking every bit of text is ambiguous. See, e.g., Anthony D'Amato, Aspects of Deconstruction: The 'Easy Case' of the Under-Aged President, 84 Nw. U. L. Rev. 250 (1989)."[54]

The four state cases refer to critical legal studies in passing. One case cited Duncan Kennedy and Roberto Unger for articles the court states advocate the principle in contract law that if the gain realized by the party in breach exceeds the injured party's loss, the measure of damages should strip the party in breach of all gain.[55] In another case, the Supreme Court of Mississippi used a citation to an article about critical legal studies as authority for its decision to ignore authority in other jurisdictions. The court argued such authority was of limited value because each authority merely cross-referenced each other for authoritative support. As such, each employed "loopified" or circular reasoning, amounting to "nothing more than unacceptable ipse dixitism or dogmatism."[56] In yet another case, a dissenting justice of the Pennsylvania Supreme Court used a reference to both legal realism and critical legal studies in an attempt to shame the majority.

> It is wrong to pick a winner for extraneous reasons and then adopt a rule to reach the pre-chosen result. To do so, as I believe the Majority has done in this case, lends credence to the theories of "realists" like the late Judge Jerome Frank, and the modern "critical legal studies" radicals that ours is not a system of law at all, but merely one of individual preference.[57]

In the last case, a products liabilities case, a passing reference is made to a study, conducted by Professor Wright comparing the

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[54] *Id.* at 1302.

[55] Earthinfo, Inc. v. Hydrosphere Resource Consultants, Inc., 900 P.2d 113, 115 (Colo. 1995) (deciding computer software developer's action to rescind development contracts based on buyer's failure to make royalty payments). The *Earthinfo* court cited Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1717, 1734 (1976), and Roberto Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 641 (1983).

[56] Knight v. Moore, 574 So. 2d 662, 668 (Miss. 1990) (citing John Van Doren & Patrick Bergin, *Critical Legal Studies: A Dialog*, 21 NEW ENGLAND L. REV. 291, 296, 299-300 (1985-86)).

[57] Biggins v. Shore, 565 A.2d 737, 743 (Pa. 1989) (Papadakos, J., dissenting).

causation theories of traditional scholars, libertarians, legal economists, realists and critical legal studies scholars.[58] Thus, to some extent the term "critical legal studies" has entered the vocabulary of the courts. Yet, it has been used primarily to mock critical legal studies scholars, or as an example of an unquestionably unreasonable point of view. Critical legal studies thus serves the courts as the equivalent of a clown or the academic village idiot.

c. Radical Feminism

The search yielded one federal case[59] and one state case.[60] In the federal case, the Seventh Circuit, through Judge Easterbrook, rejected plaintiff's section 1983 claims based on female guards' monitoring of the plaintiff while he was naked. Judge Posner, concurring and dissenting, makes a reference to radical feminists as progressive social engineers of a disdainful type.

> There are radical feminists who regard "sex" as a social construction and the very concept of "the opposite sex" as implying as it does the dichotomization of the "sexes" (the "genders," as we are being taught to say), as a sign of patriarchy. For these feminists the surveillance of naked male prisoners by female guards and naked female prisoners by male guards are way stations on the road to sexual equality. If prisoners have no rights, the reconceptualization of the prison as a site of progressive social engineering should give us no qualms. Animals have no right to wear clothing. Why prisoners?[61]

In Indiana, the state court of appeals reviewed a probation requirement for defendants convicted for criminal trespass that required them to attend a reproductive health lecture sponsored by a clinic. In rejecting the defendants' federal First Amendment argument, the court, in a footnote, noted that "defendants analogize the lecture requirement to having convicted domestic batterers

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[58] *See* Union Pump Co. v. Allbritton, 898 S.W.2d 773, 779 (Tex. 1995) (Cornyn, J., concurring).

[59] *See* Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995) (deciding § 1983 action brought by male detainee seeking damages based on his monitoring by female guard).

[60] *See* Johnson v. State, 659 N.E.2d 194 (Ind. App. 1995) (deciding criminal appeal based on manner of identification of defendant, conditions of probation, and excessive sentence issues).

[61] *Johnson*, 69 F.3d 151 (Posner, C.J., concurring and dissenting).

undergo psychological reprogramming at the hands of radical feminists. We reject the implied notion that only radical feminists oppose spousal abuse."[62] Like critical legal studies, and perhaps to a greater degree, the label "radical feminist" appears useful only as a pejorative. The phrase, for some courts at least, conjures up the worst sort of social demons. Radical feminists thus portrayed, are essentially un-American and antidemocratic.

d. Multiculturalism

The search yielded just one state case[63] and one federal case.[64] The state case involved consideration of a cultural defense in a criminal case. In a footnote following the mention that the defense "obtained the assistance of two experts, Dr. Marina S. Tulao and Dr. Quan Cao, to present the appellant's insanity and cross cultural defenses" the court cited two law review articles that mentioned the very case being reviewed.[65]

The federal case provides a wonderful extended discussion on "multiculturalism" and the academy. We are reminded that, "Multiculturalism is the latest shibboleth in the Academy."[66] The court then quotes from the testimony of an expert with respect to the meaning of the multiculturalism debate in the context of the history of the American South.

> The Knight Plaintiffs have invited this court to join the foray of the national debate on multiculturalism and uses the arguments of the debate to find that the predominantly white schools of the

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[62] *Johnson*, 659 N.E.2d 200 (Ind. App. 1996).

[63] *See* Bui v. State, 717 So. 2d 6 (Ala. Crim. App. 1997) (considering appeal of capital murder conviction considering defendant's appeal based on argument that killing children, as well as wife, because of wife's infidelities was understandable in Vietnamese culture under circumstances).

[64] *See* Knight v. Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991) (adjudicating action to desegregate colleges and universities in Alabama).

[65] *Bui*, 717 So. 2d at 13-14 (1997). The court cited "for informative and sometimes critical discussions of 'cultural evidence' and the cross cultural defense," two articles. *See id.* (citing Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093 (1996), and Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multicultural Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36 (1995)). Interestingly, the court did not cite the work of Anh Lam. *See* Anh T. Lam, *Culture as a Defense: Preventing Judicial Bias Against Asians and Pacific Islanders*, 1 ASIAN AM. PAC. IS. L.J. 49 (1993).

[66] *Knight*, 787 F. Supp. at 1333.

> state are illegal bastions of Eurocentrism perpetuating segregation. The Court will decline the invitation.[67]

The federal case suggests that some courts conflate multiculturalism and critical race theory. Each, however, represents the same thing to many courts — an attempt at cultural redefinition through the mechanics of law and litigation. Some courts find this project distasteful.

2. Harlon Dalton; Ruthann Robeson; Jerome Culp; Gerald López

The search yielded no references to these authors in the cases.

3. Stanley Fish

Stanley Fish is cited in two federal cases between 1989 and 1999, though only one of the two citations is directly related to Fish's work. In the first case,[68] the court used Professor Fish to construct an analogy. The court reasoned that lectures by Stanley Fish, whatever their quality, cannot constitute personal knowledge of disputed evidentiary facts in a First Amendment case before a judge. Likewise knowledge acquired at a conference on developments in DNA technology cannot constitute the acquiring of personal knowledge of contested evidentiary facts.[69] Here Professor Fish is reduced to literary device within a judicial opinion. In the

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[67] *Id.* (stating that whether Alabama white educational institutions adopt the views of multiculturalists and their "ilk should ultimately be decided on the forge of academic debate, not in the adversarial setting of courtroom."). No sources or any of the academic literature is cited. *See id.*

[68] *See* United States v. Bonds, 18 F.3d 1327 (6th Cir. 1994) (determining that judge who attended scholarly conference on DNA did not acquire extrajudicial knowledge which that require recusal).

[69] *See Bonds*, 18 F.3d at 1331. The court was attempting to distinguish the acquisition of knowledge in a general context in from knowledge acquired specifically to influence the outcome of a particular case. The court stated:

> To the extent, if at all, that the conference presented various positions on further developments in DNA technology, this did not constitute personal knowledge of disputed evidentiary facts, any more than would . . . a judge attending a civil liberties conference and hearing Professor Stanley Fish speak before ruling on a First Amendment case. See STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH . . . AND IT'S A GOOD THING TOO (1994).

Id.

second case,[70] Professor Fish is identified as an example of "keen legal minds (especially those informed by modern literary theory) [that] will always be able to 'conjure up hypothetical cases in which the meaning of [disputed] terms' will be thrown into doubt."[71] Here Professor Fish is used to provide a specific example of what other courts have suggested was "wrong" about critical legal theory.[72]

4. Richard Delgado

Richard Delgado is cited once by the federal courts, and five times in the state courts. In the federal case,[73] the court granted plaintiff's motion for summary judgment where the plaintiff challenged the University of Wisconsin rule that prohibited students from directing discriminatory epithets at particular individuals with intent to demean them and create a hostile educational environment. The reference to Professor Delgado merely identified him as one of the faculty members who helped develop the rule.[74]

In contrast to the federal courts, the state court cases tended to more significantly engage Professor Delgado's scholarship. In a case from Oregon,[75] an appellate court cited Professor Delgado as weighty authority on the effect of racial epithets, giving him citation precedent to a sister state supreme court opinion.[76] In a case

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[70] *See* Westbrook v. Teton County Sch. Dist. No. 1, 918 F. Supp. 1475 (D. Wyo. 1996) (ruling on school policy prohibiting as unethical criticism by any staff member of other staff, administrators, or Board of Trustees except to building principal, superintendent, or at regular Board of Trustees meeting).

[71] *Id.* at 1490 n.8 (citing STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980)). The court ultimately found the term "Acriticism" too vague for use in a provision regulating speech. *See id.* at 1490-91.

[72] *See supra* notes 47-58.

[73] *See* UWM Post, Inc. v. Board of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163 (E.D. Wis. 1991).

[74] See id. at 1165 (noting that faculty members agreed that proposed rule "would likely withstand constitutional attack on First Amendment grounds if it included a requirement that the speaker intended to make the educational environment hostile to the individual being addressed").

[75] *See* Williams v. Tri-County Metro. Transp. Dist., 958 P.2d 202 (Or. App 1998) (reversing grant of dismissal of claim for disability harassment).

[76] *See id.* at 205 (stating that "just as race-based or sex-based insults may be socially intolerable in a way that insults directed to undifferentiated members of the public may not, so too is disability-based harassment different in kind, and potentially offensive in the extreme"). The court cited Richard Delgado as strong support for its position. *See id.* at 205 n.3 (stating that although case "does not involve actual slurs, the observations that courts and academic writers have made about the uniquely injurious force of such words apply equally to the kind of disability-based harassment involved here"); Richard Delgado, *Words*

from California, Professor Delgado's work was cited in support of the position that racist speech is not constitutionally protected.[77]

In a case from New Jersey,[78] the supreme court expressly relied on the hate speech ideas articulated by Professor Delgado and Laura Lederer in reinstating the suspension of an off-duty firefighter for directing a racial epithet at the on-duty police officer that stopped him for drunk driving.[79] In a second New Jersey case,[80] the court relied heavily on Professor Delgado for asserting the qualitative difference of racial insults "because they conjure up the entire history of racial discrimination in this country."[81] As such, "a rational factfinder may conclude that defendant's sole remark would have caused substantial emotional distress in the average African-American."[82] Finally, in a case from Alabama,[83] the court recognized and engaged the earlier scholarship of Professor Delgado, though it failed to adopt Professor Delgado's view. The court noted, citing among several other works of various authors, the work of Joan Vogel and Richard Delgado,[84] that much critical

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That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling, 17 HARV. C.R.-C.L. L. REV. 133, 157 (1982).

[77] *See* Aguilar v. Avis Rent-A-Car Sys., Inc., 50 Cal. App. 4th 933, 53 Cal. Rptr. 2d 599 (1996), *aff'd*, 21 Cal. 4th 121, 980 P.2d 846 (1999) (citing Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 157 (1982)).

[78] *See* Karins v. City of Atl. City, 706 A.2d 706 (N.J. 1998) (reinstating suspension of firefighter who directed racial slur at on-duty police officer when firefighter was stopped, though not ticketed, for drunk driving while off duty).

[79] *See id.* at 720-21 (citing THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY 4-5 (Laura J. Lederer & Richard Delgado eds., 1995)) (stating that firefighter's speech and hate speech, which "harms the individual who is the target[;] . . . it perpetuates negative stereotypes [and] promotes discrimination . . . by creating an atmosphere of fear, intimidation, harassment, and discrimination").

[80] *See* Taylor v. Metzger, 706 A.2d 685 (N.J. 1998) (reversing summary judgment entered in favor of defendant sheriff of Burlington County, who called another officer "jungle bunny" on state antidiscrimination claim).

[81] *Id.* at 699 (citing Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 157 (1982)). The Court also cited Howard J. Ehrlich et al., *The Traumatic Impact of Ethnoviolence*, *in* THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY (Laura J. Lederer and Richard Delgado eds., 1995).

[82] *Id.* at 699.

[83] *See* Trull v. Long, 621 So.2d 1278 (Ala. 1993) (holding that trial court did not abuse discretion by excluding expert medical testimony regarding 'conspiracy of silence' among physicians to explain why particular witness testified in numerous cases).

[84] *Id.* at 1279 (citing Joan Vogel & Richard Delgado, *To Tell the Truth: Physicians' Duty to Disclose Medical Mistakes*, 28 UCLA L. REV. 52 (1988) (urging courts to adopt positive legal duty requiring physicians to report own and other physicians' mistakes to patients and urging adoption of cause of action for failure to disclose)).

commentary has recognized the medical "conspiracy of silence" as fact. The Alabama court, however, refused to adopt this position on the grounds that other state courts, while considering this notion, had declined to recognize this "conspiracy of silence" in malpractice cases.[85]

5. Catherine MacKinnon

As should come as no surprise with regard to the person who propounded the idea of hostile environment sex discrimination,[86] Professor MacKinnon enjoys more citations between 1989 and 1999 than many others. Professor MacKinnon's understanding of the existence of unequal power in the context of sex harassment appears to be well known and officially acknowledged by the courts.

Professor MacKinnon is cited in eleven federal cases during this period,[87] though she is cited in only one state case. In the state case,[88] Professor MacKinnon's work was cited as pioneering work that "demonstrated and emphasized the role of male power and domination in sexual harassment. Ms. MacKinnon's subsequent works have elaborated, in a variety of contexts, on the interrelationship between male domination and both physical and civil rights abuses of women."[89] This state court conceded that gender related abuses of power can exist even when females occupy posi-

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[85] *See id.* 1280-81.

[86] *See* CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979). Professor MacKinnon's work was highly influential in the recognition of hostile environment claims as a form of actionable sex harassment under federal law. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

[87] *See* Jansen v. Packaging Corp. of Am., 123 F.3d 490 (7th Cir. 1997); Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997); Bryson v. Chicago State Univ., 96 F.3d 912 (7th Cir. 1996); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996); Drinkwater v. Union Carbide, 904 F.2d 853 (3rd Cir. 1990); Delaria v. American Gen. Fin., Inc., 998 F. Supp. 1050 (S.D. Iowa 1998); Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162 (N.D.N.Y. 1996); Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351 (D. Nev. 1996); Jansen v. Packaging Corp. of Am., 895 F. Supp. 1053 (N.D. Ill. 1995); Egli v. Stevens, 1993 WL 153141 (E.D. Pa. 1993); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).

[88] *See* Hanlon v. Chambers, 464 S.E.2d 741 (W. Va. 1995) (reversing summary judgment in favor of employer in case in which supervisory employee complained of hostile working environment created by subordinate employees, which owner tolerated).

[89] *Id.* at 751. The court cited MACKINNON, *supra* note 86, and for the later works cited CATHERINE MACKINNON, ONLY WORDS (1993) [hereinafter MACKINNON, ONLY WORDS], and CATHERINE MACKINNON, FEMINISM UNMODIFIED (1987) [hereinafter MACKINNON, FEMINISM UNMODIFIED].

tions of official authority and males occupy subordinate positions.[90] However, the court shrank from applying her work in discrimination cases because it believed that the ideas are substantially impossible to apply by the courts.

> The bottom line, however, is that it does not really matter for the purposes of the Human Rights Act whether the plaintiff was a victim of a power play. We do not perceive "discrimination" as necessarily synonymous with an abuse of power. More importantly, we do not find an inquiry into power to be a useful part of our fair employment doctrine. As a practical matter, any doctrinal standard that includes a requirement that a plaintiff must establish some abuse of power is simply unworkable. The concept is far too subtle and formless for judges and juries to apply in a consistent manner, especially in hostile employment cases.[91]

The courts giveth, and the courts taketh away!

In many of the federal cases in which Professor MacKinnon is cited, the citation is used to establish the historical or theoretical basis of the sex discrimination cause of action.[92] In some cases, Professor MacKinnon is cited for the purpose of questioning that basis or its later elaboration in the courts.[93] Some courts have am-

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[90] *See id.* at 752.

[91] *Id.*

[92] *See, e.g., Bryson*, 96 F.3d 912 (citing Professor MacKinnon on history of "quid pro quo" harassment cases); *Delaria*, 998 F. Supp. 1050 (citing to Professor MacKinnon with a quote defining the term "quid pro quo harassment").

[93] *See, e.g.*, Jansen v. Packaging Corp. of Am., 123 F.3d 490, 569 (7th Cir. 1997) (Wood, J., concurring and dissenting), *aff'd*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) (affirming in part and reversing in part consolidated appeals from summary judgments for defendants in sex discrimination and retaliation cases). The Seventh Circuit cited to Catherine MacKinnon, *Sexual Harassment of Working Women* as the source for the legal distinction between hostile environment and quid pro quo discrimination claims. The court then suggested that courts that have used that distinction to create strict liability for quid pro quo cases have misinterpreted the law. *See id.* at 569-70; *see also* Jansen v. Packaging Corp. of Am., 895 F. Supp. 1053 (N.D. Ill. 1995) (using Professor MacKinnon's *Sexual Harassment of Working Women* as authority for assertion that "it takes more than saber rattling alone to impose quid pro quo liability on an employer"); Gary v. Long, 59 F.3d 1391, 1396 (D.C. Cir. 1995). The *Jansen* court found no tangible economic harm to the plaintiff, and granted summary judgment for the employer on the quid pro quo claim. *See Jansen*, 895 F. Supp. at 1060. *But see Burlington Industries*, 524 U.S. 742; Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (holding that employers are vicariously liable for quid pro quo and hostile environment harassment of supervisors, yet affirmative defense exists if no tangible employment benefits are affected by the harassment, if employer can show exercise of reasonable care to prevent and correct actionable behavior, and if plaintiff unreasonably failed to take advantage of such preventive or corrective opportunities); Vicki J. Limas, *Significant Employment Law Deci-*

plified the ideas in Professor MacKinnon's work to develop the basis for liability in sex discrimination cases,[94] or to help define the forms which hostile work environment can be manifested in the workplace.[95] Federal courts have cited Professor MacKinnon to limit the reach of hostile discrimination cases, when, for example, asserted by males against females.[96] Other federal courts have used

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sions in the 1997-98 Term: A Clarification of Sexual Harassment Law and a Broad Definition of Disability, 34 TULSA L. J.307, 310-324 (1999) (discussing *Burlington* and *Faragher* cases).

[94] *See e.g.*, Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996) (affirming summary judgment against mother who brought hostile environment sex discrimination case against daughter's school on respondeat superior theory because girl's peers created hostile environment at school and on bus). The court reasoned that:

> At a theoretical level, the problem with sexual harassment is "the unwanted imposition of sexual requirements in the context of unequal power." CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1 (1979). . . . In an educational setting, the power relationship is the one between the educational institution and the student. . . . In the context of two students, however, there is no power relationship, and a theory of respondeat superior has no precedential or logical support.

Id. at 1011 n.11. *But see* Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999), *rev'g* 74 F.3d 1186 (11th Cir. 1996) (holding that under some circumstances school may be held liable for peer harassment when school can be shown to have acted with deliberate indifference); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (articulating deliberate indifference standard for school liability for harassment of student by teacher).

[95] *See e.g.*, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991) (enjoining display of sexually explicit material in the workplace and holding for plaintiff on harassment claim). The court explained that such images in the workplace "detract from the image most women in the workplace would like to project: that of the professional, credible co-worker." *Id.* at 1526. The court refuted the defense that such images have always been shown in the workplace by citing Professor MacKinnon's pithy statement: "If the pervasiveness of an abuse makes it nonactionable, no inequality sufficiently institutionalized to merit a law against it would be actionable." MACKINNON, FEMINISM UNMODIFIED, *supra* note 89, at 115.

[96] Drinkwater v. Union Carbide, 904 F.2d 853 (3rd Cir. 1990) (affirming in part and reversing in part grant of summary judgment to defendant on hostile environment claim). The court relied extensively on the work of Professor MacKinnon for support of its position:

> In the quid pro quo cases, sexual harassment claims are equally available to men and women, but non-quid pro quo hostile environment cases depend on the underlying theory that "[w]omen's sexuality largely defines women as women in this society, so violations of it are abuses of women as women." "The relationship of sexuality to gender is the critical link in the argument that sexual harassment is sex discrimination." C. MACKINNON, SEXUAL HARASSMENT at 174, 151 (1979). The theory posits that there is a sexual power asymmetry between men and women and that, because men's sexuality does not define men as men in this society, a man's hostile environment claim, although theoretically possible, will be much harder to plead and prove.

Id. at 861 n.15; *see also* Egli v. Stevens, No. CIV.A.93-157, 1993 WL 153141 (E.D. Pa. May 11, 1993) (granting summary judgment for defendant when male alleges hostile environment by female supervisors at library). The court reached the same result as the *Drinkwater* court,

Professor MacKinnon's work in support of the opposite result in the same factual context.[97] Sometimes a court merely quoted another court quoting Professor MacKinnon's work, suggesting that the only part of the work read was the portion appearing in the opinion quoted.[98] Courts have also drawn on Professor MacKinnon's work to incorporate a power analysis in their evaluation of sex harassment claims,[99] though not necessarily as Professor MacKinnon might have applied it.[100]

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yet gave Professor MacKinnon short shrift, stating "[o]ne does not have to embrace Catherine MacKinnon's views, cited in Judge Becker's *Drinkwater* opinion, to have difficulty imagining how men could be among the class of victims to whom Congress sought to give equalizing rights in Title VII." *Id.* at *8 n.8. *But see* Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998) (recognizing cause of action against employers for same sex, male on male harassment even where conduct could not be defined in terms of sexual activity).

[97] *See* Bruneau v. South Kortright Central Sch. Dist., 935 F. Supp. 162 (N.D.N.Y. 1996) (holding that school may beheld liable on sex discrimination claim, on respondeat superior basis, if fails to act after receiving notice of peer on peer harassment). The *Bruneau* court quoted language from the *Rowinsky* decision that originated from Catherine MacKinnon's *Sexual Harassment of Working Women. See id.* at 172. The *Bruneau* and *Rowinsky* courts, however, reached different results.

[98] *See* Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), *cert. granted and judgment vacated,* City of Belleville v. Doe, 523 U.S. 1001 (1998) (reversing summary judgment for city on sex harassment claim and affirming summary judgment on retaliation claim). The *Bruneau* court stated:

> Likewise, when a woman's breasts are grabbed or when her buttocks are pinched, the harassment necessarily is linked to her gender. *See* Drinkwater v. Union Carbide Corp., 904 F.2d 853, 861, n. 15 (3rd Cir. 1990) ("'[w]omen's sexuality largely defines women as women in this society, so violations of it are abuses of women as women.'") (quoting CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 174 (1979)).

Id. at 578; *see also id.* at 580 (referring also to MacKinnon's *Only Words* on nature of the humiliation of sexual acts, even in context in which harasser has no sexual interest in his victim). *See generally* MACKINNON, ONLY WORDS, *supra* note 89.

[99] *See Drinkwater,* 904 F.2d at 861; *City of Belleville,* 119 F.3d at 571.

[100] *See* Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351 (D. Nev. 1996) (denying motion to dismiss sex harassment claim by male against male supervisors). Citing CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 220-21 (1979), the court explained:

> Furthermore, categorization of same-gender sexual harassment as "homosexual" harassment makes the unwarranted assumption that sexual harassment is motivated by sexual attraction on the part of the harasser. . . . [I]ndeed, harassment, like other forms of victimization, is often motivated by issues of power and control on the part of the harasser, issues not necessarily related to sexual preference.

Id. at 355.

6. Patricia Williams

Professor Patricia Williams is cited twice during this period, despite the intense interest in her work exhibited by many traditionalists.[101] In one case,[102] Professor Williams is cited merely as one among a number of scholars who praised the book at the heart of the litigation as evidence of the validity of the author's case history method of developing the themes of the book. In the other case,[103] Professor Williams work describing racism as "spirit murder"[104] is cited along with the work of Professors Delgado and Matsuda in support of the court's statement that racial slurs inflict psychological harm on the victim.[105]

7. Lani Guinier

Federal court cases cited Professor Guinier eight times,[106] but no state court cases cited her. In line with her most well-known work, many of the cases in which Professor Guinier is cited relate to voting rights issues. Professor Guinier is used as authority to support the proposition that authentic representatives of the African American community need not be African American.[107]

Much more often, courts cited Professor Guinier in connection with her advocacy of cumulative voting to correct inequities from the current one person one vote voting rights structure. For sev-

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[101] *See, e.g.*, RICHARD A. POSNER, OVERCOMING LAW 372-98 (1995) (attacking objective and subjective truths of famous story in PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 44-45 (1991)).

[102] *See* Haynes v. Alfred Knopf, Inc., 8 F.3d 1222 (7th Cir. 1993) (deciding libel and invasion of privacy action against Nicolas Lemann, author of *The Promised Land: The Great Black Migration and How It Changed America*).

[103] *See* Taylor v. Metzger, 706 A.2d 685 (N.J. 1998) (reversing summary judgment entered in favor of defendant sheriff of Burlington County, who called another officer "jungle bunny" on discrimination claim).

[104] *Id.* at 699 (citing Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987)).

[105] *See Taylor*, 706 A.2d 685, 699-700.

[106] *See* Cousin v. Sundquist, 145 F.3d 818 (6th Cir. 1998); Lewis v. Alamance County, 99 F.3d 600 (4th Cir. 1996); Southern Christian Leadership Conference of Alabama v. Sessions, 56 F.3d 1281 (11th Cir. 1995); McCoy v. Chicago Heights, 6 F. Supp. 2d 973 (N.D. Ill. 1998); Barnett v. City of Chicago, 969 F. Supp. 1359 (N.D. Ill. 1997); White v. Alabama, 867 F. Supp. 1519 (M.D. Ala. 1994); Houston v. Lafayette County, Miss., 841 F. Supp. 751 (N.D. Miss. 1993); Prosser v. Elections Bd. of Wis., 793 F. Supp. 859 (W.D. Wis. 1992).

[107] *See Lewis*, 99 F.3d 600; Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1103 n.115 (1991) ("Authentic representatives need not be Black as long as the source of their authority, legitimacy, and power base is the Black community.").

eral courts, Professor Guinier is a "radical black,"[108] or someone that advocates the overturning of the Voting Rights Act as currently constituted.[109] For other courts, Professor Guinier is someone mentioned in passing, a curiosity whose ideas about cumulative voting as a means of electoral fairness to American minority groups may be lightly engaged.[110] Sometimes, the reference to Professor Guinier's work is even wistful.[111] Other courts mined Professor Guinier's work for something useful, even if the court applies the

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[108] *See e.g., Prosser*, 793 F. Supp. 859 (implementing reapportionment plan of district court in suit brought by Republican Party legislators challenging apportionment). The court stated, "The wisdom and seemliness of the [Voting Rights] Act have been questioned, even by radical Blacks." *See id.* at 869 (quoting Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991)).

[109] *See e.g., Cousin*, 145 F.3d 818 (reversing and vacating action by African American voters alleging that county's at-large method of electing judges violated the Voting Rights Act). The court explained its view that the Voting Rights Act specifically precluded its application to achievement of proportional representation. The court then stated: "Yet this is precisely the effect and, proponents would argue, the strength of cumulative voting as a remedy. *Id.* at 830 (citing LANI GUINIER, THE TYRANNY OF THE MAJORITY 14-15 (1995)).

[110] *See, e.g., White*, 867 F. Supp. 1519 (approving final judgment of settlement on Voting Rights Act claim). The court here noted that the evidence presented mirrored the debate among scholars and courts over "the best remedy for voting discrimination. In response to the predominance of single-member districts as a voting rights remedy, some courts and scholars have argued that districting is not the best method of ensuring minority interests are taken into account." *Id.* at 1535. The court cited Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1447-57 (1991), as a rejection of current alternatives. *See id.*; *see also Sessions*, 56 F.3d at 1281 (affirming rejection of challenge to at-large system for electing trial judges). The *Sessions* court spoke positively of the benefits of cumulative voting because it promotes a healthier style of electoral campaigning, promoting "less contentious elections." *Id.* The court quoted Professor Guinier: "[N]egative campaigning is less effective in elections with multiple winners than in elections with only one opponent." *See id.* at 1314 (quoting Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135, 1137 (1993)).

[111] *See, e.g.*, Barnett v. City of Chicago, 969 F. Supp. 1359 (N.D. Ill. 1997) (ruling in favor of defendants in claim for intentional discrimination in drawing of ward boundaries). The *Barnett* court stated that it could not "give much credence to conclusions derived from elections with different decisional rules, other than to conclude that instituting cumulative voting for aldermen would likely increase minority representation." *Id.* at 1425 (citing Professor Guinier "for one, [who] has recognized that the use of cumulative voting, among other remedial measures, would likely hasten proportionate interest representation broadening the opportunities for minority interests to participate in the legislative process"); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1135-44 (1991); *see also McCoy*, 6 F. Supp. 2d at 973 (accepting part of proposal made by plaintiffs). The *McCoy* court noted "[m]embers of different racial groups who enter into such alliances are more likely to 'find confidence-building measures that build trust and overcome antagonism.'" *Id.* at 983 (citing Lani Guinier, *(E)Racing Democracy*, 108 HARV. L. REV. 109, 133 (1994)).

result in a manner antithetical to the spirit as well as her desired outcome in the work. [112]

8. Derrick Bell

A federal court cited Professor Bell once and state courts do not at all. In the federal case,[113] the court cited Professor Bell positively, but not for a central point of the case.[114]

9. Charles Lawrence, III

A federal court cited Charles Lawrence only once during 1989-1999, but the cite is quite positive. The court, in explaining the basis of the *Griggs v. Duke Power*[115] disparate impact method, used the language and ideas of Professor Lawrence. "[N]ot all discrimination is apparent and overt. It is sometimes subtle and hidden. It is at times hidden even from the decisionmaker herself, reflecting perhaps subconscious predilections and stereotypes. See Charles Lawrence."[116] A California court also cited Lawrence, along with Mari Matsuda and Richard Delgado, to suggest that racial and eth-

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[112] *See e.g.*, Houston v. Lafayette County, Miss., 841 F. Supp. 751 (N.D. Miss. 1993) (denying Voting Rights Act claims of plaintiffs). The *Houston* court quoted extensively from the work of Professor Guinier to support the proposition that majority minority districts are bad:

> Prior to the recent Supreme Court decision in *Shaw*, voting rights legal scholars already had begun to scrutinize the worthiness of electoral districts custom designed for minorities. One of the most vocal critics has been University of Pennsylvania Law School Professor Lani Guinier. Professor Guinier, who has written extensively about the subject of voting rights, has raised questions concerning the inherent value of deliberately drawing districts exclusively for blacks and other minority groups.

Id. at 765 (citing Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1455 (1991)). The *Houston* court, however, relied on Professor Guinier's work to reject a remedy without in turn imposing any other remedy for minority-majority electoral inequality. *See id.* at 765-67.

[113] *See* Teague v. National Ry. Passenger Corp., 708 F. Supp. 1344 (D. Mass. 1989) (ruling on Amtrak management employee action under Federal Employers' Liability Act and various state laws).

[114] *See id.* at 1348 n.6 (citing Derrick Bell, *The Supreme Court 1984 Term: Forward*, 99 HARV. L. REV. 4 (1985)) ("Bell, in another context, has suggested the dilemma facing anyone who attempts this endeavor: 'First, you would have to explain to the framers how [the Black litigants] had gotten free of their chains' and secured such jobs."). The *Teague* court stated that "Professor Bell's point is well taken." *Teague*, 708 F. Supp. at 1348.

[115] 401 U.S. 424 (1971).

[116] EEOC v. Francis W. Parker Sch., 41 F.3d 1073 (7th Cir. 1994) (deciding discrimination claim).

nic slurs cause injury by their very utterance and, thus, ought not to fall within the protection of the First Amendment.[117]

10. Duncan Kennedy

Professor Kennedy, one of the earliest scholars writing in the area of critical legal studies, is cited in one state case[118] and one federal case.[119] In the state case, discussed above, Professor Kennedy is listed as one of many scholars from different scholarly camps favoring the disgorgement principle of remedy that was not adopted by the court.[120] In the federal case, the court cited Professor Kennedy in a contract case, if only to take a dismissive swipe at Professor Kennedy's notion of the nature of contractual good faith.[121]

11. Mari Matsuda

Professor Matsuda is best known in the courts for her scholarship on racist speech. Much of the citation to her work reflects this "common knowledge" in the courts. Professor Matsuda is cited five times in state courts,[122] and four times in federal courts[123] during this period.

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[117] Aguilar v. Avis Rent-A-Car Sys., Inc., 50 Cal. App. 4th 28, 53 Cal. Rptr. 2d 599 (1996), *aff'd*, 21 Cal. 4th 121, 980 P.2d 846 (1999) (citing Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 452, 461-62).

[118] *See* Earthinfo, Inc. v. Hydrosphere Resource Consultants, Inc., 900 P.2d 113, 115 (Colo. 1995) (ruling on appeal from computer software developer's action to rescind development contracts due to buyer's failure to make royalty payments).

[119] *See* Market Street Assocs. Ltd. Partnership v. Frey, 941 F.2d 588 (7th Cir. 1991).

[120] *See Earthinfo*, 900 P.2d at 115 (ruling on computer software developer's action to rescind development contracts based on buyer's failure to make royalty payments). The court cited Kennedy, *supra* note 55, at 1717, 1734, and Unger, *supra* note 55, at 641.

[121] *See Market Street*, 941 F.2d at 595. The court stated:

> The contractual duty of good faith is thus not some newfangled bit of welfare-state paternalism or (*pace* Duncan Kennedy, *"Form and Substance in Private Law Adjudication,"* 89 HARV. L. REV. 1685, 1721 (1976)) the sediment of an altruistic strain in contract law, and we are therefore not surprised to find the essentials of the modern doctrine well established in nineteenth century cases.

Id.

[122] *See Aguilar*, 50 Cal. App. 4th 28, 53 Cal. Rptr. 2d 599; *In re* R.A.V., 464 N.W.2d 507 (Minn. 1991) *rev'd*, 505 U.S. 377 (1992); Karins v. City of Atl. City, 706 A.2d 706 (N.J. 1998); Taylor v. Metzger, 706 A.2d 685 (N.J. 1998); State v. Vawter, 642 A.2d 349 (N.J. 1994).

[123] *See* Daniels v. Essex Group, Inc., 937 F.2d 1264 (7th Cir. 1991); Surti v. G.D. Searle & Co., 935 F. Supp. 980 (N.D. Ill. 1996); Pemberthy v. Beyer, 800 F. Supp. 144 (D. N.J. 1992); Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989).

In two of the state court cases from New Jersey, Professor Matsuda is cited for similar propositions, and as favorably, as Richard Delgado.[124] In a third New Jersey case, the court, though holding that the hate crime statute at issue violated the First Amendment's protection of speech, cited Professor Matsuda with deference.[125] Indeed, in the New Jersey cases, it seems clear that some courts have begun to lend significant weight to the work of critical scholars with respect to hate speech and discrimination. In this respect, the New Jersey courts stand out. In addition, a Minnesota court, reversing a finding of overbreadth of a city ordinance prohibiting bias-motivated disorderly conduct, also relied on Professor Matsuda for authority with respect to the nature and effect of racist speech and action.[126]

Professor Matsuda is also cited by a California court, in a case in which the court reversed the denial of an injunction against the manager of a car rental agency to refrain from making racial epithets against Latinas/os, and intentional and unwanted touching of his employees.[127] Here, the majority relied in part on the work of Professor Matsuda in reaching its decision.[128] The dissenting opinion rebuked the majority for this "radical restructuring of existing First Amendment and California free speech jurisprudence."[129] The dissent laid the blame for this squarely on the influ-

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[124] *See Karins*, 706 A.2d 706; *Taylor*, 706 A.2d 685; *see also supra* notes 80-84 and accompanying text. The *Karins* court quoted Professor Matsuda favorably, stating that "[t]here are certain words and phrases that 'in the context of history carry a clear message of . . . hatred, persecution, and degradation of certain groups.'" *Id.* at 720 (quoting Matsuda's *Public Response to Racist Speech* that the court had previously quoted in State v. Vawter, 642 A.2d 349 (N.J. 1994)); *see also* Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2365 (1989). The *Karin* court then concluded that Karins's conduct fell within Matsuda's definition of hate speech. *See Karin*, 706 A.2d at 721. In *Taylor*, the court cited the same Matsuda article to support its conclusion that "[r]acial slurs are a form of vilification that harms the people at whom they are directed." *See Taylor*, 706 A.2d at 691 (quoting Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2365 (1989)) ("However irrational racist may be, it hits right at the emotional place where we feel the most pain.").

[125] *See Vawter*, 642 A.2d 349 (holding that hate crime statute to violated U.S. Constitution's First Amendment). The court cited Matsuda, *supra* note 124, at 2365.

[126] *See In re* R.A.V., 464 N.W.2d at 508 n.1 (Minn. 1991), *rev'd*, 505 U.S. 377 (1992). In *R.A.V.*, the Minnesota Supreme Court cited Matsuda's *Public Response to Racist Speech* on the meaning of racist symbols. *See id.* at 508 (citing Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2365 (1989)).

[127] *See Aguilar*, 50 Cal. App. 4th 28, 53 Cal. Rptr.2d 599.

[128] *See id.* at 34; 53 Cal. Rptr. 2d at 605 (citing Matsuda, *supra* note 124, at 2335-38, 2357).

[129] *Id.* at 44; 53 Cal. Rptr. 2d at 616-17.

ence of Professor Matsuda.[130] "The case may raise important questions ultimately meriting [U.S. and California Supreme Court] review . . . , but we are bound to follow existing precedents, rather than implement schemes posited in law review articles."[131] Now an odd thing happens. Rather than embrace the reliance on Professor Matsuda's ideas, the majority, very like the apostles did long ago, disavowed any such reliance. The majority dropped a footnote in their opinion in which they categorically stated that, "We do not rely on Matsuda's thought provoking ideas, however, but simply note the existence of a vigorous debate on this subject."[132]

The federal cases all deal with issues of discrimination. In all of the cases, Professor Matsuda is quoted positively, with courts relying on her work, if only for limited purposes. In two cases, Professor Matsuda's work on accent and language discrimination has been used by the courts. In one case, Professor Matsuda's work proved helpful in discrimination case involving accent.[133] In the

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[130] In very dismissive terms, the dissent exclaimed that:

> The majority has undertaken a radical restructuring of existing First Amendment free speech jurisprudence. Its dicta are only supported by the proposal and view of one commentator on allegedly "racist speech" who contends that all allegedly derogatory and demeaning speech in a place of employment is the equivalent of fighting words, because it represents a social evil and causes a secondary effect, outside First Amendment protection, which courts should suppress by orders of prior restraint.

Id. at 44, 52 Cal. Rptr. 2d at 616-17 (Peterson, J., concurring and dissenting). The "commentator," of course, is Professor Matsuda. *See id.* at 45 n.5, 53 Cal. Rptr. 2d at 616 n.5. Judge Peterson's opinion stated that the "law review article by Professor Matsuda . . . appears to be the true source of the majority's analysis despite its contrary disclaimer. . . . The majority has further relied on authorities citing this article." *Id.* at 52, Cal. Rptr. 2d at 623-24. The work of Professors Lawrence and Delgado, also cited by the majority, are dismissed without comment.

[131] *Id.* at 45, 53 Cal. Rptr. 2d at 616 (Peterson, J., concurring and dissenting). The radical nature of Professor Matsuda's notions, as well as those who apply them, are discussed with some incredulity in the footnote which follows. *See id.* at 45 n.6, 53 Cal. Rprt. 2d at 616 n.6 (Peterson, J., concurring and dissenting).

[132] *Id.* at 34, 53 Cal. Rptr. 2d at 605. The majority continued: "We have no hidden agenda. Our holding in this case would have been the same if the Matsuda article had never been written." *Id.*

[133] *See* Surti v. G.D. Searle & Co., 935 F. Supp. 980 (N.D. Ill. 1996) (denying Rule 12(b)(6) motion in an age/national origin discrimination case). The *Surti* court stated:

> Thus, if the evidence adduced at trial suggests that the argument that Sutri did not have adequate communication skills is merely a code for references to Surti's Filipino accent, Searle's asserted "legitimate, nondiscriminatory reason" for not promoting Surti may not qualify as nondiscriminatory in actuality . . . . Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1352 (1991) ("A major complicating factor in

other case,[134] Professor Matsuda is cited as influential in the emerging case law suggesting that distinctions based on language ability may be an indication of or a proxy for race and ethnicity.[135]

In another federal court case, Professor Matsuda's work is cited for authority that it "is well established that the victims of racial discrimination suffer physically and emotionally as a consequence of multiple incidents of harassment in a hostile work environment."[136] But not all federal cases suggest agreement with the thrust of Professor Matsuda's racist speech scholarship.[137]

12. Kimberlé Crenshaw

Professor Crenshaw is cited twice in federal courts. She is not cited in state courts during 1989-1999. In one case,[138] Professor Crenshaw's work is cited for an understanding of classic forms of racism.[139] In a related case,[140] the court cited the earlier decision with the reference to Professor Crenshaw's work.

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applying Title VII to accent cases is the difficulty in sorting out accents that actually impede job performance from accents that are simply different from some preferred norm imposed, whether consciously or subconsciously, by the employer.").

Id. at 987.

[134] *See* Pemberthy v. Beyer, 800 F. Supp. 144 (D. N.J. 1992) (granting petition for habeas corpus upon finding that prosecutor struck Hispanics from jury for, among other reasons, failing to satisfactorily assure prosecutor that they would accept the state's proffered translation of evidence from Spanish to English).

[135] *See id.* at 158 n.16 (citing Mari Matsuda's *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, as extending language discrimination analysis to accents).

[136] Daniels v. Essex Group, Inc., 937 F.2d 1264 (7th Cir. 1991) (affirming judgment for employee in hostile environment employment discrimination case).

[137] *See e.g.*, Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989) (quoting extensively from paper delivered by Professor Matsuda at conference on topic held at very university that is subject of case).

[138] *See* Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc., 781 F. Supp. 1385, 1394 (1992) (enjoining racially motivated physical interference with exercise of fishing rights).

[139] *See id.* at 1394 (stating that "[p]erpetuating and encouraging stereotypes of persons as lazy or wasteful and ridiculing their religious and cultural practices are classic forms of racism that enable the perpetrators not only to rationalize the oppression of such people but to reinforce identification with the dominant group"). The court cited Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

[140] *See Stop Treaty Abuse-Wis., Inc.*, 843 F. Supp. at 1284 (enjoining racially motivated physical interference with exercise of fishing rights).

13. Gary Peller

Professor Peller is cited twice in federal court. In one case, discussed before,[141] Professor Peller is lumped together with a number of other members of the critical legal studies movement "notorious for thinking every bit of text is ambiguous."[142] In the other case,[143] Professor Peller's work is listed among those supporting the court's assertion that considerable debate exists on a topic potentially relevant to the case, but which the court will not address.[144]

14. Neil Gotanda

Professor Gotanda has been cited once in a state court case.[145] In that case, the court cited in passing Professor Gotanda, along with others, with respect to a dispute in the interpretive community over the meaning of the words "preferential treatment" and "discrimination" in the California Constitution as amended by Proposition 209.[146] However, the court concluded that "the comparative merit of these positions is not relevant here."[147]

15. Janet Halley

My search revealed no state court citations for Janet Halley, a noted scholar of the law affecting sexual minorities. Professor Halley is cited in one federal case,[148] along with Richard Posner, for the proposition that there is some evidence that sexual preference is

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[141] *See* Stupak-Thrall v. United States, 89 F.3d 1269 (6th Cir. 1996) (deciding water rights case turning on whether phrase is ambiguous).

[142] *Id.* at 1302-03 (citing Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985) as one of number of articles arguing in favor of ambiguity of constitutional provisions).

[143] *See* Rodriguez v. Artuz, 990 F. Supp. 275 (S.D.N.Y. 1998) (granting motion to dismiss petition for writ of habeus corpus based on lapse of statute of limitations under Antiterrorism and Effective Death Penalty Act).

[144] *See id.* at 278.

[145] *See* Hi-Voltage Wire Works, Inc. v. City of San Jose, 72 Cal. App. 4th 600, 605 n.10, 84 Cal. Rptr. 2d 885, 890 n.10 (Ct. App. 1999) (holding unconstitutional under Proposition 209 municipal program designed to increase participation by minority and women businesses in public construction projects).

[146] *See id.* (citing Neil Gotanda et al., *Legal Implications of Proposition 209: The California Civil Rights Initiative*, 24 W. ST. U. L. REV. 1, 21-22 (1996)).

[147] *Id.*

[148] *See* Able v. United States, 968 F. Supp. 850 (E.D.N.Y. 1997) (ruling on constitutionality of "don't ask/don't tell" rules for exclusion of sexual minorities from service in armed forces).

for some immutable.[149] Professor Halley's analysis of the law in this area, of central relevance to the case, was not discussed.

C. Citation Quality

The review of citation quantity appears somewhat disappointing at first. The study found a mere handful of citations to outside scholars writing in the areas that have been at the forefront of controversy and litigation throughout the 1990s. However, mere quantity does not suggest either the impact or usefulness of outsider scholarship. Focusing on citation quality more clearly reveals the nature of the important place of outsider scholarship in mainstream institutions.

Citation rates for law review articles or other scholarly work in court opinions is generally quite low.[150] In 1989, eighteen percent of federal circuit courts of appeal opinions cited law review articles,[151] a rate that was lower than the citation rate in the 1970s.[152] Of the law review articles cited, judges are more willing to cite those found in "elite" journals.[153] Examining citation rates by subject, studies have shown that courts were least inclined to cite to

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[149] *See id.* (citing Janet Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 937-46 (1989)) (discussing studies on immutability of sexual preference).

[150] *See* Sirico & Drew, *supra* note 21 (stating that, after finding that 1200 opinions provided 221 citations to legal periodicals, "the federal circuit courts cite law reviews infrequently. Second, they cite primarily the elite journals. Third, they cite mostly recent articles").

[151] *See id*; *see also* Kopf, *supra* note 21, at 714-16. Kopf's study derived eight findings from previous studies of citation patterns. Among these were that (1) law review articles are seldom cited in judicial opinions, (2) treatises are more likely to be cited than articles, (3) elite journals are more likely to be cited than law journals from less well reputed institutions, (4) judges and law professors are not interested in the same topics, (5) state law topics were more likely to be cited than others, (6) judges are more likely to cite more recent articles, (7) citation patterns vary significantly by judge, and (8) cited articles are not likely to influence judicial decision making. *See id.*

[152] *See* McClintock, *supra* note 21 (reviewing citation rates of elite law reviews by U.S. Supreme Court, federal circuit courts, federal district courts, and state supreme courts "during three two year periods spaced ten years apart [1975-76, 1985-86, 1995-96]."). *Id.* at 683. "The number of judicial citations of law reviews in each of the courts surveyed declined dramatically from 1975 to 1996." *Id.* at 684. The author noted a 47.35% decline in overall citation rates form the 1970s to the 1990s, with the greatest decreases in the federal appellate courts, followed by the state supreme courts. Federal district court citation decline was the least precipitous, declining only 24.8%. *Id.* at 684-85. This appeared to confirm earlier studies. *Id.* at 685-686.

[153] *Id.* at 685.

law journals or other scholarly work in the areas of sex and race discrimination,[154] the primary areas of much outsider scholarship.

Given the generally low rate of judicial citation and the even lower rates of judicial citation in areas in which outsider scholars are most active, it is not unreasonable to expect low citation rates. Yet, the citation history of the sampled outsider scholars in the courts yields some interesting, and somewhat disheartening patterns of use: positive engagement, hostility, and indifference.

1. Positive Engagement

Positive engagement implies that courts are listening and considering the ideas with which outsider scholars struggle. Positive engagement does not necessarily require that courts agree with the ideas and conclusions in the works considered. Rather, positive engagement requires that courts consider the ideas and arguments as important or as worthy of attention in deciding a case.

The courts appear to have actively engaged outsider scholarship in very few cases. In the federal courts, the clearest example of positive engagement involves ideas which are no longer essentially "outside" because they have been adopted by the United States Supreme Court and made, to some extent at least, binding on the lower federal courts. The earlier work of Catherine MacKinnon is an example of this positive engagement.[155] Yet even here, the engagement by the federal courts can be grudging. It follows a "this far because we must but no farther" attitude.[156]

State cases are another matter. Two courts very recently have begun to engage some outsider scholarship. In some instances, this work has become an integral part of the developing jurisprudence of the courts, even where the courts did not adopt the outsider ideas.[157] Although not the only state courts to do so, New Jer-

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[154] Merritt & Putnam, *supra* note 17, at 883-84. In a study of the citation patterns of the Nebraska Supreme Court, the author determined that the court tended to cite articles concerned with issues of trial practice and evidence. *See* Kopf, *supra* note 21, at 725-26.

[155] Consider the way Professor MacKinnon was cited to opposite effect in Rowinsky v. Bryan Ind. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996), and Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162 (N.D.N.Y. 1996).

[156] Some state courts have done the same thing. *See, e.g.*, Hanlon v. Chambers, S.E.2d 741 (W. Vir. 1995); *supra* notes 88-91.

[157] The Alabama courts have provided an interesting example of this. *See, e.g.*, Trull v. Long, 621 So.2d 1278 (Ala. 1993); *supra* notes 83-85 and accompanying text.

sey and Oregon courts have been the most open to such engagement.

Occasionally other courts, state and federal, have engaged outsider scholarship from time to time. Sometimes, the engagement is surreptitious so that the engagement can be plausibly denied.[158] Even so, courts attempt to engage a work of outsider scholarship, even if only to reject its premises. That type of engagement can also be seen as a positive development, a sign of outsider scholarship influence. Still other courts appear to have absorbed the work of outsiders without much comment.[159]

2. Hostility

Overt hostility is refreshing and even positive for at least two reasons. First, such hostility indicates that the outsider's work is being read and provoking significant (even if negative) reaction. Second, hostile engagement clarifies the position of institutions with significant coercive and cultural power in this society by lifting the veil of ambiguity from courts. For activist litigators especially, elimination of judicial ambiguity and the exposure of those basic norms, which courts use to decide cases, can serve important strategic objectives.[160] While hostility to outsider scholarship exists in the courts, as evidenced by the citation patterns discussed above, its intensity and breadth is smaller than expected.

The citation patterns suggest that courts direct the greatest hostility not at individuals, but at group designations. Thus, with some exceptions, courts find it easier to be hostile to "movements" than to individuals. Critical race theory (perhaps masquerading as multiculturalism),[161] critical legal theory,[162] radical feminism,[163] and

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[158] *See* Aguilar v. Avis Rent-A-Car Sys., 50 Cal. App. 4th 28, 53 Cal. Rptr. 2d 599 (Ct. App. 1996), *aff'd*, 21 Cal. 4th 121, 980 P.2d 846 (1999); *see also supra* Part I.B.11.

[159] *See, e.g.*, EEOC v. Francis W. Parker Sch., 41 F.3d 1073 (7th Cir. 1994) (citing to Charles Lawrence III).

[160] *See, e.g.*, Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993). *But see* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE (1991); GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA (1993).

[161] *See* Knight v. Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991).

[162] The opinions of Judge Boggs, alluding to the "nihilism" of the interpretive project of the critical legal studies movement is a case in point. *See supra* Part I.B.1.ii (discussing Judge Bogg's opinions).

[163] Johnson v. Phelan, 69 F.3d 144 (7th Circuit 1995) (describing radical feminists as social engineers with little regard for dignity of prisoners).

multiculturalism (as a general catch all for outsider scholarship) merit undisguised hostility or contempt in the cases. These labels appear to serve as convenient proxies for judgments that such scholarship constitutes unacceptable or absurd deviance.

Individuals, too, suffer little bursts of hostility from the courts. For example, Lani Guinier has been labeled a "radical Black,"[164] and Mari Matsuda has been characterized as the proponent of radical restructuring of our constitutional guarantee of "free" speech.[165] Hostility can be manifested using scholarship for a purpose contrary to the spirit of the scholarship itself, such as using the work of Lani Guinier to support resisting minorities' vote discrimination remedies,[166] although, engagement suggests that courts will treat the scholarship as worthy of debate. Hostility generally signifies that the debate is over. Hostile citation, much like signs in the desert next to certain watering holes, serves as a warning to other courts that the identified "pool" of scholarly ideas is "poisoned." Yet, in contrast to indifference, either reaction engagement or hostility is positive. In either case, the work of outsider scholars is recognized within a high organ of institutional norm making.

3. Indifference

Indifference is the most damaging form of disengagement with the work of outsider scholars because of the way it silences them. Indifference is an effective gatekeeper, preventing ideas raised in outsider scholarly work from appearing in those institutional arenas in which policy is debated and norms are institutionalized. Indifference suggests a banal hostility, where the ignored work fails to rise to a level worth acknowledging. Silence is a potent weapon to keep newly emerging ideas within the ghetto of the academy.

The most striking general pattern that emerges from this study of citations is the lack of any significant engagement with the work of outsider scholars. Indifference sometimes took an active form. Examples include disdainful dismissal, such as the cases mentioning critical legal studies, Duncan Kennedy,[167] and Gary Peller.[168]

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[164] Prosser v. Elections Bd. of Wis., 793 F. Supp. 859 (W.D. Wis. 1992).

[165] Aguilar v. Avis Rent-A-Car Sys., 50 Cal. App. 4th 28, 53 Cal. Rptr. 2d 599 (Ct. App. 1996), *aff'd*, 21 Cal. 4th 121, 980 P.2d 846 (1999).

[166] *See, e.g.*, Houston v. Lafayette County Miss., 841 F. Supp. 751 (N.D. Miss. 1993).

[167] Market Street Assocs. L.P. v. Frey, 941 F.2d 588 (7th Cir. 1991).

Other forms of active indifference included condescension,[169] afterthought or filler. Indifference, at other times, took the form of pedantry, where such references noted academic disagreement on a point usually not important to the resolution of the case,[170] or for a minor point of fact or history.[171]

The most significant form of indifference, though, is a total shunning. The Sixth, Seventh, and Ninth Circuits have the lion's share of citations to outsiders. In contrast, some circuits have not cited the work of any of the outsiders represented in this study. In this later group are the First, Fourth, Eighth, and Tenth Circuits. The lack of citation in the context of these circuits' caseloads, which involves review of cases in areas in which the representative authors have achieved a certain renown, is hard to explain benignly. Perhaps it is possible to explain this lack of formal citation by reference to the studies that observed courts generally tend to cite outside authority less in discrimination cases. Yet, such an explanation may also suggest that circuits that have cited outsider scholars are then aberrational because these courts cite outsider scholars when "normal" courts would not. But this explanation is unsatisfactory as well. One may suspect that the shunning in the circuits in which outsider scholars remain formally absent suggests a specifically targeted indifference, conscious or unconscious, of a greater magnitude than generalized indifference.[172] Even though some state courts engaged the work of outsiders to some degree, the majority of state courts have yet to acknowledge outsider scholarship in any manner. This is disturbing indeed.

One can argue that the "fault" for this absence of outsider scholarship from federal and state courts falls squarely on the shoulders of the outsider scholars themselves. Perhaps they have failed to produce something the courts can "use." This, after all, is the charge commonly made.[173] But giving weight to such an explana-

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[168] Stupak-Thrall v. United States, 89 F.3d 1269 (6th Cir. 1996).

[169] *See supra* notes 68-72 (discussing citations to Stanley Fish).

[170] This was the case, for example, with the citation of the work of Neil Gotanda by a California court. *See* Hi-Voltage Wire Works, Inc. v. City of San Jose, 72 Cal. App. 4th 600, 84 Cal. Rptr. 2d 885 (Ct. App. 1999).

[171] The sole citation of a court to Derrick Bell falls into this category, for example. *See* Teague v. National Ry. Passenger Corp., 708 F. Supp. 1433 (D. Mass. 1989). So does the sole citation to Patricia Williams. *See* Haynes v. Alfred Knopf, Inc., 8 F.3d 1222 (7th Cir. 1993).

[172] Perhaps in this context, a rigorous comparative study would reveal more. I leave that for a later day.

[173] *See supra* notes 1-7 and accompanying text.

tion might lead to the conclusion that the price for citation is the willingness to pander, that is, to produce only what the courts want to hear or face the prospect of being deemed judicially "useless" and therefore disposable.[174] Scholarship that does not serve to reproduce, sharpen, explain or perpetuate the current normative cultural order will tend to be consigned to oblivion. These notions are most starkly illustrated by the Seventh Circuit's dismissal of "radical feminism."[175] This conclusion should be as disturbing to mainstream scholars as it is to outsider academics. Any scholarly deviance can turn a mainstream scholar into an outsider. However, as applied to traditional outsiders, the reasons that courts respond only to scholarship that they want or are willing to hear, are not as simple as they might at first appear.

II. GENERALIZING FROM CITATION PATTERNS

A. Citation Patterns in Cultural Context

1. From the Outside In

The pattern of judicial citations between 1989 and 1999 demonstrates that dominant society does not react well to rebellion. Society accepts assimilated "others" into the fold in some loose manner, far easier than it recognizes the "others'" possibly conflicting normative points of view.[176] Indeed, the voices of "others" that acknowledge the value and place of dominant social norms are the only ones that appear intelligible to the dominant social order. As for those that do not accept the necessity of assimilation and conformity, dominant society rejects them. It is no wonder, then, that outsider scholars appear rarely, and rarely appear in a positive light, in the writings of the courts.

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[174] *See* Backer, *Chroniclers in the Field of Cultural Production, supra* note 20, at n. 3 (quoting GIRARDEAU SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 19 (1995)). Backer stated:

> Law and social hegemonies are the strategies in which power takes effect; they are the embodiment of the general design or institutional crystallization of power. Law exists within and reflects the culture from which it operates. As Girardeau Spann suggests, "the Court is institutionally incapable of doing anything other than reflecting the very majoritarian preference that the traditional model requires the Court to resist."

Id.

[175] Johnson v. Phelan, 69 F.3d 144 (7th Circuit 1995).

[176] *See, e.g.*, Knight v. Alabama, 787 F. Supp. 1030, 1333 (N.D. Ala. 1991); *see also supra* notes 46-58 and accompanying text.

The dominant discourse looks on emerging schools of outsider scholarship as uncompromisingly subversive. Traditionalists within the dominant discourse view critical narrative or outsider scholarship as evidence of the significant threat to dominant norms posed by the groups these outsiders represent. Such dissent will either be co-opted or destroyed.[177] For the dominant group to engage in dialogue with these subversive newcomers would be tantamount to accepting the notion that the sociocultural norms on which dominant society is built must be destroyed or swept aside. Traditionalists reject the obligation to engage those who seek to destroy the dominant norm structure, and certainly will not concede that such a structure is rotten to the core. The invitation to "join the conversation" extended to the previously excluded comes with a condition: those invited must accept and respect the core parameters of the extant normative conversation.[178]

Progressives within the dominant discourse share the traditionalist's unease, but express unease more furtively. For the traditional Left, the threat of outsider scholarship is to the historic relationship, often paternalistic, between the Left and communities of color.[179] Critical scholarship rejects the "helping (white) hand" of the traditional Left as merely another form of colonization — this time helping communities of color become darker skinned Europeans. To accept this challenge adversely affects the power relationships between the traditional Left and its former clients — that is the subordinated groups it had represented within dominant

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[177] *See* Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387, 413 (1993). Consider the observation of Professor Delgado: "There is actually a body of emerging writing that says empathy goes only so far, that we cannot identify with or love anyone who is too different from us, cannot resonate to a 'story' too unlike the one we usually hear." *Id.*

[178] This condition duplicates, on a cultural level, the commonly applied practice within the international community, that nations or groups invited to join an existing group must accept, as a condition of joining, the entire body of decisions and rules, the *acquis communautaire*, which has developed since the creation of the group. "Acquis communautaire essentially conveys the idea that the institutional structure, scope, policies and rules of the Community (now Union) are to be treated as 'given' ('acquis'), not to be called into question or substantially modified by new States at the time they enter." Roger J. Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland, and Sweden*, 18 FORDHAM INT'L L. J. 1092, 1095 (1995). For a discussion of the concept within the European Union, see *id.* at 1140-57, and C. Curti Gialdino, *Some Reflections on the Acquis Communautaire*, 32 COMMON MKT. L. REV. 1089 (1995).

[179] For a discussion of the problematic relationship between the Left and communities of color, see Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 78 (1996).

discourse. But it also adversely affects the balance of power between progressives and traditionalists within the dominant elite. Suppression by the Left of this sort of rebellion is also necessary and involves public abandonment of outsider scholars.[180]

The courts, as an important site of institutional norm making, reflect both traditionalist and progressive unease with their new social partners of color. For traditionalists, outsider voices *are* sometimes worth suppressing, and for this purpose may be acknowledged. Suppression occurs by those time honored methods of social and cultural control — shunning and demonization. To the extent that outsider scholarship can be painlessly co-opted, controlled or radicalized, it can play a useful role in defense of the disciplining of dominant discourse.[181] The courts appear to engage in a healthy dose of demonization — radical feminists, multiculturalists, and particular writers suffer most publicly in this regard.[182] Rejectionist and separatist discourse, served up in a highly demonized form, can be used to scare and intimidate dominant group elites seeking dialogue.[183] Thus, progressive voices within the courts can be bullied, and made to confess to the progressive's un-

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[180] The "martyrdom" of Lani Guinier may provide an example of this form of "progressive" punishment. The most effective way for the liberal dominant community to discredit her notions of the meaning of voting in a diverse community was to permit her views to be aired and distorted, and then, having acknowledged them, to walk away from her personally and intellectually. *See, e.g.*, Anne Rochell, *Jesse Jackson Hits Clinton for Reneging on Promises*, ATLANTA CONSTITUTION, June 20, 1993, at D10.

[181] There is always a danger that insular communities will be detrimentally affected by the larger community, whether or not the larger community intends harm. *See* RICHARD DELGADO, THE COMING RACE WAR? AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE 105 (1996).

[182] *See supra* Part I.C.2. (discussing "Hostility"). Richard Delgado suggested an example of academic demonization in his characterization of Anne Coughlin's review of critical scholars as presenting "a picture of disingenuous scholars who lie, play to the crowd, pretend to be radicals, and make money at the expense of scholarly ideals such as the Truth." Richard Delgado, *Coughlin's Complaint: How to Disparage Outsider Writing, One Year Later*, 82 VA. L. REV. 95, 96 (1996) (criticizing Anne Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1220 (1995)). Coughlin reviewed the work of Robin West, Jerome Culp, Richard Delgado, and Patricia Williams.

[183] There are good examples from the case law in which outsider scholarship is cited. *See, e.g.*, Johnson v. Phelan, 69 F.3d 144, 151 (7th Cir. 1995) (Posner, C.J., concurring and dissenting) (discussing radical feminists prepared to treat people like animals for purposes of social engineering); Prosser v. Elections Bd. of Wis., 793 F. Supp. 859 (W.D. Wis. 1992) (describing scholarship as emanating from "radical Black"); Knight v. Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991) (quoting extensively from testimony of Dr. James Blackwell, which touches on some central ideas of critical race theory); Aguilar v. Avis Rent-A-Car Sys., 50 Cal. App. 4th 28, 53 Cal. Rptr. 2d 599 (Ct. App. 1996), *aff'd*, 21 Cal. 4th 121, 980 P.2d 846 (1999). In *Aguilar* the majority appears to have been shamed into disavowing its reliance on Professor Matsuda's work.

ease with outsider work.[184] When not suppressed or demonized, tradition-rejecting voices can be recast into something more benign; for example sexual harassment can be reduced from an attack on the patriarchal basis of social organization to patriarchal rules for civility and decorum in the workplace.[185] In other cases, these outsider voices are largely treated as noise — uncomfortable, irritating, and persistent — not worth a credible listen.[186] The absence of these voices from the official written pronouncements of the courts reduces the likelihood that people outside the academic community will be exposed to these outsider works. Only in a few of the states in which communities of color flourish do we see a break in this pattern.[187]

Ironically, the dominant normative narrative of the Left and the Right is increasingly irrelevant in the discourse of peoples of color. In this sense, and perversely, communities of color have begun to assimilate patterns of behavior from the dominant communities. For those communities, dominant norms have little relevance in the context in which these communities must exist. Indeed, for communities of color, the dominant discourse is primarily a vehicle for assimilation, essentially erasing communities of color with the whitewash of dominant normativity.[188] This might be acceptable but for the fact that, from the perspective of communities of color, this whitewashing discourse occurs without any real hope of substantive integration within the dominant community. But there is only the slimmest hope that communities of color can really attain the status of "whiteness," whatever the hope that dominant dis-

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[184] *See, e.g., Aguilar*, 50 Cal. App. 4th 28, 53 Cal. Rptr. 2d 599 (regarding Professor Matsuda's work).

[185] *See supra* Part I.B.5 (discussing citation patterns to Catherine MacKinnon's work).

[186] The cases in which the courts referred to critical legal theory are perhaps the most pointed example of this effect. *See supra* Part I.B.1.a. This is a commonly understood, if frustrating notion within academia as well. *See, e.g.*, Martha Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115-16 ("To be taken seriously in the business of law and legal scholarship means becoming the subject of sustained criticism.").

[187] *See supra* Part I.C.1 (discussing "Positive Engagement").

[188] Normative structures within an insular community, once that community becomes associated with the larger and dominant community, will invariably be influenced by the larger community. This appears to be the case within the emerging European Community. *See* Larry Catá Backer, *Forging Federal Systems Within a Matrix of Contained Conflict: The Example of the European Union*, 12 EMORY INT'L L. REV. 1331 (1998). Backer commented that "it becomes easy to see how the solicitude of a centralizing force for the cultural differences of its constituent parts will destroy the essence of those cultures. See the solicitude of cultural difference for what it is — a *zookeeper's approach to culture.*" *Id.* at 1379.

course offers.[189] There is no need to bother assimilating in the absence of sociocultural reward.

The consequence is that people of color, and particularly scholars of color, wind up having little more than interior dialogues.[190] Their voices, though more widely circulated, even in some mainstream organs of communication, remain truly *visible* only to other people of color.[191] Dominant groups remain outside this outsider discourse and substantially unaffected by it. The paucity of citation, even for the purpose of engagement and rejection of the ideas being developed by outsider scholars, is strong evidence of the separation between outsider discourse in the academy and dominant discourse in the courts.[192] In much the same way that dominant discourse, of which the courts form a part, rejects an essentialized "them," these writers of color reject the animating notions of dominant discourse. The circle is thus closed.

The effect, of course, is mutual incomprehensibility.[193] What follows is what always follows: people continue to do what they have always done — they shut their ears except to listen for what they want to hear.[194] And in a world in which the dominant still domi-

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[189] Thus, perhaps, the wistfulness in several of the opinions discussing Professor Guinier's cumulative voting proposal for remedying voting discrimination. *See supra* note 111. For discussion of the notions of whiteness within the context of color, see Delgado, *supra* note 179, at 96-97; Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 Stan. L. Rev. 1 (1991); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

[190] *See* Eleanor Marie Brown, Note, *The Tower of Babel: Bridging the Divide Between Critical Race Theory and "Mainstream" Civil Rights Scholarship*, 105 YALE L.J. 513 (1995). Brown wrote that: "When it comes to legal scholarship addressing race, by contrast, it is striking that despite the existence of critical race theory for nearly a decade, the response to it has generally been a conversation among those who identify themselves as critical race theorists." *Id.* at 515.

[191] *See* Guadalupe T. Luna, *"Zoo Island": LatCrit Theory, "Don Pepe" and Senora Peralta*, 19 CHICANO-LATINO L.J. 339, 340 (1998). "LatCrit theory offers some corrective measures. LatCrit theory, nonetheless, is not readily accessible to students in traditional curriculums. This is unfortunate because including the legal experience of outsiders would assist them in their positions of power as political actors, legislators, and others responsible for creating and interpreting law." *Id.*

[192] *See supra* Part I (discussing "Citation Patterns").

[193] This incomprehensibility, and the extreme reactions which this inability and unwillingness to comprehend which have resulted, have been nicely described by Nancy Levitt. *See* Nancy Levitt, *Critical of Race Theory: Race, Reason, Merit, and Civility*, 87 GEO. L.J. 795 (1999).

[194] Consider the oppositional perspective of groups through the eyes of Richard Delgado:

> They conclude that, because the world is fair yet we are poor and despised, there must be something wrong with us individually, or with our culture or family — we are not among the Elect. We, by contrast, having the same belief in a fair world

nate, the consequence is that social and legal norm making will be defined largely by reference to unchanged dominant group norms. The work of scholars of color remains a mere curiosity. The citation patterns outlined above make this conclusion visible indeed.

2. From the Inside Out

Mutual incomprehensibility, irrelevance, and suppression run counter to the American twentieth-century mythology of the integrative enterprise of liberal pluralism[195] and of the open access to the marketplace of ideas.[196] This review of citations of outsider scholars in the courts has perhaps revealed a pattern at odds with this American mythology. There is only a limited access to the judicial marketplace of ideas for outsider scholars. But to what extent do outsider scholarly communities share responsibility for this result?

Outside scholars present powerful arguments for change based on the long suppressed perspectives of dominant culture in its various legal guises. These outsider scholars have helped expose the coercive power of dominant culture and social norms on people, practices, and particularly the *law.*[197] That scholarship rightly

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> but knowing that we are normal — like everyone else — interpret differences in the distribution of social goods like jobs, longevity, wealth, and happiness as evidence of malevolence or neglect on the part of those in power, or else as basic defects in the social system.

Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race,* 91 MICH. L. REV. 1183, 1200 (1993) (reviewing RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992)).

[195] *See, e.g.,* STEPHEN L. CARTER, CIVILITY: MANNERS, MORALS AND THE ETIQUETTE OF DEMOCRACY (1998); William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory,* 40 WM. & MARY L. REV. 869 (1999); Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength,* 20 BERKELEY J. EMP. & LAB. L. 20 (1999).

[196] *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market."). *See generally* Stanley Ingbar, *The Marketplace of Ideas: A Legitimizing Myth,* 1984 DUKE L.J. 1.

[197] For examples of activist critical scholarship, see GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992), Anthony Alfieri, *The Antimonies of Poverty Law and a Theory of Dialogic Empowerment,* 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987-1988), and Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective,* 1 D.C. L. REV. 1 (1992). For important work of race critical scholars in this area, see Delgado, *supra* note 194, Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood,* 1 AM. U. J. GENDER & L. 1 (1993), and Derrick Bell, *Racial Realism,* 24 CONN. L. REV. 363 (1992). There is a tremendous amount of feminist literature that touches on the

gives voice to the "other," and to the *fairness* of extending to all "others" the group dignity that the dominant group extends to its own. For these scholars, outsider norms are powerful because they are deemed fundamentally value-laden in a way truer to the authentic basic values of our society. Dominant norms are corrupt. It follows that the current dominant system of values *must* collapse as a result of its self-conscious moral bankruptcy. To this end, critical scholars tend to "deal" with dominant culture and its norms as a series of logical propositions dependant wholly on the internal logic of their ordering for their viability. Ironically, critical scholars in this way perform (again) the role last played by eighteenth-century white, male, European Enlightenment rationalists who, through reason, sought to overturn the illogical dark old world in which they lived.[198]

Perversely, this rationalist exercise is based on the faith of outsider scholars in two conditions. The first is the power of their vision to alter the normative sociopolitical structure of the United States. The second is the inevitability of the disintegration of the

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subjects of women and institutional relief. Like the feminist movement itself, feminism does not speak with one voice. For purposes of this Article, and acknowledging that while many feminist scholars may share in a form of analysis, feminism does not invariably reach a singular conclusion as to the normative consequences of that analysis, I focus on the normative implications of the analytical framework of feminist scholars such as Martha Fineman. *See* MARTHA A. FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH-CENTURY TRAGEDIES (1995). This "categorization" scheme is not meant to be either. The categorization is meant for convenience. Consider the work of bridge scholars, such as Dorothy Roberts and Lucie White. *See, e.g.*, Roberts, *supra*; Lucie E. White, *No Exit: Rethinking "Welfare Dependency" from a Different Ground*, 81 GEO. L.J. 1961, 1965-67 (1993); Lucie E. White, *On the 'Consensus' to End Welfare: Where Are the Women's Voices?*, 26 CONN. L. REV. 843, 850 (1994); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

[198] Consider the rationalism inherent in Professor Richard Delgado's culture-subverting notion of "race treason." This idea holds that *all* the dominant culture needs implode is a "few good white men" who, induced to commit continuing and fundamental acts of "treason" against the racial ordering foundations of their culture ("by identifying themselves with blacks when other whites ask for their help in reinforcing white supremacy") "will seriously jeopardize the white-over-black hegemony that has reigned in this country for over four hundred years." Delgado, *supra* note 179, 96-97. It is so easy. "If the police and the courts could not be sure that every person who looks white is loyal to the system, that system would fall." *Id.* at 97. As a logical proposition this may be true. But the emotive significance of the culture is ignored, as is the power of race traitors. If race treason has had so little success with the African American community over the last several centuries at a time when such treason would be rewarded, then why should it work any better when attempted by those who would subvert the *dominant order* (for unlike Professor Delgado, I believe that whites as well as blacks "know by a kind of instinct that these folks won't be with us when trouble comes down"). *See id.* at 71; *cf.*, Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599 (1989).

current structure of social hegemony as its inherent unfairness is exposed.[199] As such, outsider scholars can approach dominant norms, and the institutions that maintain those norms, the way people who have found a new religion approach the theology of the religion they have rejected. Their *faith*[200] in the verities of the new covenant, however, necessarily blinds them to the strength of the faith of those "left behind" within the corruption of the dominant discourse.

But faith in the truth of a normative structure is not the exclusive province of outsider scholars. Core social norms are not the stuff of rationalist exercises. Rather, these norms are the expression of an internalized conviction, absolute, confident, immutable and flowing from a source beyond human corruption.[201] White, patriarchal, European — dominant — culture is not a logical exercise. Dominant culture is both powerful and thinks itself good. For those whose faith in dominant norms is strong, cultural choices expressed in law, as the Alabama courts remind us, must be treated as political issues to be decided in the area of culture and politics.[202] By concentrating on the exposure of unfairness and of exclusion of

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[199] *See, e.g.*, Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993).

[200] Ironically, this is faith in the Western religious sense, in a sense that has insinuated itself into the bones of Western civilization for millennia. *See, e.g.*, THOMAS AQUINAS, THE SUMMA THEOLOGIAE OF ST. THOMAS AQUINAS 548-49 (Fathers of the English Dominican Province trans., Daniel J. Sullivan rev., 1952). "Faith implies an assent of the intellect to that which is believed. . . . And if this be accompanied by doubt and fear of the opposite side, there will be opinion, while, if there be certainty and no fear of the other side, there will be faith." *Id.* at 382-83. This survives in modern form in the Catholic Catechism. *See* CATECHISM OF THE CATHOLIC CHURCH Pt. 1 (the Creed), s. 1, ch. 3, art. 2, § 176, at 48 (Geoffrey Chapman trans., 1994). "Communion in faith needs a common language of faith, normative for all and uniting all in the same confession of faith." *Id.* s. 2, § 185, at 51; *see also* JOHN CALVIN, CALVIN: INSTITUTES OF THE CHRISTIAN RELIGION, Book III, ch. II (1559), *reprinted in* XX THE LIBRARY OF CHRISTIAN CLASSICS 542 (John T. McNeill ed., Ford Lewis Battles trans., 1960) ("On Faith: It's definition set forth, and its properties examined). "[W]e hold faith to be a knowledge of God's will toward us, perceived from his Word." *Id.* at 549.

[201] *See* Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 78 (1996). "It is like a certain type of religiosity. If you believe you are saved, you can easily come to believe that you can do no wrong. Because you believe in God, you will believe you are God, or at least that you're in tight with Him." *Id.* The irresistible force of faith sustains the drive to assimilation of and conformity by the not yet "saved". *See id.* And yet, Professor Delgado would limit the application of its principles to dominant group culture — no others suffer this infection. I am not convinced this is so, especially given the (for example) vibrant separatist traditions of African Americans in this country.

[202] *See* Knight v. Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991); *see also supra* notes 46-58 and accompanying text.

the "other," outsider scholars ignore or at least misperceive the basis, nature and real underlying strength and vitality of the dominant normative substructure in the United States. On both a political and socio-cultural level, "[o]ur political system is a change-resistant system, designed by the founders not to move quickly and strongly in new directions."[203] The quality of court citations to outsider work provides a glimpse of the strength and resilience of the dominant normative system. This, then, is the problem for the rationalism of critical scholarship. Neither rationalism nor an appeal to faith will convince that who believe, with equal faith, in the value of the system outsider scholars curse as hopelessly corrupt. What appears as arrogance to a dissenter,[204] may be an expression of faith by dominant culture.[205]

Recast as a mere oppositional force, transformative critical theory can be easily dismissed by dominant culture as the noble gesture.[206] The citation patterns described in Part I are testament to that effect in the courts.[207] In a more extreme form of dismissal, those that challenge this hegemony are cut off from the community, from the avenues in which discourse is transmitted. Falling outside the community of discourse, such outsiders become outlaw, a pattern of social and cultural interaction well analyzed by outsider scholars.[208] Perversely, then, to place oneself outside dominant group norms both strengthens the conscious identity of

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[203] *See* Judith Havemann, *The End of Welfare as We Might Have Known It? Congress and Clinton Come Close, but Don't Hold Your Breath Waiting for It to Happen*, WASH. POST NAT'L WKLY. ED., Jan. 22-28, 1996, at 33 (quoting Richard Nathan, assistant budget director under President Nixon now Director of Rockefeller Institute of Government in Albany, New York).

[204] "Unilateral power can beget arrogance, including the arrogance of insisting that one's worldview, one's interest, and one's way of framing an issue, are the only ones." Richard Delgado & David H. Yun, *Essay II, Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulations*, 82 CAL. L. REV. 871, 890 (1994).

[205] Consider the resulting difficulty of dialogue that results. *See, e.g.*, Richard Delgado & David Yun, *The Neoconservative Case Against Hate-Speech Regulation — Lively, D'Souza, Gates, Carter, and the Toughlove Crowd*, 47 VAND. L. REV. 1807 (1994). Even within the dominant group communication can be difficult. *See, e.g.*, Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J., 989, 1077-87 (1994) (commenting that liberals and communitarians find it hard to communicate because of emphasis on different meaning of responsibility).

[206] Consider in this light the wistfulness of some of the opinions that considered Professor Guinier's notions of cumulative voting or multiple representation. *See supra* notes 106-112 and accompanying text.

[207] *See supra* Part I.C.

[208] On the positive aspect of the *outlaw* from the perspective of the "other," see Dorothy E. Roberts, *Deviance, Resistance, and Love*, 1994 UTAH L. REV. 179, 182 (discussing notion of African Americans as outlaws of dominant culture, and suggesting that deviance sometimes constitutes act of resistance to hegemony of dominant group).

the "other" and weakens the ability of this "other" to communicate with the dominant group. This compounds the incentive to marginalize and subordinate nondominant groups within the metaphysical space occupied by the dominant group. Those are the necessary consequences of falling *outside.*

Outsider theorists will continue to babble, at least as far as the dominant group is concerned, as long as that dominant culture continues to hear these scholars speak a language which it finds unintelligible. Babbling is inevitable when outsider scholars use what Professor Balkin calls "cultural software" unknown to the dominant group,[209] when they build on the basis of a normative foundation incompatible with that of the dominant society in which they live. Moreover, these scholars will find it impossible to persuasively argue to the dominant culture in favor of polyculturalism using the very language of chauvinism and dominance that serves critical theory well as an indictment against the dominant culture.[210] A dominant culture will tolerate, and to that extent recognize, the voices of self-conscious outsiders, but no farther.[211]

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[209] *See* J.M. Balkin, *Ideology as Cultural Software*, 16 CARDOZO L. REV. 1221 (1995). Cultural software is the processes, contexts and understandings we employ in the process of understanding and evaluation. *Id.* at 1225. Ultimately, then, the absurdists are right, and with a vengeance, when it comes to debating social policy involving issues of central concern to outsider scholars. I refer to that movement in French and English theatre, at its height in the 1950s and 1960s, that lamented and exposed the senselessness of the human condition. Generally, absurdist writers hold that human beings exist in an unpredictable universe in which their actions tend to compound the general unpredictability of phenomena. Forging predictability is futile in this universe because humans are innately incapable of communicating with each other at any but the most superficial level. *Cf.* SAMUEL BECKETT, WAITING FOR GODOT (1954) (expressing absurdity of, as well as need for, some external rational guide).

[210] This problem has been particularly striking in issues involving women, patriarchy and welfare reform in the United States. *See, e.g.*, Larry Catá Backer, *The Many Faces of Hegemony: Patriarchy and Welfare as a Women's Issue*, 91 NW. U. L. REV. 327 (1997) (reviewing MIMI ABRAMOVITZ, UNDER ATTACK, FIGHTING BACK: WOMEN AND WELFARE IN THE UNITED STATES (1996)); *see also* FINEMAN, *supra* note 197, at 227-37 (redefining family to extirpate patriarchy); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539 (1989) (proposing legal jurisprudence grounded in voices of African American females).

[211] *See* Balkin, *supra* note 209, at 1225. "Human beings possess an inexhaustible drive to evaluate, to pronounce what is good and bad, beautiful and ugly, advantageous and disadvantageous. Before culture human values are inchoate and indeterminate; through culture they become articulated and refined." *Id.* Calls for recognition of multiple cultural evaluative processes will fall on deaf (dominant group) ears. Transformative models remain "defeated dreams." Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1565 (1996) (reviewing LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, and JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY). Other transformative agendas fare no better. *See, e.g.*, Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and*

The dominant majority will tend to ignore writings that marginalize its views and seek to sweep away it core normative values. Such writings do not communicate with the dominant group. "When it comes to legal scholarship addressing race, by contrast, it is striking that despite the existence of critical race theory for nearly a decade, the response to it has generally been a conversation among those who identify themselves as critical race theorists."[212] They cannot. The dominant group will not engage in dialogue on the basis of its acceptance of the notion that it must be destroyed or swept aside. Hermeneutics as suicide is rare, as cultures, and especially, as dominant cultures, go.

In a sense, then, critical theorists can fall into the old Marxist-Leninist trap:[213] it is well enough to identify racism and patriarchy (just as it was to identify capitalism) as an evil; it is quite another to assume that *naming the evil* will result in its destruction or transmogrification.[214] Judicial citation patterns suggest that naming a

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Official English, 77 MINN. L. REV. 269 (1992) (calling for recognition of linguistic polyculturalism); Reginald Leamon Robinson, *"The Other Against Itself": Deconstructing the Violent Discourse Between Korean and African Americans*, 67 S. CAL. L. REV. 15, 21 & n.13 (1993).

[212] *See, e.g.*, Brown, *supra* note 190, at 515.

[213] Consider classic Marx (whose work modern political Hegelians tend to internalize if consciously forget). Marx and Engels wrote:

> The history of all hitherto existing society is the history of class struggles. . . . [O]ppressor and oppressed stood in constant opposition to one another. . . . The modern Bourgeois society that has sprouted from the ruins of feudal society has not done away with class antagonisms. It has but established new classes, new conditions of oppression, new forms of struggle in place of the old ones.
>
> Modern bourgeois society . . . , is like the sorcerer who is no longer able to control the powers of the nether world whom he has called up by his spells. . . . The weapons with which the bourgeoisie felled feudalism to the ground are now turned against the bourgeoisie itself. But not only has the bourgeoisie forged the weapons that bring death to itself; it has also called into existence the men who are to wield these weapons — the modern working class, the proletarians.

Karl Marx & Friedrich Engels, *Manifesto of the Communist Party*, *in* GREAT BOOKS OF THE WESTERN WORLD 419, 419, 422 (Robert M. Hutchins ed., 1952). *But see* Robinson, *supra* note 211.

Consider a modern critical variation. Some apply the pattern of revolution following from conflict and resulting in the replacement of the decadent "old" covenant by the "new." *See, e.g.*, FINEMAN, *supra* note 197 (discussing replacement of patriarchy with new social order). Social constructivists fall into the same trap. *See, e.g.*, William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994).

[214] But there is *power* in a name. Labeling theory has taught us that we tend to become what we are called. *See, e.g.*, David P. Farrington, *The Effects of Public Labeling*, 17 BRIT. J. CRIMINOLOGY 112 (1977). Yet it also reveals the possibility of alternative shared truths that may well have the effect of beginning a transmogrification. On the notion of naming and

core norm evil can create a mirror effect — those who identify a thing or practice as evil or bad can in turn be characterized as the "true" face of evil in turn.[215]

The kind of dialogue between "mainstream" and "outsider" that is reflected in the citation patterns of the courts, based on mutual nonrecognition, breeds subordination.[216] The only question of interest in this sort of dialogue is: which set of norms will subordinate the others? Social cohesion, the discipline of the group in the face of mutual incompatibility, requires choice. From the perspective of the dominant group, subordination means silencing contrary cultural norms in the public (though not the private) space. Polyculturalism can exist in theory; yet in reality it more accurately describes only that transitional period between the dominance of one set of sociocultural norms and another. One set of norms must govern, the norms of others, now necessarily outsiders, may exist subordinate to the governing norms. In a pluralistic society such a set of norms acts as *primus inter pares*. In other societies, particularly traditional and religiously based societies, all other norms are suppressed. Thus, a dominant group will hear the stridency of outsider scholarship[217] as the attempt by one group to impose its

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truth, and the relationship of both to law and culture, see Backer, *Constructing a "Homosexual" for Constitutional Theory*, *supra* note 20, at 529.

[215] Critical theory can be the dominant culture's normative bogeymen. It assumes its greatest social utility as fairy stories evoking images of the evil (witches, goblins, little people, spirits, deformities) that lives in the dark apocryphal forest just outside the safety of the walls of current dominant norms. These are the kind of images used by a dominant culture to reinforce cultural norms. *See, e.g.*, Johnson v. Phelan, 69 F.3d 144, 151 (7th Cir. 1995) (Posner, C.J., concurring and dissenting) (discussing radical feminists); Prosser v. Elections Bd. of Wis., 793 F. Supp. 859 (W.D. Wis. 1992) (describing scholarship as emanating from "radical Black").

[216] *See* Larry Catá Backer, *Tweaking Facts, Speaking Judgment: Judicial Transmogrification of Case Narrative as Jurisprudence in the United States and Britain*, 6 S. CAL. INTERDISCIPLINARY L.J. 611, 616 (1998). Backer stated:

> Judging is a process of narrative transmogrification: courts hear the stories of litigants and transform them into something juridically digestible. Our society uses these transformed stories in a way that conforms to what society wants to know. Story becomes counter-story, which in turns becomes the basis for the rules which explains the way in which the story is retold.

Id. The citation pattern thus provides reassurance to traditionalists that what we believe is, in fact, true, by a process of selective observation. *See* Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929 (1991).

[217] Stridency is a very charged term. It has been used in the late twentieth century, to demonize and make irrelevant much of the work of women, especially those seeking to question the status quo. *See* Phyllis Schlafly, *Defending Domestic Tranquility from Feminism's Assault on Marriage and Motherhood*, 2 TEX. REV. L. & POL. 293 (1998) (reviewing F. CAROLYN

norms on all others — norms which will still subordinate and exclude but in ways different from that of the current norms. The perceived hypocrisy and hidden agenda of outsiders vying for the role of dominant can only serve to reduce their discourse to noise to the ears of the dominant. There may well be no solution to this problem when the dialogue between insider and outsider is cast as an either-or contest.

B. Citation Patterns and the Federalism Effect

The most interesting generalization that can be made from the patterns of citations of outsiders is that the American federal system has substantially contributed, at least indirectly, to the penetration of outsider scholarship in the courts. What the citation patterns suggests is that the availability of multiple sovereigns, and sovereign courts, has increased the size and quality of this penetration in the courts.

For a long period of American history, the protection of the sovereign power of states — states rights — has been the province of geographical minorities, mostly members of the elites of the old southern slave-owning landed aristocracy.[218] Certainly, for poor people and people of color, states traditionally have appeared to be the enemy, and a unitary federal policy the preferred means of attaining equal status within the American polity.[219] Yet the notion

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GRAGLIA, DOMESTIC TRANQUILITY: A BRIEF AGAINST FEMINISM (1998). Schlafly wrote: "Most textbooks view marriage as especially bleak and dreary for women. The texts are inordinately preoccupied with domestic violence and divorce, describing marriage as archaic and oppressive, not just occasionally, but inherently. This is but one piece of evidence of the strident feminism that dominates college campuses today." *Id.* at 308; *see also* Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL. & L. 75, 105 (1994) (citing *Crossfire* (CNN television broadcast, July 4, 1994) ("Hell hath no fury like a woman advocate advancing her own cause! Portia's behavior warrants the frequent criticism that accompanies 'strident' feminist law reformers who blindly see all men as the enemy.")). I use it here as a reminder that indeed, the dominant group will tend to hear calls for change as dangerous to its own view of a proper world or social order, and therefore dismiss it by labeling it "strident."

[218] *See, e.g.*, AUGUST O. SPAIN, THE POLITICAL THEORY OF JOHN C. CALHOUN 189-190 (1968).

[219] In the context of the administration of the federal-state program of aid to families with dependent children, see Carlson v. Remillard, 406 U.S. 598 (1972), holding that federal eligibility rules broadly void state rules (approved by federal bureaucracy) that denied benefits to the family of a soldier serving in Vietnam, Townsend v. Swank, 404 U.S. 282 (1971), holding that states have no power to vary the terms of optional programs under AFDC, Dandridge v. Williams, 397 U.S. 471 (1970), holding that the Federal Constitution does not create an entitlement (absolute right) to receive from states a certain minimum amount of poor relief (subsistence), Goldberg v. Kelly, 397 U.S. 254 (1970), holding that federal consti-

of the protection of discrete minorities, developed by southern antebellum theorists like John C. Calhoun,[220] may well provide the preferred base for the protection of minority rights in the coming century.[221]

As populations shift in the United States, and traditionally marginalized groups become a majority in certain states, the notion that the general government ought to make room for effective political expression at the state level is gaining appeal. The greater the number of formal venues for the construction of law, the greater the opportunity for the normalization of outsider voices.[222]

The process of legal transformation abhors the monolith. The power of this notion is demonstrated by the process of citation of outsider scholars within the judicial organs of the United States. The existence of multiple organs of lawmaking, each representing different admixtures of the people of that jurisdiction provide the most congenial environment for the full participation of what John C. Calhoun described as "each interest or combination of interests, orders classes or portions into which the community may be di-

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tutional principles of due process required state welfare administrators to give welfare beneficiaries meaningful notice and meaningful opportunity to be heard before terminating welfare benefits, and Shapiro v. Thompson, 394 U.S. 618 (1969), holding that state residency requirements permitted by AFDC unreasonably burdened the constitutionally protected "right to travel," and right to locate anywhere within *federal* union.

[220] Calhoun's thoughts were set down by him in writing. *See* John C. Calhoun, *A Disquisition on Government, in* JOHN C. CALHOUN, UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 3 (Ross M. Lence ed., 1992) [hereinafter UNION AND LIBERTY]; John C. Calhoun, *A Discourse on the Constitution and Government of the United States, in* UNION AND LIBERTY, *supra*, at 79.

[221] For a discussion of the philosophy of John C. Calhoun and the way the ideas he developed relating to state sovereignty and political checks on political majorities, reapplied in a modern context, has significance for subordinated or minority communities within a nation-state, see Larry Catá Backer, Critical Turnings in Federalism: On the Intellectual Legacy of American Confederate Federalism in the European Union (1999) (unpublished manuscript, on file with author).

[222] *See* Larry Catá Backer, *Culturally Significant Speech: Law, Courts, Society and Racial Equity*, 21 U. ARK. LITTLE ROCK L.J. 845, 873 (1999). Backer stated:

> For this effort, impact litigation is important — not for the purpose of coercing change through court action, but to acquire a culturally significant forum for preaching our views. Likewise, admission to the halls of government is important for the purpose of providing a forum for the expression of our understanding and the memorialization of those expressions as "law."

Id.

vided."[223] Demographic power and group self-consciousness, as the aristocrats of the old South well understood, precedes political power. Outsiders should take this lesson to heart as new interests, groups and factions come into their own in the coming century. The road to normalization of previously excluded communities may well lie through the states. Citations of outsider scholars provides a window into the normalization progress.

CONCLUSION

Citations in the opinions of courts provide an important measure of the acceptance and acceptability of the work of outsider scholars, primarily women and people of color within the formal institutional establishment for the crafting of law. A study of the rates of citation in federal and state courts among a representative sample of outsider scholars reveals that though some progress has been made, some scholars are being cited only some times, the progress is at least erratic. Engagement by courts is far less common than either hostility or, more pervasively, indifference. Yet there are bright spots that point the way to the future. The most significant of these is the growing importance of states, especially states where traditional outsiders may be becoming more integrated into the political and cultural life of the states, in the inclusion of works of traditional outsider scholars in their jurisprudence. It may well be that federalism will become an important element in the struggle by traditional outsiders for a place at the political table.

[223] ERWIN L. LEVINE, THE GHOST OF JOHN C. CALHOUN AND AMERICAN POLITICS 11 (1972) (quoting JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT (Richard Cralle ed., 1863) (1850), on the principle of the concurrent majority as a limit on government power).