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QUATSCH!*

Matthew W. Finkin†

[I]t matters, it always matters, to name rubbish as rubbish . . . to do otherwise is to legitimize it.¹

Daniel Farber and Suzanna Sherry examine the writings of a loosely connected group of legal academics who hail from several schools of thought—critical legal studies, radical feminism, critical race theory and its literary borrowing in narrative theory or “storytelling.”² They gather these under the general rubric of “radical multiculturalism.” This usage is unfortunate to the extent it could be taken generally to denigrate “multiculturalism,” which, properly understood, proceeds from the Western proclivity for inquiry into, comparison with, and assimilation of what other cultures have to offer. Perhaps “radical postmodernism” would have been a better, or, at least, less freighted choice. Even so, Farber and Sherry distill these writings supplying a rich texture of citation and direct quotation to support their critique. A reader newly come to the radicals’ assertions might well find them bizarre, even ludicrous; and, indeed, a radical reviewer has complained of Farber and Sherry’s presenting the radicals’ “conclusions without providing any of their underlying analysis or explanation.”³ “Of course,” she explains, “conclusions without any supporting analysis are about as silly as punch lines without the set-up for

* LANGENSCHIEDT’S GERMAN-ENGLISH DICTIONARY 231 (rev. ed. prtg. 1993) (“Quatsch[; familiar] . . . nonsense, rubbish, *sl[ang]* rot, crap, bullshit . . .”).

† Albert J. Harno Professor of Law, The University of Illinois. I am indebted to Bernard Meltzer and Sanford Jacoby for comment. My thinking *and* my German have also been clarified by comment from my colleague, Harry Krause. Errors in both, however, remain my own.

1. DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 3 (1997) (quoting Salman Rushdie).

2. See generally *id.*

3. Daria Roithmayr, *Guerillas in Our Midst: The Assault on Radicals in American Law*, 96 MICH. L. REV. 1658, 1662 (1998).

the joke.²⁴ But we aren't being set up for a joke—at least not intentionally—we're given what purports to be serious conclusions; and by parity of reasoning our critic could rightly claim that Wagner's music really *is* much better than it sounds. If the radicals' conclusions sound nonsensical, risible or a good deal worse, it could follow that something is wrong with the way they were reached. Suffice it to say, Farber and Sherry provide a fully fledged account; given the salience of the task, they are scarcely so foolish as to be inaccurate. They name rubbish as rubbish and explain why.

If their argument can be faulted it would not be so much for what they have said as what they have left unsaid, or, more accurately, for what they have hinted at but left largely unattended. Set out below is a summary of Farber and Sherry's account with a reservation on the ground just mentioned and a brief rumination on what all this tells us about the current state of affairs in the legal academy.

I. THE ASSAULT ON REASON

A. THE RADICAL MULTICULTURAL CLAIM

Radical multiculturalism proceeds from the altogether banal proposition that our societal reality, including law, is "socially constructed."²⁵ It next seems to borrow the Marxist notion that "[t]he ruling ideas of each age have ever been the ideas of its ruling class."²⁶ Turning to *this* age, the ruling ideas in the legal academy are the seedlings of the Enlightenment (the roots of which go a good deal deeper) that reached full

4. *Id.*

5. The term *banal* means that which is "open to the use of the entire community" as well as the more common usage, as something trivial. Alice Yaeger Kaplan, *Reproductions of Banality: Fascism, Literature, and French Intellectual Life*, in 36 *THEORY AND HISTORY OF LITERATURE* 43 (1986).

6. KARL MARX & FRIEDRICH ENGELS, *Manifesto of the Communist Party*, in *BASIC WRITINGS ON POLITICS AND PHILOSOPHY* 26 (Lewis S. Feuer ed., 1959). This was, perhaps, explained by Marx and Engels a bit earlier, in 1846:

The ideas of the ruling class are in every epoch the ruling ideas: i.e. the class, which is the ruling material force of society, is at the same time its ruling intellectual force. The class which has the means of material production at its disposal, has control at the same time over the means of mental production, so that thereby, generally speaking, the ideas of those who lack the means of mental production are subject to it.

KARL MARX & FRIEDRICH ENGELS, *THE GERMAN IDEOLOGY: PARTS I & III*, at 39 (R. Pascal ed., 1947).

flower in the liberal, materialistic, individualistic, bourgeois West of the nineteenth century: a belief in reason, which assumes that there are "facts" upon which the mind can operate by logical processes and that ideas are accordingly subject to critical assessment; a belief in objectivism, that there are norms of truth such that theories can be assessed on rational grounds; and a belief in universalism, that ideas are equally accessible to any student of a subject with the intelligence and motivation to master it.

To radical multiculturalism, this set of ideas is devised to serve the interests of the hegemonic class which is determined today not by a relationship to the means of production but by group identity, i.e., by sex (or sexual orientation), race and ethnicity. In other words, the academy's commitment to reason, objectivity and universality is a social construct devised by a white, male, heterosexual, Christian (that is, vaguely liberal Protestant⁷) hegemonic class in order to perpetuate its power and to exclude all others. As one observer put it, "Rationality, objectivity, accuracy and standards of intellectual quality and merit are slogans or masks of oppression designed to convince the oppressed that subordination is justice."⁸

Nor is radical multiculturalism identical with nihilism for it does have a proposal of its own, reflecting a mirror image of what it depicts: If there is "no objective reference point, separate from culture and politics, available to distinguish truth from ideology, fact from opinion, or representation from interpretation,"⁹ then truth is subjective. What saves this self-referential validation from degenerating into solipsism is the assertion that this subjectivity is grounded in membership in

7. Cf. GEORGE M. MARSDEN, *THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF* 434 (1994) (reference omitted):

Today, however, the idea of such objective science no longer seems viable and many critics have pointed out the community-relative character of moral ideals, including those that limit academic freedom. In the present context it seems much more plausible to view all ideals for the social good as sectarian and the sciences that serve those ideals as equally so. There is little basis for sustaining the illusion that "academic freedom" is part and parcel of an open-minded scientific search for truth that ought to exclude the substantial influence of all religious viewpoints.

Marsden is no radical multiculturalist. He recites their relativism in order to plead a place in the academy for religiously-determined truth.

8. FARBER & SHERRY, *supra* note 1, at 26 (quoting Neil W. Hamilton).

9. *Id.* (quoting Gary Peller).

the very groups that have been marginalized, devalued and oppressed. Consequently, "ways of knowing" are posited that differ radically from that of the dominant class: truth is to be found not in "facts," by "reason," but in the mythopoetic power of the stories told by these groups; their rhetoric "is a 'magical thing' that 'transforms things into their opposites.'"¹⁰ Consequently, "truth" known *this* way cannot be universal. Of the notorious episode of Tawana Brawley, for example, Patricia Williams has opined that Ms. Brawley "has been the victim of some unspeakable crime. . . . No matter who did it to her—and even if she did it to herself. Her condition was clearly the expression of some crime against her,"¹¹ even if her allegations of rape and torture by white assailants were, in fact, made of whole cloth. That is, her perception of reality, as a black woman, trumps any claim of objectivity. It follows that the law should be driven by her perception and not by some spurious objectivity, though it would seem problematic just what the legal result should be.

Suffice it to say, being female or black or homosexual alone might not be a sufficient condition for truth-knowing and truth-speaking, for members of these groups may be co-opted by the power structure and mouth the masters' mantras. Consequently, truth can only be told by those members of these groups who speak in an "authentic voice"—which, for example, is to exclude Clarence Thomas and Thomas Sowell. Inasmuch as the authenticity of what one speaks has to be certified by the racial, ethnic or gendered community, this certifying function, lacking any more authoritative agency, is performed via its self-appointed spokesmen and women in the academy *ex cathedra*.¹²

10. *Id.* at 31 (quoting Thomas Ross).

11. *Id.* at 96 (quoting Patricia J. Williams).

12. Farber and Sherry observe that inasmuch as the radicals measure scholarship by political tests, scholars have been browbeaten by the radicals because of political differences. *See id.* at 103. They point inter alia to "[t]he vilification of Julius Lester, drummed out of the Afro-American Studies Department at the University of Massachusetts for essentially refusing to stand silent while other blacks made anti-Semitic remarks." *Id.* at 104. This fails to capture the full meaning of the episode. In 1988, Lester wrote critically of James Baldwin whom he alleged to have remained silent some four years earlier while anti-Semitic remarks were delivered. Lester's allegations only capped a long process of estrangement with the Department resulting in the publication of a pamphlet signed by fifteen members of the department, including its Chairman, calling Lester an "*anti-Negro Negro*." W. E. B. DUBOIS DEPT OF AFRO-AM. STUDIES, JAMES BALDWIN ON BLACKS AND JEWS 26 (1988).

It follows accordingly that scholarship *is* politics. When an eighty-plus page article in the *Harvard Law Review* consistently deploys the upper-case “B” in referring to blacks and the lower-case “w” in referring to whites, the writer explains:

[T]he use of the upper case and lower case in reference to racial identity has a particular political history. Although “white” and “Black” have been defined oppositionally, they are not functional opposites. “White” has incorporated Black subordination; “Black” is not based on domination. “Black” is naming that is part of counterhegemonic practice.¹³

The typeface “names” the writer’s reality and is deployed for a political purpose.

B. THE CRITIQUE

Radical multiculturalism is vulnerable, like much of the “postmodern” thought it borrows from, in its theory of knowledge and especially in the consequences that flow from it. This is not to say that models of “truth” and “objectivity,” especially in the social sciences and humanities that were given full fashion in the nineteenth century, would not benefit from serious rethinking; for example, that it might not pay critically to reconsider the distinction between fact and representation.¹⁴ But such is not presented: of concern here is not an assimilation of new insight in the discipline’s approach to truth, but radical claims that there is “no truth outside of ideology.”¹⁵

Is it true that there is “no objective reference point, separate from culture and politics, available to distinguish truth from ideology, fact from opinion”?¹⁶ Let us assume this essay were to begin, “I am writing this from an ice floe in the North Atlantic.”¹⁷ If there is no objective reference point available—not even *available*—to distinguish fact from opinion, then the

One member of the department was quoted in the press asserting Lester’s “flight from blackness.” Jonathan Kaufman, *At U Mass, Comrades Have Become Combatants*, BOSTON GLOBE, July 25, 1988, at 1. In sum, the members of the Department of Afro-American Studies reserved to themselves the prerogative to define what authentic blackness spoke. By mutual agreement, Lester transferred to the Department of Jewish Studies. *See id.* at 21.

13. Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1710, n.3 (1993) (citation omitted).

14. *See* JOYCE APPELBY ET AL., *TELLING THE TRUTH ABOUT HISTORY* (1994) (stating a powerful extended argument for the incorporation of new critical insights while rejecting the excesses of postmodernism).

15. *Id.* at 203 (italics added).

16. FARBER & SHERRY, *supra* note 1, at 26 (quoting Gary Peller).

17. With appreciation the late Sir Peter Medawar, winner of the Nobel Prize for Medicine in 1960, stated:

ot even *available*—to distinguish fact from opinion, then the truth *vel non* of this proposition can be decided not by sending a search party out to the North Atlantic, but by sending an opinion survey out to the readership.¹⁸

The writer concedes elsewhere in the essay the quoted assertion was taken from that “the new critical approaches [do not] deny that we can, and do, make decisions about the world . . . about what makes sense to us and what doesn’t.”¹⁹ But if we do make decisions in everyday life that we can explain as making sense, as being reasonable, why would such a reasoning process not be equally applicable in science, history or law? This concession would seem to eviscerate radical multiculturalism’s epistemological claim. Not so. “The point,” the writer goes on to explain, “is that there is no grand organizing theory or principle with which to justify our *social choices* as neutral and apolitical, as the *products* of reason and truth rather than of passion or ideology.”²⁰ This tends to conflate the “social choices” we make—political or otherwise—with the factual determinations and reasoning processes we rely upon, even if only in part, in making them. This transitional conflation returns the writer to his larger theme, for he next eviscerates the apparent concession: the factual determinations and reasoning processes we rely upon even in everyday life are themselves merely a “particular way of representing the world,” the effect of a “particular form of social power.”²¹ And

When the word is used in a scientific context, *truth* means, of course, correspondence with reality. Something is true which is “actually” true, is indeed the case. This is empirical truth—truth in the sense in which it is true to say that I am at this moment delivering the Romanes Lecture and not standing on my head on an ice floe in the North Atlantic; and you know that correspondence with reality in just this sense is the test that all scientific theories must be put to, no matter how lofty or how trivial they may be.

PETER MEDAWAR, *Science and Literature*, in PLUTO’S REPUBLIC 42, 52 (1982).

18. Though it would seem that the determination of whether or not the opinion of the readership is that the writer is indeed on an ice floe has to turn on an objective reference point, i.e., in the counting of the replies, else it be a matter of opinion what the opinion is in an infinite regression of opinions.

19. Gary Peller, *Reason and the Mob: The Politics of Representation*, in TIKKUN . . . TO HEAL, REPAIR AND TRANSFORM THE WORLD 163, 165 (Michael Lerner ed., 1992).

20. *Id.* (emphases added).

21. *Id.* The passage is worth noting:

[T]he deconstructive approach puts at issue what have been the traditional mainstays of our liberal and progressive commitment to Enlightenment culture. . . . The new critical approaches suggest that what has been presented in our social-political *and our intellectual*

so it turns out that there really *is* no good reason why an opinion survey should not be a perfectly acceptable way of deciding whether or not I am standing on an ice floe. This is *Quatsch*—in science,²² in history,²³ in life,²⁴ in law.

traditions as knowledge, truth, objectivity, and reason are actually merely the effects of a particular form of social power, the victory of a particular way of representing the world that then presents itself as beyond mere interpretation, as truth itself.

Id. (emphasis added).

22. See MEDAWAR, *supra* note 17, at 52-53:

We must at once dismiss the idea that empirical or factual truth as scientists use it (or lawyers or historians) is an elementary or primitive notion of which everyone must have an intuitive or inborn understanding. On the contrary, it is very advanced, very grown-up, something we learn to appreciate, not something that comes to us naturally.

23. The historian, Eric Hobsbawm, has drawn attention to the rise of "postmodernist" intellectual fashions in Western universities, particularly in departments of literature and anthropology, which imply that all "facts" claiming objective existence are simply intellectual constructions—in short, that there is no clear difference between fact and fiction. But there is, and for historians, even for the most militantly anti-positivist ones among us, the ability to distinguish between the two is absolutely fundamental. We cannot invent our facts. Either Elvis Presley is dead or he isn't.

ERIC HOBSBAWM, ON HISTORY 6 (1997).

24. Cf. ALAN SOKAL & JEAN BRICMONT, FASHIONABLE NONSENSE: POSTMODERN INTELLECTUALS' ABUSE OF SCIENCE 91-92 (1998):

[W]e do not see any *fundamental* difference between the epistemology of science and the rational attitude in everyday life: the former is nothing but the extension and refinement of the latter. Any philosophy of science—or methodology for sociologists—that is so blatantly wrong when applied to the epistemology of everyday life must be severely flawed at its core.

Issue is implicitly taken with this by a literary critic who has distinguished the existence of facts as we confront them in everyday life from facts as the stuff out of which scientific and other systematic knowledge is built, which she calls "epistemological units." MARY POOVEY, A HISTORY OF THE MODERN FACT: PROBLEMS OF KNOWLEDGE IN THE SCIENCES OF WEALTH AND SOCIETY 9 (1998). She argues that such "facts *seem* (and can be said) *to exist* . . . *only* when they constitute evidence for some theory—*only*, that is, when there is a theoretical reason to notice these particulars and name them as facts." *Id.* (emphases added). She later issues a reminder on point: "I place 'fact' and 'facts' in imaginary question marks to signal their socially constructed nature." *Id.* at 336. This rather wonderfully confuses the question of whether a fact *exists* at all with its *relevance* to a system of knowledge. According to Professor Poovey, that I might be starving (even until death) is not a "fact" until it is made relevant to a theory of nutrition, whereupon the fact that I have starved to death becomes a "social construct." Professor Poovey is correct: we can think of facts as existing only this way; but we don't, and there is no good reason why we should.

Alternatively, it is possible that our radical multiculturalist is only expressing a deep epistemological skepticism about the possibility of drawing the distinction between, say, fact and opinion. "But deep epistemological skepticism is decidedly not entitled to pass itself off as an obvious truth."²⁵ It may be that, like solipsism, deep skepticism cannot be refuted; but, "the mere fact that an idea is irrefutable does not imply that there is any reason to believe it is true."²⁶ Moreover, if a deep epistemological skepticism undergirds the radical multicultural claim, by its own terms it must be equally skeptical of the truth of the alternative "ways of knowing" that it posits and which we have accordingly no better—or even good—reason to accept. Whence the dark consequence of radical multiculturalism's approach to knowledge. As Thomas Haskell has explained:

If there is no such thing as truth but only a variety of incommensurable perspectives in criterionless competition with one another, then force and persuasion become indistinguishable If nothing is true, then giving up one's own initial perspective and adopting that of an interlocutor can signify nothing more than submission. The honorable option of bowing to reason and willingly renouncing error for the sake of impersonal truth drops out, leaving only *me v. you*, or *us v. them*. Down this path lies Nietzsche's world, where not only power and knowledge blur together but might and right as well.²⁷

For the most part, Farber and Sherry do not deal with these questions. They choose instead to center their attack by taking radical multiculturalism on its own terms, in its critique of the concept of academic merit. This may have been a tactical mistake, for a reason to be explored below; but it has the dual benefit of ease of comprehension and analytical power.

By the radicals' lights, standards of academic merit are socially constructed to perpetuate the white, male, heterosexual, Christian hegemony necessarily to subordinate or oppress women and minorities. However, there are minority groups that seem to be doing quite well in the academy. The Nobel Prizes [Sweden] in medicine, chemistry, economics, and physics seem to know no ethnic or religious boundaries; neither does the Wolf Prize [Israel] nor the Humboldt Research Prize

25. Judith Jarvis Thomson & Matthew Finkin, *Academic Freedom and Church-Related Higher Education: A Reply to Professor McConnell*, in *FREEDOM AND TENURE IN THE ACADEMY* 419, 428 (William W. Van Alstyne ed., 1993).

26. SOKAL & BRICMONT, *supra* note 24, at 54 (emphasis omitted).

27. Thomas L. Haskell, *Justifying the Rights of Academic Freedom in the Era of "Power/Knowledge"*, in *THE FUTURE OF ACADEMIC FREEDOM* 43, 71 (Louis Menand ed., 1996).

[Germany], both awarded for world-acknowledged achievements in a variety of disciplines. The Chinese, who suffered under federal exclusionary laws and state restrictive acts, the Japanese, who were interned in concentration camps during World War II, and the Jews, who were placed under quotas at Ivy League schools as recently as the 1960s, all seem to be doing rather well. As Seymour Martin Lipset has noted, Jews have been "extraordinarily successful in . . . meritocratic competition."²⁸ How is this to be explained?

Farber and Sherry attend primarily to the application of radical multiculturalism to the Jews because in dealing with the fact of Jewish success the radical multicultural claim has inherently anti-Semitic implications. There is, of course, a perfectly "rational" explanation: what America values, though "socially constructed," it offers to any person with the capacity and will to accept whether it be NBA stardom or a chair in physics. If Jews and some Asian groups have been notably unsuccessful in competing for the former, they have had some success in competing for the latter. From this it would seem that the standards of disciplinary excellence are adaptive, not oppressive.

If radical multiculturalism wishes to offer a contrary view, it has to explain why a white, male Gentile power structure would rig the rules against some minorities, but not against the Jews and some other minorities; and all the available explanations—for example, that the Jews' ostensibly neutral academic success was allowed them to be deployed as agents of the oppressor, as willing collaborators or obsequious lackeys of the hegemonic class, much as they served as "court Jews" for the European nobility (and were detested by the peasantry for it)—are at once academically demeaning and historically freighted.

Professor Deborah Malamud has recently taken up the question of Jewish success in an effort to defend affirmative action in higher education;²⁹ but her arguments lend no support

28. SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* 151 (1996).

29. See Deborah C. Malamud, *The Jew Taboo: Jewish Difference and the Affirmative Action Debate*, 59 OHIO ST. L.J. 915 (1998). (I am indebted to Daria Roithmayr for bringing this reference to my attention.) Professor Malamud speaks of the topic as a "Jew Taboo," *id.* at 968; but, as she acknowledges at the outset—and as her extensive references indicate—one subject Jewish social scientists have *not* been reticent about is the fact of and reasons for the success of Jews in America. The "taboo" part is her claim that success

to the radical camp. Malamud argues that the Jews succeeded academically—in say, logic or physics—because they had socio-economic advantages that set them apart from other immigrant and minority groups at the time and that allowed them to secure the education that then enabled them to excel in terms of the standards the discipline set.³⁰ But to radical multiculturalists, those very standards, of what constitutes excellence in say, logic or physics, are social constructs: the academically adept are not accepted by the discipline because of their achievements, but because of the power of those who dominate the discipline to accept them. To radical multiculturalists, Jewish success *has* to depend on Jewish power, or craftiness; and because of that, it is inherently anti-Semitic.

In sum, Farber and Sherry pay radical multiculturalism the highest academic respect: they treat it seriously, and they ask a hard question posed in *its* own terms. If radical multiculturalism wishes to be worthy of respect, it has to come up with a persuasive answer based not on sociology or historical circumstances, but on the claim it makes about power—and thus far it has not even attempted to do so.³¹

flowed from advantages the Jews “reaped . . . from the fact that another group—blacks—occupied the lowest rung on America’s racialized social ladder.” *Id.* at 969. Whatever the soundness of that claim, it proceeds from a socioeconomic explanation, not an ideological one.

30. *See id.* at 965-68.

31. One “critical race” proponent has addressed Farber and Sherry’s argument in a review of the instant book:

It is possible that dominant groups historically constructed merit standards that naturally favored *their* own cultural performances, but that after formal discrimination was outlawed, groups like Jews and some Asian groups in some professions began to outperform them on the measures they constructed. In contrast, other groups like Latino/as or African Americans, who had entirely different social, political, and cultural histories, continued to be excluded by those standards. *This alternative explanation, completely ignored by the authors, is perfectly consistent with the radical critique of merit.*

Rothmayr, *supra* note 3, at 1669 (emphases added). Alas, this simply won’t do.

The first sentence assumes that the standards were in fact objective. Jews weren’t excluded by the standards; they were excluded by overt discrimination, a refusal to abide by the standards, which refusal could not be continued in the face of anti-discrimination law. Such was a common explanation of why many large law firms began to hire Jewish associates after World War II; but, as the leading study of these firms in the 60s observed, that was not the main reason. *See* ERWIN O. SMIGEL, *THE WALL STREET LAWYER* 65 (1964). The strong bias of the major New York law firms against the hiring of Jews was breaking down under the sheer weight of “academically superior” Jewish lawyers being produced by Ivy League law schools. *Id.* at 45.

On the contrary, a strategy has been essayed not so much to deal with the question as to avoid it: if the ruling ideas in an academic discipline embody white male dominance, then the very process of mastering the discipline in order to succeed in it is a form of oppression. This has been argued by feminists to be so of logic and physics: that the *modus ponens* is a male-invented way of defining rationality that oppresses women;³² that the equation $E=mc^2$ is a sexed equation that privileges the constant for the speed of light.³³ This argument illuminates

By either account, however, the standards of merit *were* objective; and once they had to be consistently applied—either because the law required it or because it would have been economically foolhardy for firms to deny themselves such high quality talent—the Jews could not be kept out.

The second sentence explains that other groups that have had “different . . . histories” (or had different “cultural performances”) than the Jews were still excluded. Fair enough; but *why* were they still excluded? There are two possible explanations. The first is sociological—that for social, cultural, economic, and historical reasons, these groups find it harder to achieve than Jews and Asians. This seems the fair implication of Professor Malamud’s treatment of the Jewish condition. But this is only to say that, with effort and over time, these groups can and will get there. That is, that the standards of academic merit are objective and adaptive for these groups just as for Jews and Asians. This would explain the situation; but it would be perfectly *inconsistent* with the radical critique of merit.

The second explanation would maintain that the rules are still rigged—but now to favor Jews (and some Asians) over African-Americans. This explanation *is* perfectly consistent with the radicals’ critique of merit; but, if the necessary next question—of *why* the rules are that way—is not to be answered in historical and sociological terms, then the answers necessarily implicate the anti-Semitic consequences that our “critical race” proponent inartfully dodges.

32. See Ruth Ginzberg, *Feminism, Rationality and Logic*, APA NEWSLETTER ON FEMINISM AND PHILOSOPHY, Mar. 1989, at 34, 37. The *modus ponens* in the inferential form: if P, then Q; P, therefore Q. See *id.*

33. See SOKAL & BRIGMONT, *supra* note 24, at 109 (quoting Luce Irigaray). “To privilege” is to confer a special right or advantage, usually on a person or class. Postmodernists commonly employ the term in conjunction with their concept of hegemony; thus, a “privileged” equation, as a “sexed” equation, connotes a male equation, just as the *modus ponens* is said to embody a male system of rationality.

A postmodern literary critic has extended the term beyond physics, beyond logic, to all of what she calls “numerical representation.” POOVEY, *supra* note 24, at 4. Professor Poovey writes, “to assign numbers to observed particulars is to make them amenable to the kind of knowledge system that *privileges* quantity over quality and equivalence over difference.” *Id.* (emphasis added). But we commonly represent ineffable qualities numerically, as in judging the beauty and form of competitive figure skating and gymnastics. More to the point, the sciences, quintessential “knowledge systems,” *do* numerically represent the qualities of observed particulars and of the differences in them: Mohs’ Scale numerically represents the relative difference in the hardness of minerals; the thermometer numerically represents the relative

three critical aspects of radical multiculturalism. First, only if one agrees at the outset that truth is grounded in sex, race or ethnicity can the argument proceed; but the truth of that claim is far from self-evident. Thus, the radical multiculturalist argument is that one's refusal to perceive the claim's truth is a capitulation to the hegemonic system; thus it "explains" even why one does not accept it. In this way, radical multiculturalism achieves complete intellectual closure.³⁴

Second, the denial of universality and accessibility flies in the face of the historical record. Take, for example, our now common system of mathematical notation:

Little is clear about the origin of what we usually call Arabic numerals except that the Arabs did not invent them. They got them from the Hindus, who may be their inventors, but it is just possible that the Indians got them from the Chinese. We will call them Hindu-Arabic numerals. Whatever the truth about their origin, the Arabs, who knew a good thing when they saw it, adopted and adapted them to their own ends. The Muslim whose name is most closely associated with the new system is the scholar and author Abu Jafar Muhammed ibn Musa al-Khwarizmi, who lived in the ninth century. His book on the new numbers traveled west to Spain, and the new system soon percolated into Europe. In the twelfth century an Englishman, Robert of Chester, translated al-Khwarizmi's book into Latin, and after that the influence of the new numerals in the West was continuous.³⁵

Third, and closely related, the necessary implication of the radical multiculturalist claim is that all the women, Indians, Chinese or Jews who have achieved international academic distinction have betrayed their feminine or ethnic essence. In mastering their disciplines, in making important contributions to them, they acquiesced in their own oppression. Through multiculturalism's metalogic, by which a thing is turned into its opposite, education (in logic or physics) does not liberate, it oppresses. This is absolute rubbish—*Quatsch mit Soße*.³⁶

warmth or coolness of an object; et cetera. To say that Mohs' Scale *privileges* hardness (the particular it observes) over beauty (which it does not), or that the thermometer *privileges* the quantity of heat over its quality is gibberish; but so, too, is the attribution of sex to the constant for the speed of light.

34. See also FARBBER & SHERRY, *supra* note 1, at 127-29 (discussing the intellectually closed aspect of radical multiculturalism).

35. ALFRED W. CROSBY, *THE MEASURE OF REALITY: QUANTIFICATION AND WESTERN SOCIETY, 1250-1600*, at 112 (1997) (references omitted). The words *algorithm* and *algorism* come down to us from the English corruption of *Al-Khwarizmi*.

36. *THE OXFORD-DUDEN GERMAN DICTIONARY* 585 (rev. ed. 1997) (colloquial) (Literally, "*Quatsch* with sauce."). Nor does this argument obviate the anti-Semitic and anti-Asian implications discussed above, for it has to explain

II. THE FASCIST CONNECTION

As powerful as Farber and Sherry's argument on academic merit is, it remains to be seen whether they were wise to have made it so central a feature of their critique. In seeming (but only seeming) to pit Jews and Asians against other minorities, the argument tends to sideline radical multiculturalism's epistemology and to obscure the larger consequences of it. At one point, Farber and Sherry do connect radical multiculturalism to the "specter of authoritarianism"³⁷—scholarship, as one radical put it, being merely "a question of power."³⁸ They further observe that "radical multiculturalism has *affinities* with totalitarianism,"³⁹ having noted earlier Richard Delgado's assertion that "enlightenment-style Western democracy" is a source of "subordination."⁴⁰ And they harken ever so gently, in one brief paragraph, to scholarship in the "shadow of Nazism."⁴¹ But all this is said more or less in passing; these themes are dropped almost as soon as they are touched.

Farber and Sherry decline to pursue the connection out of evident good will, in order to seek some common ground of discourse with the radical camp. (To accomplish that, however, radical multiculturalism will have to abandon its central message and methods, so don't bet on it.) But toward that otherwise commendable end, they miss an opportunity fully to explore just what that "affinity" is. This is not the place for such an undertaking; but it is to suggest that our understanding of the history of ideas would be enriched by an exposition of the Fascist connection. Consider only this much:

Fascism grew out of "the revolt against the Enlightenment"⁴² that swept across Europe at the end of the nineteenth and the beginning of the twentieth century: a "rejection of the rationalistic, individualistic, and utilitarian heritage"⁴³ of the eighteenth century, and a rejection of the liberal-democratic regimes of western Europe. It "denied the validity of any absolute and universal moral norms: truth, justice, and law ex-

why Jews and Asians were so willing to betray their ethnic essence.

37. FARBER & SHERRY, *supra* note 1, at 102.

38. *Id.* (quoting Robert Chang).

39. *Id.* at 106 (italics added).

40. *Id.* at 29 (quoting Richard Delgado).

41. *Id.* at 107.

42. ZEEV STERNHELL ET AL., *THE BIRTH OF FASCIST IDEOLOGY* 3 (David Maisel trans., 1994).

43. *Id.* at 7.

isted only . . . to serve the needs of the collectivity."⁴⁴ It rejected rationalism: it posited instead instinct, intuition, sentiment, and emotion as constituting the "reality and truth of things,"⁴⁵ including myths as "systems of images' that can neither be split up into their component parts nor refuted."⁴⁶

Apropos the latter, the German self-image since the Middle Ages was of a people confronted with the trauma of decline, a "chronic feeling . . . of being encircled by enemies and driven into a corner."⁴⁷ In the unprecedented economic catastrophe that followed the German defeat in World War I and in the political upheaval left in its wake, they saw themselves as a people victimized: by the "stab in the back" (*Dolchstoß*) that betrayed the troops at the front; by the punitive and economically devastating conditions laid down by the treaty of Versailles; by the Jews who dominated the economy; by the decadence and degeneracy of liberal-democratic government. The self-depiction of Germans as threatened and oppressed was pervasive; and it was upon this regnant story that German national socialism built.

In its German form, Fascism combined the flight from Reason with an all-pervasive racial essentialism. In 1936, in an address for the 550th anniversary of Heidelberg University, Ernst Krieck observed that "[t]he idea of humanism, with the teaching of pure human reason and absolute spirit founded upon it, is a philosophical principle of the eighteenth century caused by the conditions of that time."⁴⁸ It was an idea whose time had passed, overtaken by racial ways of knowing: "*Such a*

44. *Id.* at 10.

45. *Id.*

46. *Id.* at 24. See GEORGE L. MOSSE, *THE NATIONALIZATION OF THE MASSES: POLITICAL SYMBOLISM AND MASS MOVEMENTS IN GERMANY FROM THE NAPOLEONIC WARS THROUGH THE THIRD REICH* (1975), for a fuller exploration of the role of myth and its expression by the use of symbols as an element of Fascism. Mosse argues that forms of expression utilized by German national socialism, its cultic and liturgic, even "magical" elements, have been neglected by historians who have looked largely to economic and social factors to explain the attraction of Fascism: "Millions saw in the traditions of which Mussolini spoke an expression of political participation more vital and meaningful than the 'bourgeois' idea of parliamentary democracy." *Id.* at 4.

47. NORBERT ELIAS, *THE GERMANS* 360 (Eric Dunning & Stephen Mennell trans., Michael Schröter ed., Columbia Univ. Press 1996).

48. MAX WEINREICH, *HITLER'S PROFESSORS: THE PART OF SCHOLARSHIP IN GERMANY'S CRIMES AGAINST THE JEWISH PEOPLE* 21 (1946) (quoting REICHSMINISTER RUST & ERNST KRIECK, *DAS NATIONALSOZIALISTISCHE DEUTSCHLAND UND DIE WISSENSCHAFT* 31 (1936)).

*folk-bias carries its certainty in itself and not in logical criteria of truth, because the latter do not attain to the metalogical, such as symbol, [or] myth . . .*⁴⁹ Or, as a prominent professor of philosophy put it nine years later:

For centuries, the racial-soul and folk (rassenseelisch-völkische) peculiarities *in spite* of all universalistic counteraction were able to produce a unity of culture. Finally, the power abated. The international Jew, by making use of money thinking, elevated himself to world domination and threatened to destroy all waxing creative power; bolshevism was about to annihilate the nations physically as well. Just then the distress of the time in the most threatened folk gave rise to the will and the cognition which led to regeneration. Instead of the vague mixture of general concepts and values which used to be called the spirit of humaneness or the idea of Western culture, national socialism set up an organically founded *Weltanschauung*.⁵⁰

The question presented at the time was whether a theory of law could be fashioned out of this material. Germans had taken great pride in their legal achievements, especially in the realization of the Enlightenment goal of a government of law and not men. This idea was (and is today) embodied in a powerful word—*Rechtsstaat*—which assumed universalistic norms and objective methods of legal reasoning. National socialist legal science accordingly took on the task of creating new norms and methods.

In 1934, Carl Schmitt took up the question of “National Socialism and *Rechtsstaat*.”⁵¹ Schmitt was one of the most prominent of German legal academics of the time, then in the process of coordinating himself with the regime.⁵² He presented the question as a struggle (*Kampf*) over the concept itself, a concept heretofore monopolized by the liberal movement of the nineteenth century. As he put it early on, “The word *Rechtsstaat* is no longer a virgin. As with other beautiful words such as Freedom, Equality, Progress, the Constitutional State and the like, it is completely impregnated with the liberal spirit that runs through the 19th century.”⁵³ He returns to

49. *Id.* (italics added).

50. *Id.* at 23 (quoting ALFRED BAEUMLER, ALFRED ROSENBERG UND DER MYTHUS DES 20. JAHRHUNDERTS 97 (1943)).

51. Carl Schmitt, *Nationalsozialismus und Rechtsstaat*, 63 JURISTISCHE WOCHENSCHRIFT 713 (1934) (translation by the author).

52. See JOSEPH W. BENDERSKY, CARL SCHMITT: THEORIST FOR THE REICH (1983).

53. Schmitt, *supra* note 51, at 714 (translation by the author) (“Das Wort *Rechtsstaat* ist kein jungfräuliches Wort mehr. Es ist liberaler Herkunft und wie Freiheit, Gleichheit, Fortschritt, Verfassungsstaat und ähnliche, an sich

this theme toward the close, this time depicting the concept as an instrument of foreign oppression:

We Germans have always been in great danger of being defeated without resistance by foreign legal concepts We received the "constitutional" idea of the liberal state in the 19th century and have subjugated (*unterworfen*) ourselves to the liberal-democratic State and the legal ideals of the West The political danger of intellectual subjugation [*geistigen Unterwerfung*] under foreign legal concepts of the state is therefore great and our concern for conceptual clarification is well-founded.⁵⁴

He notes, however, that the word is a compound combining two separate ideas—of law and of the state. Viewed as a matter of "scholarly responsibility" (*wissenschaftlicher Verantwortlichkeit*) one cannot speak of the government of law (*Rechtsstaat*) as a single concept: there are dozens of "governments of law"—under feudalism, under socialism, under liberal-democracy, and the like—and as many as there are nations, i.e., a French, an American, an English *Rechtsstaat* and so on. "Under these conditions," he declared, "one can establish what the word is to mean."⁵⁵

Thus, Schmitt argues that German national socialism has *its* concept of the *Rechtsstaat*. In the "classical liberal" state, the idea of a government of law was concerned with the separation of legislation from administration, with the independence of the judiciary and with the requirement of legal certainty. National socialism rejects the separation of legislation from administration. It also rejects the liberal obsession with legal

sehr schöne Worte—im Laufe des 19. Jahrhunderts ganz von liberalem Geiste imprägniert.").

54. *Id.* at 717 (translation by the author) ("Wir Deutschen sind stets in größter Gefahr gewesen, fremden Rechtsbegriffen widerstandslos zu unterliegen. . . . Wir haben im 19. Jahrhundert das sogenannte 'konstitutionelle,' d.h. liberal-rechtsstaatliche Verfassungsdenken rezipiert und uns den liberal-demokratischen Staats- und Rechtsidealen des Westens unterworfen. . . . Die politische Gefahr der geistigen Unterwerfung unter fremde Rechts- und Staatsbegriffe ist also groß und die Sorge um begriffliche Klarstellungen wohl begründet.").

55. *Id.* at 715 (translation by the author). "The unconditional premise," Schmitt concludes, is that each person who uses the word will "henceforth speak not of a national, or socialist, or national-socialist, but unreversedly of a national socialist German *Rechtsstaat*." *Id.* (translation by the author) ("Unter dieser Bedingung allerdings kann man das Wort gelten lassen. Unbedingte Voraussetzung ist jedoch, daß jeder, der sich des Wortes *Rechtsstaat* bedient, nun auch das erforderliche Beiwort hinzufügt und nicht mehr nur vorsichtig von einem nationalen, oder sozialen, oder nationalsozialen, sondern vorbehaltlos von dem einen nationalsozialistischen deutschen *Rechtsstaat* spricht.").

certainty and the determinacy of words: law is governed instead by a body of norms, by general clauses requiring that acts be in accord with "good morals" (*guten Sitten*), with "good faith" (*Treu und Glauben*), with the "just feeling of all decent, fair-minded and right-thinking people" (*Rechtsgefühl aller anständig, billig und gerecht denkenden Menschen*), and with the "ruling values of the times and of the people" (*herrschenden Wertanschauungen der Zeit und des Volkes*). These general clauses were an integral part of preexisting German law—acts *contra bonos mores* (*gegen die guten Sitten*) or the requirement of good faith (*Treu und Glauben*), for example, being expressly provided for in the Civil Code (BGB); but, under national socialism they were to be applied as newly infused with an intense political meaning.⁵⁶

Carl Schmitt tells a story: He depicts German law (and so the Germans living under it) as subjugated. He depicts the long cherished ideal of the *Rechtsstaat* as a German virgin deflowered (whether by seduction or rape is not clear) by those same foreign elements, first by the "reception" of Roman law and later by Western liberalism. As with Fascism generally, Schmitt rejects universalism: what a "government of law" is is culturally determined; the concept means what we choose it politically to mean. So, too, with "equality under the law," "freedom," and the like; the words are put into the service of those who use them. Thus, a thing can be made into its opposite; a total distortion of meaning can be made an act of "scholarly responsibility." As with Fascism generally, Schmitt rejects objectivism: results are not determined under a rule of legal certainty, but under general clauses that carry whatever political meaning the community wishes them to have.

Schmitt mutes the racial element out of which those norms were to be sought.⁵⁷ The connection was more thoroughly developed in a contemporaneous lecture by Professor Dr. Erik Wolf of Freiburg, on "The National Socialist State's Ideal of Law."⁵⁸ The national socialist conception of man, he wrote,

56. See generally Heinrich Lange, *Generalklauseln und neues Recht*, 62 JURISTISCHE WOCHENSCHRIFT 2858 (1933) (arguing that these general clauses failed to fulfill their real functions (*ihre eigentlichen Aufgaben*) in the liberal state).

57. Only later did Schmitt's anti-Semitic expressions grow more frequent, in part because of the use his enemies made of his prior association with Jewish colleagues. See BENDERSKY, *supra* note 52, at 227-29.

58. Erik Wolf, *Das Rechtsideal des nationalsozialistischen Staates*, 28 ARCHIV FÜR RECHTS-UND SOZIALPHILOSOPHIE 348 (1934/35).

stands in opposition to the individual, liberal and material legal conception of man in the law of the past: it is indissolubly connected to its legal conception of one who lives *in* the racial community of the people (*Volksgemeinschaft*) and who is devoted wholeheartedly to serving it. Such a person's innermost essence is of oneness with the racial-German nation which defines the "people's spirit" (*Volksggeist*) or the "people's soul" (*Volkseele*).⁵⁹ The lecture goes on like this for several pages. Its "metalogic" seems indistinguishable from the racial essentialism of radical multiculturalism.

As for the independence of the judiciary, it, too, was seen as a concept deployed by the liberal-democratic state to protect the individual from encroachment and intrusion from the state and its administration.⁶⁰ But the unity of the state and the people under national socialism called forth a different conception of judicial independence. As Professor Dr. Eduard Kern of Freiburg put it: "The national socialist judge is twice bound: to the law and to the exercise of his judicial discretion in accordance with the goals of the state leadership. The inner attachment [of the judge] to the leadership of the state is the assumption on which judicial independence rests."⁶¹ Here, too, words are made into their opposites: the essence of judicial independence is judicial subservience.

As noted earlier, modern radicals have a bit of a problem in deciding whose voice speaks authentically for the racial or gendered community. German national socialism was saved from that dilemma by the Leader Principle (*Führerprinzip*) which embodied in the ideas of the *Führer* the values of the people that the judges were silently expected to follow.⁶² In 1938, for example, a judge in Luneberg acquitted a Jewish physician of performing an abortion.⁶³ Abortion was a crime and the doctor had performed one; but, as the patient was

59. *Id.* at 357.

60. See Eduard Kern, *Zur Unabhängigkeit des Richters*, 28 ARCHIV FÜR RECHTS-UND SOZIALPHILOSOPHIE 424, 425 (1934/35).

61. *Id.* at 426 (translation by the author) ("Der nationalsozialistische Richter sei zweifach gebunden: einmal an das Gesetz, sodann aber in seiner Ermessensfreiheit an die Ziele der Staatsführung. Die innere Verbundenheit mit der Staatsführung sei die Voraussetzung für die richterliche Unabhängigkeit.").

62. See Wolf, *supra* note 58, at 362. See generally DIEMUT MAJER, GRUNDLAGEN DES NATIONALSOZIALISTISCHEN RECHTSSYSTEMS: FÜHRERPRINZIP, SONDERRECHT, EINHEITSPARTEI (1987).

63. See EDITH ROPER & CLARA LEISER, SKELETON OF JUSTICE 140 (1941).

Jewish, the court held the act not unlawful inasmuch as it contributed to a decline in the number of Jews.⁶⁴ The Ministry of Justice issued a press release on the case: "Here most welcome progress was made by the judge. In his capacity as an independent master of justice, he based his judgment not on laws and statutes, but on the true folk feeling."⁶⁵

The works just surveyed were written not by party hacks but by eminent academics rather early on in the regime, before it had fully consolidated its power. They anticipate the large body of theoretical writing and decisional law to follow; they adumbrate the primary teachings of national socialist legal philosophy:⁶⁶ the rejection of liberalism; the rejection of individualism in favor of an intense communitarianism; the rejection of the principle of legal equality, i.e., equality only among racial comrades (*Volksgenossen*); the erection of a system of law based on anti-rationalism; and the perversion of language, the rejection of speech intended to convey clear meaning, one that is transparent and so accessible to all, for one that presents numerous possible readings into which new contents can be translated.⁶⁷ As Ernst Forsthoff put it in 1948 ("in hindsight, naturally," says Kaufmann): "With 'natural law' one can prove the perfect lawfulness of everything—right up to the gas chambers of Auschwitz."⁶⁸ Natural Law had several hundred years of scholarly elaboration grounded in a search for fundamental natural (or God-given) rights of human beings. Thus, Forsthoff's cynicism flows naturally from Fascism's deconstructive approach to language which, by a political act, turns a thing into its opposite.⁶⁹

64. *See id.*

65. *Id.* The SS newspaper, the *Schwarze Korps*, which had approved of the decision, acknowledged receiving a protest letter, which asserted that under this theory, no one could be punished for killing a Jew: "Yes . . . no Jew who killed another Jew ought to be punished." *Id.*

66. *See* Von Arthur Kaufmann, *Rechtsphilosophie und Nationalsozialismus*, 18 ARCHIV FÜR RECHTS-UND SOZIALPHILOSOPHIE 1 (New Series) (1983). This number of the journal is devoted to a symposium, *Recht, Rechtsphilosophie und Nationalsozialismus*, containing several insightful papers.

67. *See id.* at 16.

68. *Id.* (quoting Ernst Forsthoff, *Zur Problematik der Rechtserneuerung*, in 19 ZEITWENDE 684 (1948) (translation by the author).

69. Forsthoff, a student of Carl Schmitt, was appointed to a professorship in 1933, at a very young age, upon the removal of all Jewish law professors from German law schools. Apropos of his then view of language, he wrote in a book review in 1934: "Every politically-spirited epoch develops a distinctive language in accordance with its thought. The superiority of a particular po-

Just as radical multiculturalism would have it, law under Fascism *was* politics. As an early text put it, "The jurist in the German Leader-State must also be a political man because the ideas of State and Law, of Politics and Law, are only different expressions of a complete unity."⁷⁰ And, just as our radical multiculturalists claim, scholarship about law was politics too. As a German jurist observed in 1934, "neutral research" in law was quite and rightly dead.⁷¹ Indeed, all scholarship was politics; and the German universities ceased to be cognizable as such viewed, however, through the "liberal-democratic" lens of free speech, individualism, and academic freedom.⁷² Even the rather childish use of typeface by our radical multiculturalist writing in the *Harvard Law Review* to "name" her reality⁷³ has a much stronger fascist antecedent, for the German national socialist state decreed the use of a specific gothic-style typeface in order authentically to represent the German racial essence in text.⁷⁴ In other words, the ample historical record, of which only a tiny fragment has been discussed here, presents a testable hypothesis: that radical multiculturalism has more than an "affinity" with Fascism; that it is Fascist to the bone.⁷⁵

litical way of thinking proves its success when its terminology is generally accepted and is taken as self-evident as a matter of course." Ernst Forsthoff, *Otto Koellreutter: Der deutsche Führerstaat*, 63 JURISTISCHE WOCHENSCHRIFT 538 (1934) (translation by the author) ("Jede geistig-politische Epoche entwickelt eine ihrem Denken gemäße Sprache. Die Überlegenheit einer politischen Denkweise erweist sich am sichersten darin, daß es ihr gelingt, ihre Terminologie als die allgemein geltende und mit Selbstverständlichkeit aufgenommene durchzusetzen.")

70. *Id.* (translation by the author).

71. WEINREICH, *supra* note 48, at 37 (quoting PAUL RITTERBUSCH, IDEE UND AUFGABE DER REICHSUNIVERSITÄT 29 (1935)).

72. See RICHARD GRUNBERGER, *THE 12-YEAR REICH: A SOCIAL HISTORY OF NAZI GERMANY 1933-1945* ch. 20 (Da Capo Press 1995). Nor was the politicization of scholarship limited to the social sciences and humanities. See, e.g., ALAN D. BEYERCHEN, *SCIENTISTS UNDER HITLER: POLITICS AND THE PHYSICS COMMUNITY IN THE THIRD REICH* (1977).

73. See *supra* text accompanying note 13.

74. See JOACHIM PETSCH, *KUNST IM DRITEN REICH* 76 (1994) (noting that the typestyle was invented by Otto Eckmann in 1901). Though George Mosse does not discuss this particular episode, it is a useful illustration of what he terms the "aesthetics of politics." MOSSE, *supra* note 46, at 21.

75. Sokal and Bricmont ruminates on the fact that the anti-rationalist tradition is usually associated with the political right, but that "what is new and curious about postmodernism is that it is an anti-rationalist form of thought that has seduced part of the left." SOKAL & BRICMONT, *supra* note 24, at 198. They essay some thoughts on why this has come about; and they make a cogent plea, from the left, for the abandonment of key features of postmodern-

We do not have a body of law decided under radical multiculturalism; but we do have a body of law decided under German national socialism. If the two draw from the same Fascist wellspring, it would be useful to see if radical multiculturalism would give any principled ground to differ with the methodology employed. Let us take but one case.

Ingo Müller recounts the case of a Polish maid, Rosalie Kulesa, sent by her employer in Poland to make a purchase at a shop eighteen kilometers away.⁷⁶ She got into an altercation with the proprietress, a German woman with the non-German name of Meta Baschek, whom she struck with her handbag.⁷⁷ She was prosecuted for doing an act "detrimental to . . . the reputation of the German nation," i.e., a dignitary crime based on race.⁷⁸ She claimed that she was unaware that the proprietress was German, but the court was not convinced.⁷⁹ The maid should have known the owner was German by her very demeanor; Frau Baschek's self-confidence bespoke her Germanness.⁸⁰ Ms. Kulesa was convicted and sentenced to death.⁸¹

The result seems on all fours with radical multicultural teaching: the State recognized a racial indignity as criminally actionable, and it was proper for it to have done so. The court's reliance on what it assumed Frau Baschek's demeanor to have conveyed was also proper for the court proceeded on an essentialist racial principle; the court spoke in the authentic voice of the racial community. In any event, the court's reliance on what it assumed would be so objective a manifestation of Frau Baschek's racial essence was unnecessary to the decision because the truth of whether or not such a racial affront occurred could be determined subjectively. Just as in Patricia Williams'

ism:

If all discourses are merely "stories" or "narrations", and none is more objective or truthful than another, then one must concede that the worst sexist or racist prejudices and the most reactionary socio-economic theories are "equally valid", at least as descriptions or analyses of the real world (assuming that one admits the existence of a real world). Clearly, relativism is an extremely weak foundation on which to build a criticism of the existing social order.

Id. at 209.

76. See INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* 162 (Deborah Lucas Schneider trans., 1991).

77. *See id.*

78. *Id.* at 161.

79. *See id.* at 162.

80. *See id.*

81. *See id.*

account of Tawana Brawley's case, Ms. Baschek's perception of the wrong done to her is what counts. And recall that *her* story, Frau Baschek's story, is as a member of a threatened and oppressed racial group only seeking respect. Inasmuch as there is no objective reference point available to distinguish truth from ideology, fact from opinion, inasmuch as we are to be guided by racial stories and metalogic, one is hard-pressed to see how radical multiculturalism could claim any ground on which to contest Frau Baschek's story and so the racial slight she perceived—which the court accordingly and rightly repressed.

On the contrary, as Farber and Sherry point out, radical multiculturalism has had its most significant impact on the campus, in the promulgation and enforcement of speech codes.⁸² Commonly, these target speech that creates a "hostile," "offensive" or "discriminatory" atmosphere or environment for members of identified groups whose sensibilities are accordingly privileged above others, just as Meta Baschek's was. As Charles Kors and Harvey Silverglate explain, the creation of such an atmosphere is defined as a deprivation of rights or opportunities.

It is therefore appropriate, by this theory, to halt the speech of individuals (and to deny their status as discrete, autonomous beings), in order to combat this cumulative effect. The traditional formula—that free speech is allocated equally to all and is not to be limited in terms of content and viewpoint—perpetuates majority dominance. Individual equality before the law must be sacrificed in the name of equal opportunity for the members of groups.⁸³

In the terms of the code adopted at Bowdoin College, for example, "No one is entitled to engage in behavior that is *experienced by others* as harassing."⁸⁴ When Eden Jacobowitz, a freshman at the University of Pennsylvania, was disturbed by a group of black sorority sisters loudly celebrating under his window late at night, he called them "water buffalos" and invited them to move their boisterous behavior to a nearby zoo. "Water buffalo" is not a racial epithet,⁸⁵ but because the women

82. See FARBER & SHERRY, *supra* note 1, at 40-45.

83. ALAN CHARLES KORS & HARVEY A. SILVERGLATE, *THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES* 80-81 (1998).

84. *Id.* at 93.

85. Jacobowitz is of Israeli parentage and had studied in a Hebrew-language high school. In modern Hebrew, "water buffalo" is a slang term of mild derision meaning a loutish person or an idiot and is used commonly as

had taken it as such—had felt themselves to have been the victims of an act of racial harassment (and had been encouraged by University policy in that belief)—disciplinary proceedings were commenced against Jacobowitz.⁸⁶ In terms of legal theory, there is every reason to believe that Rosalie Kulesa's prosecutors would feel altogether at home in the Office of Judicial Affairs of the University of Pennsylvania.

III. SILENCE

The outpouring of radical multiculturalism in the legal literature has not been met with any comparable body of legal writing in reply. Farber and Sherry note the occasional dissenter; but, for the most part, the response of the traditional legal academic community has been silence.

This lack of critical response could be rationalized, perhaps something along the following lines: The vast majority of our law reviews are in the hands of law students; they are not scholarly journals.⁸⁷ They are neither professionally edited nor professionally refereed. An article that appears in the Harvard, Yale or Michigan law review means only that a more highly selected group of ignorant children has deemed it worthy of publication. And if these children have themselves been socialized at multiculturally correct liberal arts institutions, it would not be surprising that, unencumbered by any serious idea of scholarship, they should be captivated by the multicultural avant-garde, even to the point of deploying typeface toward a political end. From a practical point of view, given the sheer cumulative bulk produced by the hundreds of student-edited law reviews every year, one simply cannot spend one's professional life pointing to all the lapses in logic, the factual errors, the sources not researched or misunderstood in all the rubbish that gets published.

Moreover, traditional legal scholars, as children of the Enlightenment, are nothing if not welcoming to new ideas, new schools of thought, new provocations (many of the writers decrying the "oppression" of the system seem to have found secure homes in it). Traditional scholars assume that the "mar-

such. *See id.* at 15, 24-25.

86. *See generally id.* at 9-33.

87. This aspect of the legal academy has rendered non-U.S. academics incredulous. *See generally* Reinhard Zimmermann, *Law Reviews: A Foray Through a Strange World*, 47 EMORY L.J. 559 (1998).

ketplace of ideas" will eventually sort out the sense from the nonsense, the merely clever from the true.

Finally, publicly to raise the questions Farber and Sherry raise is to raise eyebrows as well about academic freedom⁸⁸ and, perhaps, tenure. It is not that both could not be defended; but, the more prudent path might counsel a lower public profile concerning them. After all, the radical multiculturalists are merely extending into law ideas that are currently fashionable in avant-garde literary and philosophical circles; surely no harm in that.

As with most rationalizations, these have a grain of truth. As with many rationalizations, they work at justifying an abnegation of responsibility.

The claims made by radical multiculturalists go to the heart of the academic enterprise: *if* they are right, that which other legal scholars do, maintaining the hegemonic white male Myth of Reason, subordinates and oppresses. What calls for correction is not that the radicals' message is vulgar and insulting (though it is that); what calls for correction is how profoundly it miseducates. It *matters* that students learn to distinguish fact from opinion: purveying racial or ethnic myth as a truth has had and continues to have murderous effect throughout the world. Even where less lethal, the radical multicultural message nevertheless calls on us to disparage others on the basis of their race (white) and sex (male). It *matters* that minds are not stultified especially for the sake of an ideology: scientific, sociological and legal understanding cannot possibly "progress on a basis that is both [as] conceptually confused and radically detached from empirical evidence"⁸⁹ as radical multiculturalism.

88. See generally David M. Rabban, *Can Academic Freedom Survive Postmodernism?*, 86 CAL. L. REV. 1377 (1998); Edward Shils, *Do We Still Need Academic Freedom?*, 62 AM. SCHOLAR 187 (1993).

89. SOKAL & BRICMONT, *supra* note 24, at 206. After this was written, William Van Alstyne drew my attention to Thomas Nagel's *The Last Word*, which is less an attack on postmodernism than an incisive and elegant defense of reason. See THOMAS NAGEL, *THE LAST WORD* (1997). Suffice it to say here, Nagel points out that statements of the kind that all truth is "socially constructed," POOVEY, *supra* note 24, at 336, or there is "no objective reference point[] separate from culture . . . to distinguish . . . fact from opinion," FARBER & SHERRY, *supra* note 1, at 26 (quoting Gary Peller)—that is, that all truth is conditional—are themselves unconditional, statements of a universal truth. See NAGEL, *supra*, at 15. Thus, they must be false. See *id.* That consequence might be avoided by changing the assertion from a universal to a conditional. But, being then only a conditional, it cannot deny the possibility

Nor will it do to rest content with the "marketplace of ideas," for the metaphor assumes active competition in the market. Others have not been loathe to rebut postmodern rubbish in their disciplines: Alan Sokal and Jean Bricmont have assembled a compelling case against postmodernism's abuse of science and mathematics.⁹⁰ Eric Hobsbawm has spoken out against postmodernism in history.⁹¹ Mary Lefkowitz has painstakingly refuted the myths of Afrocentrism,⁹² and Martha Nussbaum has mounted a powerful critique of radical feminist claims in philosophy.⁹³ Nor have they been alone in these efforts; indeed a struggle over the legitimacy of radical postmodernism has been raging in a number of disciplines.⁹⁴ The near total silence of legal academics has worked to make *this* market fail.

The last rationalization is the most damning because it is oblivious to history; it assumes that ideas have no consequences. But we have been here before. Fascism, just as the "post-Enlightenment" (or neofascist) thought out of which radical multiculturalism proceeds,⁹⁵ was rooted in a literary and

of a universal. "To put it schematically," Nagel observes, "the claim 'Everything is subjective' must be nonsense." *Id.*

90. See generally SOKAL & BRICMONT, *supra* note 24.

91. See HOBBSBAWM, *supra* note 23.

92. See MARY LEFKOWITZ, NOT OUT OF AFRICA: HOW AFROCENTRISM BECAME AN EXCUSE TO TEACH MYTH AS HISTORY (1996).

93. See Martha Nussbaum, *Feminists and Philosophy*, N.Y. REV. BOOKS, Oct. 20, 1994, at 59.

94. See generally JOHN M. ELLIS, LITERATURE LOST: SOCIAL AGENDAS AND THE CORRUPTION OF THE HUMANITIES (1997). (I am indebted to Benjamin Aaron for bringing this work to my attention.) Postmodernism's critique of science has drawn some of the most spirited responses, perhaps because the sciences have achieved a degree of precision that the social sciences and humanities have failed to achieve and which makes the claim of nonobjectivity (or relativity) of "truth" in the scientific setting especially hard to swallow. See generally A HOUSE BUILT ON SAND: EXPOSING POSTMODERNIST MYTHS ABOUT SCIENCE (Noretta Koertge ed., 1998); PAUL R. GROSS & NORMAN LEVITT, HIGHER SUPERSTITION: THE ACADEMIC LEFT AND ITS QUARRELS WITH SCIENCE (1994).

95. See Reed Way Dasenbrock, *Slouching Toward Berlin: Life in a Post-fascist Culture*, in FASCISM'S RETURN: SCANDAL, REVISION, AND IDEOLOGY SINCE 1980, at 244, 255 (Richard J. Goslan ed., 1998):

[I]t is fascism as well as poststructuralism that urges us to move beyond the individualism and subjectivism of the humanist tradition, to see human beings as subjects produced by a larger collectivity . . .

[I]t is fascism as well as poststructuralism that tells us that there is no truth, but rather that truth has to be relativized to the occasion and to the speaker. It is fascism as well as poststructuralism that celebrates the dissolution of the human individual into his or her

philosophical revolt against the Enlightenment that took a broad hold on the intelligentsia—the professorate *not* excepted—and we have seen the consequences. As Verlyn Klinkenborg put it, “there can be no post-Enlightenment, only a sub-Enlightenment.”⁹⁶

In 1929, Ernst Cassirer debated Martin Heidegger, the “standard-bearer of antiuniversalism and one of the prophets of postmodernism”⁹⁷ in Davos, Switzerland; and in 1935, Edmund Husserl defended rationalism and universalism in a public lecture in Vienna, at no small risk to himself. When Husserl spoke, Zeev Sternhell reminds us, “Cassirer was already in exile . . . and Martin Heidegger was making speeches about the greatness of Nazism and the spiritual truth it contained. Thus, we learn once again that theoretical discussions never take place in a vacuum and there can be no philosophical thought without political consequences.”⁹⁸ With apologies to Salman Rushdie, silence is more than legitimation; it is complicity.

collectivity.

96. Verlyn Klinkenborg, *The Noble Ideal of Rationalism in Nazi Dresden*, N.Y. TIMES, Nov. 29, 1998, § 4, at 8 (commenting on the recently published diary of Victor Klemperer who, it should be noted, assigned a higher blame to professors than to other intellectuals for the abandonment of reason).

97. STERNHELL ET AL., *supra* note 42, at 250.

98. *Id.*