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Cheryl I. Harris

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LAW PROFESSORS OF COLOR AND THE ACADEMY: OF POETS AND KINGS

CHERYL I. HARRIS*

Once upon a time the leopard who had been trying for a long time to catch the tortoise finally chanced upon him on a solitary road. 'Aha,' he said; 'at long last! Prepare to die.' And the tortoise said: 'Can I ask one favour before you kill me?' The leopard saw no harm in that and agreed. 'Give me a few moments to prepare my mind,' the tortoise said. Again the leopard saw no harm in that and granted it. But instead of standing still as the leopard had expected the tortoise went into strange action on the road, scratching with hands and feet and throwing sand furiously in all directions. 'Why are you doing that?' asked the puzzled leopard. The tortoise replied: 'Because even after I am dead I would want anyone passing by this spot to say, yes, a fellow and his match struggled here.'

My people, that is all we are doing now. Struggling. Perhaps to no purpose except that those who come after us will be able to say: True, our fathers were defeated but they tried.¹

Throughout the body of his work, Chinua Achebe, premier novelist and poet of Nigeria, has drawn infinitely poignant and ever more illuminating pictures of the African struggle to emerge from colonialism and to forge a new society. The destruction of the social fabric of traditional life by colonialism and the ravages inflicted on all social relations was his text in *Things Fall Apart*.² The cooptation of the victory of independence by the personal greed and corruption of ruling elites, and manipulation by international economic interests that adapted to the new political forms yielded the sharply satiric outsider's inside view of post-colonial Nigerian society in *Man of the People*.³ And it is in his later work, *Anthills of the Savannah*,⁴ that he gives full vent to an oppositional voice—a poetic voice that tells the stories of aspiration, disappointment, triumph, and failure of a struggling people and so situates the poet in opposition to the dominant regime. The vehicle of Achebe's critique is Ikem Osodi, a central character in the novel and (like Achebe) a leading journalist and poet. Ikem is finally fired as chief editor of the national newspaper of

* Assistant Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology; B.A. 1973, Wellesley College; J.D. 1978, Northwestern University.

1. CHINUA ACHEBE, *ANTHILLS OF THE SAVANNAH* 117-18 (Anchor Press 1988) (1987).

2. CHINUA ACHEBE, *THINGS FALL APART* (1958).

3. CHINUA ACHEBE, *MAN OF THE PEOPLE* (Anchor Books 1967) (1966).

4. ACHEBE, *supra* note 1.

Kangan, a fictional African country, for his continuous stream of editorials critical of "His Excellency's" increasingly compromised political positions. In commenting on Ikem's fate, Achebe has argued that Ikem as poet is bound to "stay in trouble with the king." Indeed, says Achebe, "if poets are not in trouble with the King [because of their stories], then they are in trouble with their work."⁵

By this metaphor I take Achebe to underscore the inherent risks in confronting power, and the necessity of assuming those risks in embracing the central task of social transformation which is the work of the artist, the poet, and the scholar, in any imperfect, unjust society. The poet's voice is annoying, disruptive, and provocative and the poet's stories ultimately are dangerous—a fact articulated and experienced by Ikem himself. In speaking to an audience of university students after his dismissal, Ikem delivers a lecture called, "The Tortoise and the Leopard—A Political Meditation on the Imperative of Struggle" in which he recounts the story of the Tortoise and the Leopard related above. He tells his audience of the fate of the storyteller:

That story was told to me by an old man. As I stand before you now, that old man who told me that incredible story is being held in solitary confinement at the Bassa Maximum Security Prison . . . Why? I hear you ask. Very Well . . . This is why . . . Because storytellers are a threat. They threaten all champions of control, they frighten usurpers of the right-to-freedom of the human spirit—in state, in church or mosque, in party congress, in the university or wherever. That's why.⁶

While acknowledging the thousands of miles and years that separate the experience of Achebe in contemporary Africa and my own which is grounded here as a blackwoman⁷ in the United States, Achebe's work

5. Chinua Achebe, *Informal Address Following the Publication of Anthills of the Savannah*, Delivered at Guild Books, Chicago, Illinois (1987).

This theme of tension between the writer and the regime appears not only in Achebe's fictional text, but in his essays as well:

I believe that we do not always appreciate fully the connection between the freedom of the artist and the freedom of man in general. Some modernists have led us to conceive the rights of the individual as antagonistic rather than complementary to those of society. This false conception has weakened or totally destroyed the alliance between the writer and his audience and has enabled an adversary regime to clobber the artist in the name of society and the public good. This is of course merely tactical. Once the annoying voice of the artist is silenced, the regime will bare its teeth with impunity in the face of the people.

Chinua Achebe, *The Annoying Voice of the Artist*, in *INDEX ON CENSORSHIP* 59 (June 1981).

6. ACHEBE, *supra* note 1, at 141. Ikem's fate is sealed following this speech: his story about stories of struggling people is interpreted through the filter of "His Excellency's" paranoia as a sign that a revolution is brewing. Ikem is taken into custody by the authorities and, according to the predictable official account, dies in the course of an attempted escape and armed attack on his captors. *Id.* at 155-56.

7. I use the word "blackwoman" to describe myself to emphasize the unity of my identity as black and woman, with neither unit primary or subordinate to the other. This is part of my refusal to accede to society's inability to conceive of the social constructs of race and gender as joined and

presupposes and evokes images I find extremely resonant. As a woman of color in the legal academy, the paradigm of the poet in an unjust society is one which I suggest has much to offer.

I believe this is so because contemporary America has been shaped and forged in the crucible of white supremacy, slavery, genocide of native peoples, exploitative working conditions, and the protection of race and class privilege, against which horrors wondrous achievements have been fought for and won. Although the individual paths to this destination vary widely, the very presence of the person of color in the academy, and in the legal academy in the particular, is a product of these collective stories of struggle. Given this backdrop of injustice and resistance, being a person of color in the legal academy evokes the question of social transformation and calls forth echoes of the same challenge posed to poets in an imperfect kingdom. The challenge for scholars of color in the academy, like the challenge to the poet in the unjust society, is to render the invisible visible and tangible, to move what is in the background to the foreground; to tell a different story that is neither known or familiar and indeed may be disturbing, annoying, and frightening. Because the past is with us in the present, because subordination existed and exists, the work of the scholar of color involves the task of exposing the jurisprudence that oppresses in order to work towards articulating a jurisprudence that resists subordination and empowers.⁸ In discovering the transformative

intersecting, and to resist the constant pressure on blackwomen to disaggregate themselves into categories defined as "women" or "black" when they speak or otherwise assert concerns or demands. See Rosemary L. Bray, *Taking Sides Against Ourselves*, N.Y. TIMES, Nov. 17, 1991, § 6, at 56 (discussing the conflict faced by Anita Hill in bringing charges of sexual harassment against Supreme Court nominee Clarence Thomas because within the assumed categories of race and gender she could not be heard or understood: she was either breaching racial solidarity by speaking "against" a black man or violating gender solidarity by remaining silent); see also Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (arguing that the law's unidimensional focus on race or gender as separate categories has ignored the ways in which gender subordination interacts with and reinforces racial domination and has thus failed to include the experience of blackwomen, which is at the intersection of race and gender).

8. As Catharine MacKinnon has noted, jurisprudence is a critical aspect of subordination. Here, she describes its operation with particular respect to gender:

A jurisprudence is a theory of the relation between life and law. In life, "woman" and "man" are widely experienced as features of being, not constructs of perception, cultural interventions, or forced identities. Gender, in other words, is lived as ontology, not as epistemology. Law actively participates in this transformation of perspective into being. In liberal regimes, law is a particularly potent source and badge of legitimacy, and site and cloak of force The force underpins the legitimacy as the legitimacy conceals the force Hierarchies among men are ordered on the basis of race and class, stratifying women as well. The state incorporates these facts of social power in and as law. Two things happen: law becomes legitimate, and social dominance becomes invisible.

CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 237 (1989).

Jurisprudence operates to legitimate various oppressions based on race, gender, class, and sexual orientation, which though distinct in modalities and forms, are interlocking and reinforcing. See

power of the law, a necessary tension is implied in the relationship of the scholar of color to the academy, so that in performing her task, like the poet, she must not only survive, but tell a story that is both hers and is larger than hers—a story that undermines the prevailing order—thereby risking “trouble with the king.”

The purpose of this Essay is not to prescribe how each person should deal with this challenge. Rather, I presume to tell a tale—my own tale—about my entry into the legal academy and some of what I have encountered during my sojourn here. There could be many ways to tell the tale. It could be seen as a matter of choices, a set of reasoned decisions, or a series of accidents. Like all people, my experience and perspective has been shaped and filtered by race, gender, and class. But if I begin with who I am—a blackwoman whose particular experience is located within and at the borders of prevailing and intersecting hierarchies of race, gender, and class—then I am more likely to get it right and, for the purposes of this piece, move from the task of self-conscious reflection that is intimately tied with any role that we assume towards more general and, hopefully, useful observations.

In many respects, mine is not a unique story. So much here is not. In some respects, what I relate is not my story alone, but is entwined with the stories of many I have encountered as well. That is, even my experiences of isolation are not isolated from the experiences of others who, like myself, in someways are outside the traditional venue of the academy. My path—my story—is interwoven with the paths and stories of others. As I do not own their stories, my story is not owned solely by me. For in the sharing of stories, the line between what is my story and what is another’s story is not experienced as a closely guarded boundary. My sense of who I am is made stronger by the sharing of these stories. That sharing has become a crucial tonic for my own healing⁹ and a nec-

John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2166-67 (1992) (citing Mari Matsuda as an example of one of the “many adherents of critical race theory [who] see an interlocking set of oppressions that extend beyond the singular base of race and include the bases of gender, economic class, and sexual orientation”). A jurisprudence that resists and empowers is required then in order to expose and eliminate the ideological and normative bases of subordination. See MACKINNON, *supra* at 249 (arguing that “[e]quality will require change, not reflection—a new jurisprudence, a new relation between life and law”).

9. The therapeutic and “opponentist” nature of storytelling has been articulated by Richard Delgado:

Oppressed groups have known instinctively that stories are an essential tool to their own survival and liberation. Members of outgroups can use stories in two basic ways: first, as means of psychic self-preservation; and, second, as means of lessening their own subordination The therapy is to tell stories. By becoming acquainted with the facts of their own historic oppression—with the violence, murder, deceit, cooptation and connivance that have caused their desperate estate—members of outgroups gain healing.

essary weapon in the fight to subvert the crushing weight of the prevailing story—the story that says that existing norms and modes of behavior and assessment of value, worth, and contribution are natural, inevitable, fair, and neutral.¹⁰ So it is in this context that I chart my journey.

Neither my route to law teaching nor my experience as a lawyer has followed conventional paths. After ten years of practicing law in areas that ranged from criminal trial work to landmark regulation, from a community-based law practice to working in local government for the city's first Black mayor, in early 1990 I found myself once again confronting the ambiguity I experienced in law school, the same compelling question about whether "being a lawyer" was something that I really wanted. My constant search both during and after school had been to find more socially flexible and creative avenues of personal expression and development that I had found lacking in the law. My own personal reexamination of options caused me to again consider law teaching, as I had been encouraged to do some five years before. Instead I thought that I would first spend some time abroad in London working on a degree in an international relations program.

Then came the unexpected in two forms. The first was a phone call

Richard Delgado, *Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2436-37 (1989) (citations omitted).

These stories can and do take on various cultural forms, as factual and mythical narratives, as parables, as song, as poetry, and as part of conversation of everyday life.

10. See *id.* at 2412, 2413. Neutrality is a highly valued trait, particularly in law and the academy. So too is the cool reason of objectivity that is presumed to protect all from abusive power. In fact, neutrality as the replacement for demonstrably discriminatory norms and measures has often worked to enshrine and preserve the existing distribution of power and resources. It does so by turning from context, by adopting the voice of abstract observer, ignoring the fact that law is the work of human beings whose conditions, reasoning, and perspectives are the framework within which issues are defined, considered, ignored, or rejected. This pseudo-objectivity and neutrality is a retreat from confronting the contingent nature of many deeply held assumptions and the ideological premises that predetermine outcomes. Application of neutral norms tend to uphold and legitimate societal stratifications as "natural." As MacKinnon argues:

Neutrality, including judicial decisionmaking that is dispassionate, impersonal, disinterested and precedential, is considered desirable and descriptive The separation of form from substance, process from policy, adjudication from legislation, judicial role from theory or practice, echoes and reechoes at each level of the regime its basic norm: objectivity Objectivity is liberal legalism's conception of itself. It legitimates itself by reflecting its view of society, a society it helps make by so seeing it, and calling that view, and that relation rationality. Since rationality is measured by point-of-viewlessness, what counts as reason is that which corresponds to the way things are. Practical rationality in this approach means that which can be done without changing anything [Thus,] [o]bjectivist epistemology . . . ensures that the law will most reinforce existing distributions of power when it most closely adheres to its own ideal of fairness.

MACKINNON, *supra* note 8, at 162-63. See also Richard A. Matasar, *Storytelling and Legal Scholarship*, 68 CHI.-KENT L. REV. 353 (1992) (arguing that traditional legal scholarship has been "characterized by a pseudo-scientific neutral voice . . . [in which] we act as if law is objective, write with the scientific paradigm in mind, distance ourselves and others from the action, and all the while understand that the entire enterprise rests on a subjective foundation").

from a friend and colleague with whom I have done movement work who informed me that Chicago-Kent Law School was seeking to fill a full-time, tenure-track position and, further, that the school was interested in qualified minority candidates. The second thing that happened was that the national press reported that Professor Derrick Bell announced that he was taking an unpaid leave of absence from Harvard Law School until such time as the school hired a woman of color in a tenured or tenure track position.¹¹ His decision was accompanied by student protests at the school in support of his stance and in vocal opposition to Harvard's claim that it had found no qualified candidates.¹² All of this caused me to reflect on my experiences in law school and marvel at the fact that in the ten years that I had been away from the academy, the more things changed—the increase in the number of people of color in the legal profession—the more things stayed the same—the lack of people of color in law teaching.¹³ Apparently, change is still only provoked by crisis. Con-

11. In May 1990, Professor Derrick Bell announced that he was taking an unpaid leave of absence from Harvard Law School in protest over the school's failure in its 150 year history to hire a woman of color in a tenured or tenure track position. See Fox Butterfield, *Harvard Law Professor Quits Until Black Woman is Named*, N.Y. TIMES, Apr. 24, 1990, at A1; see also Lisa G. Markoff, *Action of Harvard's Prof. Bell Focuses Attention on Diversity*, NAT'L L. J., May 7, 1990, at 4. In 1991, Professor Bell remained on leave for the same reasons. In 1992, Professor Bell requested to renew his leave of absence as, in his view, the failure of the law school to add a woman of color to its faculty constituted a continued violation of the commitment to affirmative action, an unjustified rejection of eminently qualified candidates, and a diminution of his status as a member of the faculty. Letter from Professor Derrick Bell to Dean Robert Clark, Harvard Law School (Feb. 26, 1992) (on file with author); see also Fox Butterfield, *Professor Steps Up Fight with Harvard*, N.Y. TIMES, Feb. 28, 1992, at A12. Harvard Law School declined his request, citing the University's policy of restricting professorial leaves of absence to two years. Professor Bell's appeal of the decision to the Harvard Corporation was denied and his tenure was terminated on July 1, 1992. *Harvard Law Notifies Bell of Dismissal for Absence*, N.Y. TIMES, July 1, 1992, at A19. He is presently a visiting professor at New York University Law School. *Id.*

12. See Fox Butterfield, *Harvard Law School Torn by Race Issue*, N.Y. TIMES, Apr. 26, 1990, at A20 (reporting sit-ins and protests by students in support of Professor Bell's action). Professor Bell's actions were also supported by numerous members of the legal community and professoriate, including myself. See Statement of Support for Professor Derrick Bell by Concerned Black Women Law Professors (March 1992) (on file with author); Emma Coleman Jordan and Charles Lawrence III, *The Law School Clone-O-Matic*, LEGAL TIMES, Aug. 6, 1990, at 21-22.

Despite the public perception that there are insufficient qualified women of color candidates for law teaching, and repeated assertions that women of color are favored in the market because they satisfy the demand for women and people of color, a recent study reinforces the empirical basis for Professor Bell's protest over the lack of women of color at Harvard as well as other institutions. See Deborah J. Merritt & Barbara F. Reskin, *The Double Minority: Empirical Evidence of a Double Standard in Law School Hiring of Minority Women*, 65 S. CAL. L. REV. 2299 (1992). In comparing the success of minority men and women who entered law teaching, the study disclosed that minority women suffer significant disadvantages in law school hiring: they joined law faculties at significantly lower ranks, obtained positions at less prestigious schools, and were more likely to be teaching lower status courses, like legal writing. *Id.* at 2301. Based on these distinctions, which could not be accounted for by differences in credentials, age, experience, or other factors, the authors conclude that minority women are treated less favorably than minority men in hiring. *Id.*

13. See Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 539 (1988) (evaluating data on hiring and retention of

sequently, when I received the offer to enter the academy here at Chicago-Kent (following the process of interviews and a presentation to the faculty), I accepted with great anticipation but not without some degree of hesitancy and awareness that all of this was occurring in a context of power relationships that had not been reordered by the passage of time.

In 1990, I became the only person of color on Chicago-Kent's full-time tenure-track faculty. I do not know if history would support my bearing the dubious honor of being the "first"¹⁴ as well as the "one and only." I do know that I was the first woman of color ever. (I should mention not so parenthetically that I was pleased to relinquish the position of being "the only" and was joined this fall by another person of color on the tenure and tenure-track faculty.)

There was certainly no reason to believe that in this respect this institution was vastly different from many American law schools.¹⁵ There was no evidence of venal intent, no hooded sheets in the closet, not even a set of subtly coded standards that were facially neutral but embodied hidden discriminatory intent.¹⁶ In fact, many colleagues greeted my

minority faculty and concluding that "minority professors in general and black professors in particular, tend to be tokens if they are present at all"). While there was a thirty percent increase in the numbers of minorities hired in law school faculties between 1981 and 1987, Chused notes that during the period, the overall percentage of minorities in the profession increased only from 2.8 percent to 3.7. *Id.* at 538. In 1991, full-time minority faculty members constituted 10.6 % of the total full-time faculty. Of the 5,580 full-time faculty positions, 370 or 6.6% are Black, 15 or 0.3% are American Indian, 56 or 1% are Asian, 39 or 0.7% are Mexican American, 63 or 1.1% are Puerto Rican, and 46 or 0.8 % are Other Hispanic. The minority J.D. population as of Fall 1991 was 19,410 or 15% of the total. Memorandum of American Bar Association, Section of Legal Education and Admissions to the Bar to Deans of ABA-Approved Law Schools (Apr. 7, 1992) (on file with author). According to Professors Merritt and Reskin, between 1986 and 1991, 181 people of color assumed tenure-track positions, representing 16.4% of the total of 1105 hired during the period. Merritt & Reskin, *supra* note 12, at 2315-16. Because the numbers of minority faculty were so low in the immediately previous period, these figures appear to represent a significant gain in minority hiring. Nevertheless, white men still obtained the majority of the jobs as reflected by the following figures: 53.4% white males, 30% white women, 8.8% minority men, and 7.6% minority women. *Id.*

14. Based on my informal survey and discussions with faculty members, there were other black professors at Chicago-Kent before me, but none were either tenured or in tenure-track positions in the J.D. program.

15. A study done by the Society of American Law Teachers (SALT) in 1986-1987 found that 30 percent of the law schools responding had no minority law faculty, either Black or Latino, while another 34 percent had only one. See Michael A. Olivas, *Latino Faculty at the Border*, CHANGE, May/June 1988, at 6-7; see also Chused, *supra* note 13, at 539.

16. However, one cannot help but note that the definitions of merit which typically devalue practice experience in favor of grade point averages attained at elite law schools, judicial clerkships and law review participation are likely to diminish the opportunity of minority lawyers to successfully compete for teaching positions primarily because of the relatively small numbers of minority students admitted to such institutions. Given the small numbers admitted, and allowing for expected patterns of grade distribution, the number of minority students at the top of the class is likely to be extremely small. Those few who do achieve grades that place them at the top of their class comprise the minuscule pool of minority candidates for which all schools compete, ignoring the larger number of minority candidates who may present other indicia of excellence. Apart from these concerns regarding the exclusionary effect of these criteria, the logic of placing a higher value on

arrival with almost visible relief that at least in 1990 they would not have to raise the same concern about the total lack of faculty diversity. What was in evidence here is what is in evidence in many places of power and influence: the same inexorable institutional logic that operates to exclude those who are always excluded; a vision constricted to the narrow confines of what is close and familiar,¹⁷ making invisible that which is tangible but not present; a deafness to voices speaking unfamiliar stories.

Some would say that it is a matter of qualifications. It is always interesting to hear that sour old tune. The myth of "no qualified applicants" seems to outlive facts, outdistance reality, and deepen its hold on both private and public debate. Yet, overall, minority law professors enter teaching with credentials that are comparable to non-minority candidates and can be read to exceed them.¹⁸ Moreover, it is well-known that the selection process is highly influenced by subjective factors, not only in relation to the measurement of credentials from different institutions but also, even more problematic, the weight to be given particular kinds of credentials such as grades in law school, judicial clerkships, law

predictors of performance—grades—over actual performance—practice achievements or writing skills—is neither compelling nor self-evident. See Stephen Carter, *The Best Black and Other Tales*, 1 RECONSTRUCTION No. 1, at 6 (1990) (criticizing the current method of selecting law school teachers as a "star system" that relies on a profile that consists of high law school grades attained at elite institutions, participation in law review, judicial clerkships and glowing references as predictors of the necessary tools for scholarship and teaching, when in fact, other factors, like publications may have far more predictive value). The extent to which the "star system" is deeply entrenched is evident in Harvard's justification of its failure to hire two highly qualified blackwomen who visited the institution as a legitimate insistence on standards despite the fact that both were graduates of top-flight institutions who had excellent teaching and publishing records.

17. Delgado notes that when hiring the mythic candidate is impossible, law schools hire the functional equivalent whose good credentials are supplemented by reliance on personal references. That frequently means that the candidate is white male and straight. "The reason: We rarely know blacks, Hispanics, women and gays We are employing a form of affirmative action" Delgado, *supra* note 9, at 2432.

18. Michael Olivas has noted that despite the "perfect" profile of candidates for law school teaching, in 1986-1987:

[o]f the 577 new law teachers hired, only 38 percent had law review experience (versus 48 percent of the total professoriate); 16 percent had been elected to Coif membership (the national honorary reserved for the top 10 percent of graduates); 10 percent held the L.L.M., an advanced graduate degree in law (versus 23 percent of the total); and only 14 percent had ever published an article or legal writing. Most interestingly, one-third had no legal experience before they entered teaching; 30 percent had not even passed a bar exam. It was not minority teachers who pulled down these data; the minorities who were hired statistically resemble their majority counterparts.

Olivas, *supra* note 15, at 7.

This assertion is further supported by AALS data for 1986-1989. See Leslie Espinoza, *Colloquy: Masks and Other Disguises: Exposing Legal Academia*, 103 HARV. L. REV. 1878, 1882 n.21 (1990). For example, in 1987 and 1988, of the nonminority candidates hired 32% were members of law review, 10.6% had advanced degrees, 59% were admitted to the bar, 39% had never practiced, and 12% had publications. Minority hires included 21% who were members of law review, 18% had advanced degrees, 94% were admitted to the bar, 91% had practiced, and 15% had publications. *Id.*

review publications, and practice experience.¹⁹

As a blackwoman, my entry into a previously unaccessed place has caused me to become ever more attuned to the dual consciousness so eloquently described by W.E.B. Du Bois.²⁰ DuBois' notion is that, by reason of the history of being violently rent from Africa and the past and present experience of being violently excluded from official American identity,²¹ Blacks in the United States have a sense of double-consciousness, of "two-ness" that both filters and permeates our experience. It is a dialectic of being both within and without, of being without a self-defined and safe place.²²

Even in the academy, a place of privilege and power, by experience, history, and memory I remain connected still to those without and thus acquire the curious and layered perspective of an outsider's inside view. I do not seek either to romanticize nor overdraw the image of an outsider. Yet, though I am inside the academy, I am "without" in the sense that this is not a place in which either by experience or tradition the world that I know is considered, contemplated, validated, or seen as a fit subject of scholarly legal inquiry.

I recognize that many in the academy would deny that there is anything in the experience of black people or other people of color that is

19. This set of "standard" criteria has most usually valued law school grades, judicial clerkships, and law review participation more highly than practice experience. See Carter, *supra* note 16.

20. WILLIAM E.B. DUBOIS, *The Souls of Black Folk*, in THREE NEGRO CLASSICS 214-15 (1965). DuBois said:

[T]he Negro is a sort of seventh son, born with a veil, and gifted with second sight in this American world—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his two-ness—an American, a Negro; two souls, two thoughts, two unreconciled strivings

Id. While I do not share all of the sentiments expressed regarding American identity, I most certainly have experienced the double, in fact, multiple consciousness, that is shaped by being outside dominant culture.

21. As Toni Morrison eloquently argues, the exclusion of Blacks as "others" was central to the definition of American identity:

[i]t is no accident and no mistake that immigrant populations (and much immigrant literature) understood their "Americanness" as an opposition to the resident black population Deep within the word "American" is its association with race. To identify someone as South African is to say very little; we need the adjective "white" or "black" or "colored" to make our meaning clear. In this country, it is quite the reverse. American means white

TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* 47 (1992).

22. See GLORIA L. HOUSE, *TOWER AND DUNGEON: A STUDY OF PLACE AND POWER IN AMERICAN CULTURE* 2 (1991) (in study of spatial politics, describing the notion of "dwelling" or sense of place, 'inhabiting,' as essential to the formation of identity," and identifying "deprivation of this experience as constituting a violation of human development").

qualitatively different from other "ethnic groups" in the United States who carry scars of discrimination because they were of a different religion or cultural background than those who then were wielding power. The particular legacy of chattel slavery and centuries of legislated deprivation, however, are neither common, nor easily dismissed as historical events without contemporary significance. It has been fewer than thirty years since *Brown v. Board of Education*.²³ The signs designating "white" and "colored" entrances to movie houses and public bathrooms are part of what I remember in my lifetime from childhood visits to the South. I can still see Emmett Till's²⁴ mangled body on the cover of the magazine that lay on my grandmother's living room table—a frozen horror of the chaos of unbridled white supremacy that screamed danger even in the quiet of her orderly house.

Racist violence perpetrated against black people and other people of color is indeed again on the rise²⁵ and there are still places in this city where black people risk their lives should they happen to pass through.²⁶ Indeed, a blackwoman acquaintance who recently moved to the city to take up an academic appointment related to me that within months of her arrival, she was physically attacked by racist thugs on a public beach near her home who threw stones and shouted racial epithets at her and her son, only to then be chided by whites who witnessed the incident for screaming too loudly afterwards.

23. 347 U.S. 483 (1954).

24. Emmett Till, 14 years old, was brutally lynched by two white men in Money, Mississippi in 1955. Emmett had offended the wife of one of his white attackers when on a dare from his cousin, he said to the woman, "Bye, Baby" as he was leaving the local store. His conduct towards the woman, however, appeared not to have been his fatal misstep; it was his refusal to beg for mercy once he had been abducted. One writer reports that,

[h]is abductors had actually first thought only to scare the boy and "chase his black ass back to Chicago," but when Till refused to cry out when they beat him, or show fear, grovel, or plead for mercy, the brother reportedly told the court, "what else could we do except kill him?"

DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 68 (1980). Emmett's body was viciously mutilated, but his mother insisted that his coffin remain open during the wake. Thousands of people attended the funeral and the outcry over his death became a key rallying point for the emerging civil rights movement.

25. According to the Southern Poverty Law Center, hate crimes increased in 1991 for the fourth year in a row. See Mark Mayfield, *Hate Groups Increase—As Do Their Crimes*, USA TODAY, Feb. 20, 1992, at 3A. This increase in the number of hate crimes, which are underreported, included 25 murders. *Id.* In addition, the number of white supremacy groups operating in the United States increased by 27% to 346. *Id.* See also Laurent Belsie, *The Face of Hatred in America*, CHRISTIAN SCI. MONITOR, Nov. 27, 1991, at 8 (reporting rise of hate crimes in America).

26. See City of Chicago Commission on Human Relations, Special Report #1, 1990 Hate Crime Report, at 1 (on file with the *Chicago-Kent Law Review*) (noting that between 1986 and 1990, half of all the hate crimes in the city occurred in three areas: the Southwest Side, Austin, and the North Lakefront). 1990 had the highest percentage of violent hate crimes reported in the last five years, and a 15% increase in total hate crimes reported over 1989. *Id.*

I could cite the statistics and tell those that do not know that the black infant mortality rate in some neighborhoods in the major cities of this country is equivalent to or higher than in Malaysia or other countries in the "developing" world.²⁷ I could recount the research that documents the gross working conditions for many Mexican-American undocumented workers and forcible land dispossession of their predecessors.²⁸ No, not all people of color share that specific background, but it is part of the personal or transgenerational experience of far too many to be an abstraction. But for many who do not know this reality, citing these statistics would merely be a pebble thrown into a void—a shallow rendering of distant facts. Perhaps, for the "objective listener," it would mirror the experience of the hero in the movie *Grand Canyon* played by Kevin Kline who in taking a wrong turn on the way home, found himself in a black neighborhood—an unfamiliar but parallel world of want and pain that is best understood or contemplated from far away where fear does not assert its queasy presence.

Yet, this is part of the particular history, experience, and shared memory that informs my perspective and the perspective of many scholars of color. And to say it exists, that it is real, that, to paraphrase Christopher Edley, "we teach what we have lived"²⁹ is to be an outsider within, possessed of an everheightened sense of the contradiction between what informs my perspective and the "rational discourse of the law."³⁰

As an outsider then, there have been unique challenges, demands and occasional rewards. Many of these experiences are familiar ground shared by many people of color in the profession, although they are by no means universal and I do not intend to write consensus history here. But

27. The infant mortality rate in Central Harlem, New York City, in 1990 was 23 per 1000 live births, the same as Malaysia. Lisa W. Foderaro, *World Summit for Children*, N.Y. TIMES, Sept. 30, 1990, § 1, at 1. Infant death rates as high as 42.2 per thousand have been reported in East Harlem as well. Sam Roberts, *Note to the U.N.: Talk to Jonas and Jonathan*, N.Y. TIMES, Oct. 1, 1990, at B1. Overall rates of black infant mortality are twice that of whites, and in Illinois are 23.3 per 1000 live births. A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 398-99 (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989).

28. The land dispossession of Mexican-Americans and their poverty are intrinsically linked:

A conservative estimate indicates that Spanish-Americans between 1854 and 1930 lost over 2,000,000 acres of privately owned land, 1,700,000 acres of communal land, and 1,800,000 acres taken by the United States government without payment to the heirs This enormous loss is considered to have 'destroyed the entire economic basis of the Spanish-American rural villages . . . [and] played a major role in the formation of a large distressed area marked by high incidence of poverty, and social disorganization.'

HOUSE, *supra* note 22, at 21.

29. See Portia Y.T. Hamlar, *Minority Tokenism in American Law Schools*, 26 HOW. L.J. 443, 567 (1983)

30. See MACKINNON, *supra* note 8, at 162-63.

perhaps most well documented is the sense of tangible and intangible burdens that specifically derive from being a member of "a society of one."³¹ For me, it was not merely a matter of the anticipated (though perhaps underestimated) demands of the students I taught nor even of students of color who understandably took advantage of a virtual open door policy. (Where else could they go where they would face a welcome and unambiguous reception?) Nor was it merely the demands of committee assignments or other administrative tasks to which I was formally assigned. The demands also included the informal consultations on a host of other matters, both student and faculty generated, for which the input of a minority member of the faculty was sought or in which I believed another perspective was needed.³²

Such burdens also took the form of non-specific, non-particularized visits from students who were not in any of my classes but who came to inquire whether or not things that I was reported to be saying in my class were possibly true—such as was it really true that I had said that race was less a scientific or genetic construct rather than a social one, defined to provide the basis of domination and subordination.³³ How could I be believed since I was not objective, not a dispassionate observer, but a

31. This phrase is borrowed and used in the sense employed by Rachel Moran in her eloquent essay on minorities in the legal academy. Rachel F. Moran, *Commentary: The Implications of Being a Society of One*, 20 U.S.F. L. REV. 503 (1986).

32. These higher demands on time are a common experience among minority law faculty: [M]inority faculty are frequently burdened with disproportionately heavy administrative duties. In addition to their teaching responsibilities, they may be asked to assist in minority recruitment, act as advisors to minority student organizations, and direct formal or informal tutoring programs for minority students. These tasks divert minority and women law professors from legal scholarship, an important element of the traditional legal academic role. These added duties thereby impede acculturation, especially when colleagues are prompted to dismiss the minority or woman professor as a political rather than an academic appointment.

Moran, *supra* note 31, at 508 (citing address of Professor Taunya Banks, Black Scholars in the University: Roles and Conflicts, Minority Law Conference (Oct. 27, 1985)).

33. I do not take the view that racial distinctiveness or racial characteristics are matters of fiction. Noting and respecting differences among peoples is not racist, but to be either determinist or dismissive about race is to only perpetuate domination. Thus, I argue based on the course of human history, those who would describe or define race cannot claim a state of innocence. Because definition is a central part of domination and re-definition a critical part of liberation, the issues as they pertain to defining race are not principally biological or genetic, but social and political: who is defining, how are they defining and why are they defining. In a classic expose of colonialism, Albert Memmi argues that racism is an essential feature of colonialism, based on three ideological components:

[t]he gulf between the culture of the colonialist and the colonized; . . . the exploitation of these differences for the benefit of the colonialist; [and] . . . the use of these supposed differences as standards of absolute fact To search for differences in features between two peoples is not in itself a racist's characteristic, but it has a definitive function and takes on a particular meaning in a racist context.

ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* 71 (Beacon Press 1991) (1957). The dedication reads, "the American edition is dedicated to the American Negro, also colonized . . ." *Id.*

blackwoman with a particular view of things. Passion then is a disqualifying attribute—the antithesis of rationality—depriving the speaker of any claim to persuasion.³⁴ Only those who deny they are affected by oppression in our society can claim rational discourse. All others have a “perspective”—something which instantly diminishes the validity of the observation or analysis.³⁵ The required “perspectivelessness” that Kimberlé Williams Crenshaw describes is the hallmark of professionalism and rationality, the values most prized in the academy.³⁶ Yet none of us, student or teacher, leaves who we are at the door of the academy. What we see, what we hear, how we listen and respond, is all informed by the sum total of everything that has happened or not happened to us before, and all of our translations of that experience.³⁷

Not all of these encounters take on hostile forms. Some are obviously well-intended. As I noticed on occasion those who casually or not so casually stood outside my office door or the door of my classroom peering in as I was teaching, I wondered if the sense of living in a fish bowl would ever pass. While time has indeed diminished the degree to which I am sensitive to such occurrences, it has not diminished my sense of wonder and, indeed, anger at an educational system and a society that breeds the gross ignorance or studied indifference that underlay some of these encounters. For the students who live on opposite sides of the race and class divide, it is a matter of not knowing enough about the basic humanity that we all share to be able to dismiss as racist and ignorant assertions by their fellow classmates that Black people did not swim or that because of the texture of our hair, water would not pass through it easily—statements related to me by a student who wanted to know if these generalizations were “true” since the student felt unable to assess their veracity.³⁸ Because these students have never encountered black people as human beings, as anything more than the objectified “other,”

34. Achebe's view of passion however is quite different: “those who mismanage our affairs would silence our criticism by pretending they have facts not available to the rest of us. And I know it is fatal to engage them on their own ground. Our best weapon against them is not to marshal facts of which they are truly managers, but passion. Passion is our hope and strength, a very present help in trouble.” ACHEBE, *supra* note 1, at 35.

35. Catharine MacKinnon notes that the objective, rational stance is “ostensibly noninvolved,” assuming “a view from a distance and from no particular perspective, apparently transparent to its reality”—a reality in which its way of perceiving is a “form of subjugation.” MACKINNON, *supra* note 8, at 121-22. Rationality requires “point-of-viewlessness.” *Id.* at 162.

36. Kimberlé Williams Crenshaw, *Foreword: Towards a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 12 (1989).

37. As Delgado notes, much of social reality is constructed. Delgado, *supra* note 9, at 2416. Indeed, “We participate in creating what we see in the very act of describing it.” *Id.*

38. It did occur to my somewhat saddened and bemused colleague to whom I later recounted this discussion that perhaps the existence of one of these myths reinforced the other.

they have no frame with which to distinguish the absurd from the real. Despite the fact that they hold degrees, that presumably they have attained some measure of competency in mastering a core of information that those who are "educated" are supposed to share, basic analysis about race and racism—one of the defining issues in world history and in U.S. history in particular—remains at the primitive level.

I am often told, however, that race is not that important. I have no quarrel with that as a theoretical matter. Race might not be important but racism most certainly is. Both the historical use of race as scientifically determinative of inherent inferiority and the current use of race as a neutral though immutable fact without social content serve to support race subordination. The first use of race creates a false linkage between race—specifically Blackness and inferiority, while the second use of race as a neutral fact denies the real linkage between race and oppression under systemic white supremacy.³⁹ Both share the false construct of race as an immutable, objectively determined fact; both serve to distort and deny reality.

More complex are discussions that do not reveal lacunae but, like the student who sincerely asserted that the problem of poverty is behavioral in origin, reveal the insidious and subtle ways in which the fissures in American society are created and sustained. By making the issue of poverty and conversely, by implication, attaining success a matter of knowing how to act,⁴⁰ the student was disconnected from the "others" that do not occupy the community for which everyone is responsible.⁴¹ However, social and economic marginality has never been known to respect such rigid catechisms of rewards and punishments for good and

39. See Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 4 (1991) (discussing the deployment of historical race and formal race as categories which replicate black subordination by rendering a false account of the significance of race—the former linking race to inferiority and the latter denying the link between race and oppression).

40. The student is certainly not alone in this perception. This culture of poverty model that ascribes the worsening economic conditions of the poor to their "behavior problems," their lifestyles, mores, and living habits rather than the structural inequities of the economic regime, is prevalent in dominant society. See Hermon George, Jr., *Black America, the "Underclass" and the Subordination Process,* THE BLACK SCHOLAR 44 (May/June 1988) (criticizing prevailing explanations of poverty as the problem of "the underclass," as ignoring the degree to which current capitalist relations depend and are structured on the racial, economic, and political subordination of blacks).

41. In a moving account of the disintegration of Yugoslavia, Slavenka Drakulic, a Croatian novelist and journalist, relates the slow and painful process by which she was forced to come to terms with the war and the ever increasing problem of refugees. After her encounter with another woman journalist, a Muslim who fled Sarajevo, Drakulic recognized her growing prejudice against the flood of refugees, who she began to see as "others." She notes, once people are consigned to the category of the "other" or "otherness," there is no responsibility for action to alleviate their suffering. Slavenka Drakulic, *You Are Balkans, the World Tells Us, Mythological, Wild, Dangerous,* N.Y. TIMES, Sept. 13, 1992, § 6, at 36, 70. In fact, she states, when "the concept of 'otherness' takes root, the unimaginable becomes possible." *Id.* at 68.

bad behavior and thus I wonder about the reaction of those students who at some point in their lives encounter the startling realization that how they acted could not forestall a bad outcome. The current freefall of American politics and economics—the result of being unloosed from well-understood, albeit miscast, polarities and assumptions about America's world position—has clearly infused these students with fear that they may suffer a bad outcome for reasons they do not know or understand.

What is less obvious, however, is that the tenuous and uncertain nature of economic success for many is not a behavioral problem but a structural one. For example, the growing feminization of poverty—the fact that more of the poor are women with children who slide into poverty after divorce or separation from their partners leaves them without economic support, or who cannot attain economic viability because of the systematic devaluation of “women's work,” lack of affordable child care or health care⁴²—cannot be fairly situated in the failure of women to learn how to behave. Given the spasms and contractions of the corporate sector as the economic shakeout from the disinvestment and debt binge of the 80s continues, the existence of the “working poor”⁴³—an apparently unknown phenomenon to students in my classes who, like former President Reagan, pointed to the want ads as the answer to unemployment—may not remain an abstraction.

This is not an easy discussion to have. Infusing students with some sense of critical analysis that challenges comfortable myths is hard work. It is made even more impossible when from within academe some argue that equality is not a compelling concern when other factors like stability, market efficiency, or scarcity are considered;⁴⁴ that there is a correlation between race and inferiority; and that many people of color in the

42. See HILDA SCOTT, *WORKING YOUR WAY TO THE BOTTOM: THE FEMINIZATION OF POVERTY* (1984) (describing the structural factors that disproportionately group women into occupations at the low end of the economic scale, and into part-time work).

43. The working poor are a significant proportion of the those who are poor: “Millions of people work but remain poor. In 1984, 9.1 million poor Americans were in the labor force, including 2.1 million who worked full-time year-round and 1.2 million who were heads of households.” Sar Levitan, *The Evolving Welfare System*, 23 *SOCIETY* 4 (Jan./Feb. 1986). Recent data indicates that the majority of poor adults—52.6 percent—are working poor. The Census Bureau Reports that 14.4 million people worked full time but earned less than \$12,195. David Hage, *Why Poor Workers Lost Ground in the 1980s*, *U.S. NEWS & WORLD REPORT*, June 1, 1992, at 46.

44. See, e.g., Lloyd R. Cohen, *South Africa: A Global Perspective*, 5 *THE WORLD AND I* 575 (Feb. 1990) (arguing that equality should not be the only principle considered in evaluating the system of apartheid in South Africa, as in doing so, the critics of apartheid have failed to be fair and consider need for stability and efficiency); RICHARD EPSTEIN, *FORBIDDEN GROUNDS* (1992) (arguing for the repeal of Title VII and other antidiscrimination laws as inefficient and ineffectual interventions with market forces).

academy, as faculty and students, are not qualified and will not successfully compete.⁴⁵

At the personal level, students have assumed and asserted that neither my intellectual qualifications nor teaching abilities could match those of my white male counterparts. Early in my third semester of teaching, a black student appeared in my office visibly distraught following a "conversation" with one of her fellow classmates. The black student reported that while sitting in the library, a fellow white classmate, a student in my class, had approached and asked the black student's view about the professor teaching the other section of the course I was teaching. The black student responded that the professor was O.K. In turn the black student asked what opinion the white student held of me since I was teaching the same course. The white student responded that, "Professor Harris is pretty good," but that this was unexpected since, as a blackwoman, "she probably wasn't qualified." The black student was stunned and vigorously argued that this was a gross assumption. The white student went on to charge that affirmative action was unfair and an unwarranted derogation from merit standards. As the argument continued, the white student suggested that perhaps one of the reasons for black underachievement was the high birth rate of blackwomen on welfare. It was clear that the white student did not see any of this discussion as infected by racism or, in fact, as an aggressive attack on the competency or well-being of the black student. To the white student, these were simply neutral facts and opinions about which reasonable people differ.

I remain aware that I am not alone in being affected by these lingering and inevitable effects of racism as the same set of assumptions underlie some of what is said or not said, what is done or not done to students of color. Attacks on their ability and humanity sometimes come quite casually from classmates and more formally from others inside the academic hierarchy itself. The presence of students of color in anything more than microscopic numbers is assumed to be the result of gross deviation from standards of merit which all others have met. Students of color have been directly confronted by their white classmates who have said that they should not be in law school since "they bring down standards." Deviations from existing "pure merit" standards that currently inhere in admissions decisions influenced by preferences accorded children of alumnae and donors are not considered nor are the ways in which the yardstick of meritocracy consists of chosen and assumed com-

45. See Richard Posner, *Duncan Kennedy on Affirmative Action*, 1990 DUKE L. J. 1157, 1159.

ponents that are far from the irrebuttable presumptions they are purported to be.⁴⁶

Indeed, the rhetoric of this Supreme Court has obscured the reality of racism and exacerbated the tensions regarding remedial obligations by articulating a new mission under the Equal Protection Clause. The Court now rejects any interpretation of equal protection guarantees which would require intervention on behalf of blacks although the Equal Protection Clause was conceived as the country's first and long overdue effort to cure the problem of slavery and white supremacy. Now the Equal Protection Clause is read to require the protection of "innocent" whites.⁴⁷ Such readings obviously remove any obligation to address the continuing effects of the history of the oppression of black people or its current reformulations despite the fact that the present legacy of formal and informal mechanisms of white supremacy are well-documented and singularly evident.

Students of color in the academy then are often left doubting their own sanity or competency since obvious distortions in social and economic relations wrought by racism and gender subordination are treated as speculative theses about reality that must be proven to the satisfaction of legal requirements. While the effects of such doctrinal and analytic approaches to white supremacy directly impact the definition of what "the law is," more indirectly, they implicitly sanction a perspective that denies the possibility of critical thinking about questions of domination, of remediation, of repairing, of healing.

They also form the background for more direct attacks. Racist assertions made publicly by fellow classmates or colleagues about the quality or competency of people of color in the academy and more generally about the behavior of people of color in the world at large are frequently

46. Merit is not objective fact but a social construction which is shaped in relation to selected goals. As illustrative of this point, Ronald Dworkin disputed Allan Bakke's claim that his rejection by University of California at Davis Medical School in favor of "lesser-qualified" minority students was a violation of merit standards as ignoring the fact that "merit" does not necessarily mean only MCAT scores and undergraduate grade point average. Test scores and UGPAs are not the only possible definition of merit. See, e.g., Ronald Dworkin, *Why Bakke Has No Case*, N.Y. REVIEW OF BOOKS, Nov. 10, 1977, at 13.

47. Whether the Supreme Court has affirmed or rejected affirmative action plans, the Court has been constrained by a felt need to avoid harm to "innocent whites"—those who have not directly participated in acts of discrimination, but who may be disadvantaged by an affirmative action plan in that they are not entitled to its benefits. See RONALD FISCUS, *THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION 4-5* (1992). In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Justice Powell expressed his concern that the special admissions program unfairly burdened Bakke as an innocent white, in violation of Equal Protection guarantees. *Id.* at 290-98. This concern for innocent whites later caused the Court to require a compelling state interest—a strict scrutiny equal protection standard—before affirmative action can be allowed. *City of Richmond v. Croson*, 488 U.S. 469 (1989).

unanswered or unchallenged by members of the academy, though they may find them reprehensible or simply wrong-headed. Engaging students or colleagues who voice such ideas often is difficult since the commands of "rational discourse" are seen to require disengagement from "personal opinion" that is considered of diminished value. Racist statements are seen as a matter of opinion, which although controversial, are beyond the ken of engagement or direct confrontation since they are personal views that presumably do not impact or effect the neutral intellectual norms and practices of the academy. And so the insults, the distortions, the dehumanization experienced by some people of color in the academy at the hands of fellow students and faculty become "unfortunate comments," privately decried but not always publicly denounced or rejected. Such tasks too often may be left to the person of color on the faculty whose collection of such anecdotes from the whole minority population that includes students and staff far too quickly becomes a cup filled to overflowing. Because the person of color in the academy is presumed to lack impartiality when it comes to opposing racism, the irony is that while the burden frequently may be delegated to her by default, she is the very person whose voice lacks credibility in making anti-racist critiques.

I recall encountering a student one morning after a particularly grisly photograph of the results of an attack on black commuters on a train from the townships into Johannesburg, South Africa was printed conspicuously on the cover of the *New York Times*. As the student clucked his tongue with considered disgust, he thrust the paper into my view, saying, "Isn't this disgusting? They are just killing each other," challenging me to justify this latest incident of "black-on-black, tribal violence" among "them." The fact that I was never similarly greeted with such concerns or labels when reports of ethnic violence in the disintegrating Soviet Union were rampant indicates the degree to which race still influences how we understand political events. When I asserted that the events depicted in these photographs were in large part the result of state-sponsored violence,⁴⁸ I was met with puzzled expressions and assertions of disbelief: I was seen once again as "exaggerating," and "partisan," not rational and objective.

48. Long standing reports that the violence between Buthelezi's Inkatha members and supporters of the African National Congress was not "black on black violence" among members of warring tribes, but was in fact political conflict, fueled, orchestrated, and secretly funded by the white minority government have been confirmed by South African papers and most recently the *New York Times*. See Christopher Wren, *Zulu Ex-Aide Tells of Arms Training*, N.Y. TIMES, Mar. 1, 1992, § 1, at 3.

None of these experiences is unique; indeed, all of them have analogs in many of the experiences of scholars of color who have preceded me. Traversing this ground however does force me to confront the fundamental question of why I should be a law professor, apart from the reasonable level of material comfort that it affords. Within this question is embedded another: why should I, as a blackwoman, be a lawyer? No one in my family was. No one pressured me. And while I decline to repeat the shameless exploitation of personal history deployed by Clarence Thomas in his quest for ascendancy to the Supreme Court, I might also add that not only was no one in my family a lawyer; at least on the Mississippi side of my family, I was the first to complete college. In regards to my initial view of the law, I tended to share the view of one famous reggae musician who after a lengthy meeting with a lawyer for a record company during which the lawyer explained the terms of a contract, simply stood up and said, "lawyer, liar, lawyer, liar."

Perhaps my intuitive views were not so off-based. After all, American law and jurisprudence are grounded in a set of assumptions and a view of history that has ignored the truth.⁴⁹ At the foundation of American law is both the promise of democracy and its profound disappointment. The inherent contradiction of the founding document—the U.S. Constitution—in which rights against government tyranny were enshrined while simultaneously the human rights of Black people were trampled has been fully and carefully explored by many scholars includ-

49. The assumptions of the law are often based in world views that are rife with dehumanizing and demeaning perspectives. Plato, presumably one of the central architects of the foundations of "Western Civilization" asserted that women's roles were that of whore, mistress, and wife—the only privilege of the latter status being that she was expected to keep the house and produce "legitimate" heirs to inherit her husband's material goods.

The history of American law is similarly tainted. One of the first judicial decisions issued in the colony of Virginia in 1630 was *Re Davis*. The case held that one Hugh Davis was to be soundly whipped "before an assembly of negroes for abusing himself to the dishonor of God and the shame of Christianity by defiling his body in lying with a negro . . ." See A. LEON HIGGINBOTHAM, JR., IN *THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* 23 (1980). Presumably, Hugh Davis was white and had brought much shame to the white race by being with a blackwoman and *getting caught*. The blackwoman's name, shame, and circumstance is unreferenced and clearly unimportant in the view of those who sat in judgment.

Later, Virginia adopted legislation which provided that "children got by an Englishman upon a Negro woman shall be bond or free according to the condition of the mother . . ." *Id.* at 43. As the status of blacks as a whole deteriorated in relation to that of white indentured servants and the term of servitude imposed on blacks stretched from a number of years to life, the "condition of the mother" soon meant that of slave. The adoption of this law and similar legislation formed a cornerstone of the system of chattel slavery and the plantation economy—the ability to reproduce one's own labor force. If the child of a slave woman took on the status of the mother, regardless of whether the father was free or not, black or white, then the supply of slaves could continuously be replenished through the use of a black woman's body, at far cheaper cost and less economic risk than the slave trade. *Id.* at 44.

ing, notably, in groundbreaking work authored by Derrick Bell.⁵⁰ Indeed, as one black scholar has noted, “as a document that, in a sense, writes itself on the enslaved body of the African, the Constitution of the United States contains both a foreground story of freedom and a variety of backgrounded narratives of suppression.”⁵¹

The history of the development of American social, political, and economic structures has been a contradictory one—one filled with struggle, resistance, achievement, and failure. It is a history filled with the language of democratic ideals and the reality of persistent violence and disenfranchisement of Blacks, Latinos, Native Americans, Asian-Americans, however the “other” may be defined in particular circumstances and context. These modes of suppression range from the overt to the implicit including the sustenance of privilege by control over a principal instrument of power—the law.

These are the foundations of this legal system that have operated on us, our mothers, our fathers, our mothers’ mothers, and fathers’ fathers, on and on, as far back as the beginning of our time in this land. These are also the bases on which the academy is constructed to enshrine, protect, and develop norms for the benefit of those to whom this history and its current legacy of pain, poverty, and disillusionment are unknown or irrelevant. The question then is what am I doing here? What should I be doing here?

In searching for some answers, I find guidance from those men and women who have preceded me in confronting the same questions. In their history, their scholarship, their struggles, their stories, I find the ongoing challenge to the dominant presumptions of neutrality, inevitability, and formality that undergird and have built a jurisprudence that has oppressed. The work of Charles Hamilton Houston, Thurgood Marshall, Vine de Loria, Derrick Bell, Haywood Burns, Kimberlé Williams Crenshaw, Mari Matsuda, Patricia Williams, and many others begins the task of documenting the lies, subverting the false assumptions, and reconstructing options in furtherance of the task of social transformation.⁵²

50. See DERRICK BELL, JR., *AND WE ARE NOT SAVED* (1987) (describing the contradiction in the constitution which upheld the liberty and freedom of whites while institutionalizing slavery and oppression of blacks).

51. Houston Baker, Jr., *There is No More Beautiful Way: Theory and the Poetics of Afro-American Women’s Writing*, in *AFRO-AMERICAN LITERARY STUDY IN THE 1990s* 140 (Houston Baker, Jr. & Patricia Redmond eds., 1990).

52. I offer the following description of critical race theory articulated by John Calmore as illustrative of what I mean by jurisprudence of resistance. While not all of the scholars I have cited are part of the relatively new body of work identified as critical race theory, all mentioned are either its progenitors, authors, or fellow travelers.

As represented by legal scholars, critical race theory [a form of oppositional scholarship]

This is the foundation of a jurisprudence of resistance. Obviously, we—people of color—cannot singlehandedly transform the academy. It is far too entrenched, too complex, too deep-rooted in the sustenance of power and privilege to be overturned by the efforts, however heroic, of one, two, five, or ten minority faculty and their non-minority allies. But the lives of our people are in fact the bridge that we crossed over to enter the academy and our organic connection to that reality cannot be allowed to fall by the wayside.⁵³

The other source in which I find guidance to this question is poetry and literature—the stories and myths forged out of reality. It is Achebe that has suggested that in the context of social tasks it is the obligation of the poet to stay in trouble with the king. It is the task of the artist to take risks, raise contradictions, raise consciousness, and develop an oppositional role—not for its own sake, but for the sake of those of us who remain under the burden of inequities and injustice in the social order.

If the task beyond survival is social transformation, then this too requires of us—all of us—a critical insurgent stance that relentlessly challenges the lies that kill. There is much room for debate as to how we achieve this—what are the strategies and tactics. And, of course, it is always crucial that we analyze our failures. Our task cannot merely be to accommodate ourselves to the demands of the academy although first we must survive. But we will not survive on our own any more than our predecessors did. We can choose to make use of our positions as intellec-

challenges the dominant discourses on race and racism as they relate to law. The task is to identify values and norms that have been disguised and subordinated in the law. As critical race scholars, we thus seek to demonstrate that our experiences as people of color are legitimate, appropriate, and effective bases for analyzing the legal system and racial subordination. This process is vital to our transformative vision.

* * *

[A]s critical race theorists confront the texts of America's dominant legal, social and cultural strata, we are critical, fundamentally so, because we engage these texts in a manner that counters their oppression and subordinating features. In this endeavor we are not simply in opposition; we are not rebels without a cause. We are the "new interpreters," who demand of the dominant institutions a new validity.

Calmore, *supra* note 8, at 2160-61, 2164.

53. Judge Leon Higginbotham in an open letter to Justice Clarence Thomas eloquently articulates the crucial connection between people of color in institutions of power and history:

[W]hile much has been said of your admirable determination to overcome terrible obstacles, it is also important for you to remember how you arrived where you are now, because you did not get there by yourself. When I think of your appointment to the Supreme Court, I see not only the result of your own ambition, but also the culmination of years of heartbreaking work by thousands who preceded you. I know you may not want to be burdened by the memory of their sacrifices. But I also know that you have no right to forget that history. Your life is very different from what it would have been had these men and women never lived . . . This history has affected your past and present life.

A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas From a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005, 1007 (1992).

tuals of color in the legal academy to agitate and at the concrete level to open the theories we develop to the check and test of reality. We can learn to survive and to stay in trouble with the king. Only in doing both will we discharge our duty and aid the birth of freedom for which we all long.