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Deborah Waire Post†

THE NATURE AND CREATION OF ETHICAL IDENTITY

When I was growing up in Auburn, New York, people referred to me as "one of the Post girls." I never thought to question the label. Although it did not describe me completely, it provided most of the information needed to place me within the social landscape of our town. In fact, I never really thought about describing myself in any other way until I left home and people began to ask me "What are you, anyway?"

As a young woman, the knowledge that my interrogators were trying to classify me phenotypically evoked emotional responses that ran the gamut from fear and anger to amusement. Anger and fear were closely connected, a product of the realization that the answer to the question could be used against me. At other times the question made me laugh. People are often misled by the context in which they find me, and I find their confusion funny. When I worked for Margaret Mead, students who asked me that question always assumed the answer would be "Samoan." When I lived in Texas, there were those who assumed the answer would be "Hispanic" and others who just knew I had to be Creole from Louisiana.

After twenty or more years of being asked "What are you?", if I remain ambivalent about the answer, it is not because of any confusion about my identity, but because I am uncertain about the politics of choosing a particular descriptive term. I was a very small child when I rejected the idea of identifying myself as a mulatto. In college I struggled with the choice between the more traditional "negro" and the more unfamiliar and radical terminology "black." Today we are asked to abandon "black" for "African-American," and I find myself as intransigent in my use of black as my grandparents' generation was in the use of "colored."[1]

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[1] See, for example, the discussion of the choice of the term black over African-American in Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan L Rev 381, 586, n20 (1990); compare with Randall Kennedy's decision to employ an "eclectic set of racial identifi-

Over the years the question "What are you?" has lost its sting. It no longer makes me angry. I recognize it as a question which asks me to identify myself in social and cultural terms. The danger hidden in the question "What are you?" is found in the motives of the asker, and that danger has not diminished over the years. It is this danger that gives my answer a moral and ethical dimension.

My decision to identify myself as a black person is not exclusively a matter of descent, although my father's grandfathers were a runaway slave and a free black man who fought in the Civil War. Nor is it simply a matter of residence, although the fact that I grew up in a black neighborhood surely played a part in the creation of my sense of identity. It is not a matter of skin color, although there has never been a question about the fact that I am a person of color. Some might argue that I am black because whites will not let me be anything else. I prefer to believe that I am who I am, a black woman, because I made an ethically and morally correct choice with respect to my identity.

The other day Agnes, my son's paternal grandmother, asked me "Does Christopher know he's black?" Christopher's father got angry. He thought the question foolish. Obviously Christopher is black. As Agnes would say, "he comes by it naturally." His father and I are both black, and three of his four grandparents, including Agnes, are black. Christopher's father did not understand the question, but that really did not matter. The question was addressed to me, one woman to another, one mother to another, as the person responsible for the transmission of culture, the socialization of Agnes' grandchild.

Agnes explained her question with a story. Aunt Fannie, the first in the family to move North, found a position working for Robert Moses and settled on Long Island. Aunt Fannie raised her nephew, Leonard. As a young black child, Leonard became the playmate of the Moses children. He rode around in limousines and played with them in their home. One day Leonard came home furious with Aunt Fannie. He screamed at her and demanded to know why no one had bothered to tell him he was black.

They did not tell the child he was black. Worse than that, I suppose, they did not tell him what it means to be black. Even if they had, I am not sure it would have made a difference. When we are given the privileges and prerogatives of whiteness, it is easy to decide that we are somehow different from the blacks who are denied these advantages. The danger to the child who later becomes the adult is the emotional and psychological harm that can be done when those privileges are withdrawn.

Agnes' question about my son's black identity echoed my own

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cations" and his position that the racial labels "Negro" and "colored" have "equal dignity" with "black," "African-American" and "Afro-American." Randall Kennedy, *Racial Critiques of Legal Academia*, 102 Harv L Rev 1745, n2 (1989).

thoughts. I had been thinking about my son's choice of a black identity, a choice that I am anxious to have him make. I am concerned because I am raising him in circumstances I never knew as a child—he is a black child isolated in a white community. I must create for him a sense of the black community to which he belongs. I try to reach him emotionally and intellectually, using discourse to create a sentiment of affinity.[2] People who do not live together can still be members of a community.[3] Members of the black community are bound to one another by common experiences, shared values and beliefs, myths and heroes. We face a common danger: we share a risk which is peculiarly our own. The social borders between the white and the black community are well marked with symbols of "estrangement."[4] The greater challenge today is finding a way to establish for our children the emotional and cultural connections, a sense of attachment and solidarity with the black community that will make the ethics and morality of identity clear to them.

A few years ago, I began spending summers with a white woman friend who married a black man. It became a running joke with her children that my arrival would herald the beginning of an intense course in black history and culture. I expected the boys to grumble. I did not expect an emotional confrontation with their mother. Why, she asked me, did I think of myself as black when my mother was white?[5] Didn't I see that she was hurt when I encouraged her children to ignore their white identity? If they were to choose to be black, she explained, they would be rejecting her culture. If they rejected her culture, they rejected her.

I fell back on an easy answer. I told her that they did not have a choice. She accepted the truth of what I said when her eldest son was called "nigger" for the first time. This past summer, she warned him when he asked to buy a Rebel cap at the Atlanta airport that he would have to deal with me. I think I made the lines of "external estrangement" very clear when I asked him whether he really wanted to wear the cap of the army that fought to keep him a slave.

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[2] See generally the discussion of the use of sentiment in discourse in Bruce Lincoln, *Discourse and the Construction of Society, Comparative Studies of Myth, Ritual and Classification* 9-11 (Oxford U Press, 1989) ("*Discourse and Construction*"). Lincoln argues that social borders, the cultural boundaries between groups, are "constructed" through the use of sentiments of affinity, which bind the group together, or estrangement, which separate the group from others. The most provocative aspect of Lincoln's theory is his advocacy of the use of discourse as an "instrument of struggle."

[3] For a discussion of the definition of social community and the growing irrelevance of place, see Melvin M. Webber, *Towards a Definition of the Interest Community* in Peter Worsley, ed, *Modern Sociology: Introductory Readings* 414, 415 (Penguin Books, 2d ed 1985). Although you do not have to live together, there has to be accessibility and opportunities for interaction.

[4] Lincoln, *Discourse and Construction* at 9-10 (cited in note 2).

[5] I think it is important to point out here that most interracial marriages in my parents' generation resulted in the adoption of the white spouse by the black community and his or her exclusion from the white community. For example, my mother assumed the identity of an octoroon. While this may not be the case today, if there really is a choice, it may result in greater pressure for endogamy by the black community.

The "easy" answer I gave my friend does not explain why her sons, who could "pass" phenotypically for white, should not do so. Nor does it answer her original question to me. The "easy" answer does not explain why blacks who are able to assimilate should embrace and affirm a separate cultural tradition. The real answer requires an exploration of the politics and ethics of identity, a subject which has significance in the current debate over the meaning and the value of diversity.

I recently read an article in a philosophy journal which used the question "But would that still be me?" to explore the idea of race, gender, and ethnicity as sources of "ethical identity."[6] The author, Anthony Appiah, uses "ethics" and "ethical" in several ways in the essay. He alludes to the "ethical project of composing one's life," where ignoring social reality, the centrality of race and gender, is a form of self-deception. Self-deception is "inauthentic" and therefore unethical behavior. He distinguishes between the different ethical consequences which flow from what are arguably qualitatively different denials of identity. A rejection that takes the form of a lack of participation in the life of the community is defined as inauthenticity. Active concealment of identity, a more serious transgression, is dishonesty. These distinctions, which go to the nature and the content of the ethical obligations attached to identity, are very helpful and I have tried to elaborate on them in this paper.[7] The description of identity as ethical, suggesting the possibility of moral choices, seems intuitively correct to me. I disagree with the author's conclusion that in the case of race, at least, ethical identity is based on a "false metaphysical belief that being black is more 'real' than being Irish."[8] If we accept the idea that gender, race, and ethnicity are social and not biological, it is still possible to argue that in the United States, at least, being black is more real than being Irish. It all depends on what we mean by "real."

The ethical nature of identity hinges on the "centrality" of the particular characteristic or attribute. I assume that "centrality" refers to the emotional and psychological significance of a source of identity.[9] The centrality of a socially-constructed source of identity like gender, race, or ethnicity cannot be separated from culture or politics. Approaching the problem of ethical identity from the perspective of a social scientist

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[6] Anthony Appiah, *"But Would That Still Be Me?" Notes on Gender, "Race," Ethnicity, as Sources of Identity*, 87 J Philosophy 493 (Oct 1990).

[7] See Section on *"Ethical Identity and Acts of Betrayal"* infra.

[8] Appiah, 87 J Philosophy at 498 (cited in note 6).

[9] I have chosen to characterize "centrality" in terms of psychological and emotional significance because we are talking about an individual's experience and choice of identity. The economic, social, and political consequences of membership in the particular group or category have objective consequences but these are experienced subjectively by the individual. A source of identity can assume importance because it provides emotional gratification or fulfills a psychological need, or it can be central to identity because it is the source of humiliation or resentment.

rather than as a philosopher, I would argue that the most significant source of identity for individuals is that which defines the purpose and direction of their lives. Individuals experience oppression as a struggle for dignity and self-respect and that struggle provides meaning for their lives. When the rationale for oppression is tied to social status, to membership in a particular social category, the fate and the identities of the individual and the group are linked.

There was a time when I believed that the knowledge that there is a struggle going on—a struggle for dignity, self-respect and material well-being—was bred in the bone of all black people. In Auburn, the history of the struggle of the black community is as old as the city itself. Auburn was settled by two men, one white and the other black, working side by side to clear the land. One, an officer in the Continental Army during the American Revolution, received the land as compensation for his services during the war. The other, his slave, received his freedom for his services in carving the original settlement out of a forest. Harriet Tubman's home, a gift of Lincoln's Secretary of State, William H. Seward, was in Auburn, New York, which was one of the stops on the Underground Railroad. My own great-grandfather, Johnny Waire, took the Underground Railroad North to freedom.

But it was the stories my father told me about his own part in the struggle that made the greatest impression on me. He told me about the time he spit in the face of a white dowager who leaned over my carriage and exclaimed "My, what a cute little pickaninny." He told me about the time the Ku Klux Klan burned a cross on the hill at the top of our street and all the black men in the neighborhood marched up to meet them armed with guns and makeshift weapons. The KKK disappeared in the night and never resurfaced, at least not in their Klan guise.

The existence of a shared struggle generates a normative construct, an imperative that makes rejection of membership in the group unethical and immoral. Most simply stated, ethical identity is a concept which describes a set of loyalty norms.[10] My father used his stories to teach me what it means to be black in America, the responsibilities that go with my identity, my role in the struggle. He gave me my ethical identity as a black person.

ETHICAL IDENTITY AND FEMINISM

It is hard, probably impossible, to remember the point in time when

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[10] A social order, the prescribed behavior for one who occupies a particular status, may have a moral or ethical component. For instance, the failure to perform the duties that accompany the status of parent is viewed as morally derelict. The difference between the moral content of a particular social role and ethical identity is the difference between an individual ethic and a group ethic. Ethical identity refers to the relationship that the individual has with the group which is the source of that identity.

race became a part of my ethical identity. It is less difficult to pinpoint the moment when I became a feminist, when my gender, my status as a woman, became a part of my ethical identity.

At the point in my life when I was most involved in learning about black culture, I consciously rejected involvement in the women's movement. I thought of the feminists I knew in college as crazy women who burned their bras and spouted rhetoric about the evils of patriarchy. I shared their concern about certain issues, but I had no sympathy for their middle-class angst or tolerance for what I considered whining. There was nothing revolutionary about deciding to work. To say you have to make a decision is to say you have a choice. Where I grew up, there was no choice. I felt as Sojourner Truth must have felt when she first heard the argument that women were meant to be sheltered and protected: "Ain't I woman?"[11]

Gender became a part of my ethical identity while I was in law school. In the legal profession, gender bias is the dominant experience of all women, black and white. I had been prepared for the discrimination I would face as a black person. I was singularly unprepared for the attacks on my dignity and my competence which are the product of the hostility of men towards women in this profession.

From where I sat I could see my classmate leaning over his desk, his face distorted by emotion. It appeared to me that he was straining, as though he would have liked to reach all the way to the front of the room. "How's that for your two-prong test?" I heard him challenge my female contracts professor in a tone of voice which left me speechless. It was unparalleled in its hostility, disrespect, and arrogance.

I learned in my very first year in law school how dangerous it is to be a woman in an environment where men rule—men who are faculty and men who are students. I learned how easy it is for women to adopt the attitudes of men, to internalize the value system which teaches them to hate themselves and other women.

The woman who taught me contracts walked out of a class after she called on several people in a row who answered, "I pass." The students' response was a mass meeting of the section and a delegation to the dean. Women and men alike declared her incompetent because she was not Charles Fried, their standard of comparison.[12] These first-year students

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[11] Sojourner Truth, reminding an audience of whites who were accustomed to seeing black women labor in kitchens and in fields alongside black men, quoted in Paula Giddings, *When and Where I Enter: The Impact of Black Women on Race and Sex in America* 54 (William Morrow, 1984). Giddings discusses the difficult and sometimes strained relationship between black women and the feminist movement.

For a contemporary version of this schism in the rarified atmosphere of the legal academy, see the discussion of race and essentialism in feminist legal theory in Harris, 42 Stan L Rev at 581 (cited in note 1).

[12] Charles Fried was then and is now a Harvard Law professor. He served as United States Solicitor General in the Reagan administration.

refused to accept the knowledge that she offered them because it was not what students were learning in other sections. She taught contracts using the Uniform Commercial Code. Rumor had it that Duncan Kennedy, another contracts professor, also used what might be considered an unconventional approach to contracts law, but the grumbling from his section did not result in a mass meeting. In the long run, his unconventionality was attributed to his brilliance, hers to incompetence. [13]

Gender issues still catch me off guard. I am surprised whenever I encounter resistance from men who have been staunch allies in other political battles.

In at least two memoranda to the faculty, one of my colleagues who has practiced and taught in the area of civil rights, objected to the Policy on Sexual Harassment and Consensual Relationships ("Policy") drafted by a faculty committee and circulated to the faculty in December, 1989. [14] *At a faculty meeting held on December 11, 1990, one year after the circulation of the first draft of the Policy, the faculty voted on several of the objections he had articulated in his memoranda. The women faculty found their voices at that meeting and, with the support of the dean, Howard Glickstein, persuaded the faculty to affirm several provisions of the original draft which had been criticized.* [15] *There were some of us who thought the adoption of the Policy was subject to faculty approval of language changes discussed at the December 11th meeting. After that meeting, Eileen Kaufman remarked that she had never felt her feminist*

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[13] Duncan Kennedy's recent description of himself as a left-wing, "white male ruling class academic" explains why he was viewed as controversial, though still accepted in academia. See Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 Duke L J 705, 707.

[14] In a letter to the Editorial Board of the Berkeley Women's Law Journal dated May 28, 1991, Professor Douglas Scherer described himself and his role in the process of adopting the Policy in the following terms:

> Objections to the Committee draft were made at a faculty meeting. I was more outspoken than others, and agreed to gather comments from faculty members and work with members of the Sexual Harassment Committee in developing a more acceptable approach. I had credibility because my background includes the teaching of Employment Discrimination Law, teaching Sex-Based Discrimination, and involvement in approximately 1000 sex discrimination cases, including about 25 sexual harassment cases.

> He prepared a memorandum discussing various aspects of the Policy which were of concern and distributed it to the faculty on October 15, 1990. Another memorandum dated December 9, 1990, reiterating his concerns, was distributed to the faculty. He raised objections to the language in the faculty draft which would have made sexually explicit statements, questions, jokes or anecdotes or comments of a sexual nature, sexual harassment. He objected to provisions restricting consensual sexual relationships between faculty and students. He also objected to the provision which permitted third parties to file complaints and initiate formal proceedings.

[15] The "activism" by the women faculty members drew fire from a male colleague in the form of an editorial that appeared in the student newspaper. He wrote, in part: "And for twenty-five years, out of fear of being branded some kind of 'ist,' an entire gender [men] has cowered in silence . . . . So, I hereby resolve that the [women] will no longer cut off my speech. No more Mr. Yes Ma'am." Dan Subotnik, *Sex, Gender and Regulation: A Message to the Touro Community*, 12 The Restatement 1, 5 (number 4).

identity as strongly as she has since she began teaching. Subsequent events made it clear to all of the women faculty members why that was so.

The next semester there were allegations of procedural irregularities in the adoption of the Policy. To cure these irregularities, the faculty agreed to consider student comments on the Policy at the last faculty meeting of the year. Many of the students' comments raised the same issues which had been addressed at the December 1990 faculty meeting.[16]

After a discussion of the students' proposal to limit sexual harassment to purposeful acts or conduct, the question was called. The author of the memoranda critical of the faculty draft raised the issue of voter eligibility. A resolution had been adopted in February 1987 giving non-tenure track faculty the right to vote. This had been treated as a continuing resolution. Until that meeting, the legal methods faculty's voting rights at regular faculty meetings had not been challenged.[17] *The Rules were consulted and read to the faculty. Non-tenure track faculty could vote if their participation was approved by 2/3 of the tenure track faculty. Several faculty members pointed out that it was the custom and practice to have a vote by all faculty, tenure track and non-tenure track. Someone was sent to look through the faculty minutes to find the resolution that we assumed we had adopted giving the affected classes of faculty members, legal methods faculty, clinicians, and visiting faculty, the right to vote. He could not find the minutes which conferred the non-tenure track faculty with the right to vote.*

A motion made by Louise Harmon was designed to memorialize the custom and practice of the faculty. A friendly amendment offered by a male colleague would have given a vote to a delegate of the student committee. The amendment was refused. A third male faculty member asked for a secret ballot.

Louise Harmon's motion failed to garner the requisite 2/3 majority vote by six votes. Without prior consultation or agreement, ten women, five tenure track faculty and five legal methods instructors, walked out of the meeting. Close behind them were two men, a visitor and a tenure track faculty member who had taught legal methods for several years. When the dust settled, the meeting resumed with all the women present and voting.

The vote which disenfranchised half the women faculty left me overwhelmed with emotion, rendered speechless by anger. Women and blacks'

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16 In May, 1991, students presented the faculty with a very thorough document which compared certain language in the faculty draft to language proposed by the students. Among other things, the students objected to the section of the Policy restricting consensual relationships between faculty, administrators, and students and to the third party complaints. See *The Student Committee on Sexual Harassment.*

17 The Faculty Rules of Goverance ("Rules") distinguish between regular and limited faculty meetings. Only tenure track faculty and the Dean may attend limited meetings. In recent years, the practice has been to invite non-tenure track faculty members to remain at the meetings although they cannot vote. The Policy on Sexual Harassment and Consensual Relationships was considered at a regular faculty meeting.

*historical struggle to obtain political equality became even more personal
and real. I experienced a sense of frustration at the use of "neutral" prin-
ciples to silence and exclude those of us who are affected by political
choice. I felt the shock and horror as I became reacquainted with the
meaning of powerlessness and the knowledge that "rights" are insubstan-
tial and meaningless when they are defined by others.*[18]

I do not know any women in law teaching who are not feminists,
whether they call themselves that or not. We all recognize gender as a
political issue because power is distributed or withheld on the basis of
gender. Economic resources are allocated on the basis of gender. I am a
feminist because people use gender as a basis for deciding whether or not
I will be allowed to pursue my vocation as a teacher and a scholar.

Opposition creates an environment in which it is possible for mem-
bers of the affected groups to strengthen or even to create a community.
I am part of a community of women, white and black. The stories of my
white female colleagues are my stories, for we are engaged in a common
struggle.[19] The sense of community among women is built on shared
experiences. Here, too, I recognize social borders created by sentiments
of affinity and external estrangement. It is the sense of community which
gives loyalty norms, the ethics of identity, their power. Abandoning a
concept or idea may be unprincipled. Abandoning people who depend
on you or people who are members of your community is immoral.

Among women, race issues may create sentiments of estrangement.
Among blacks, gender can have the same disintegrative effect. Gener-
ally, "multivocality" or "multiple consciousness" is viewed as a way of
recognizing "multiple sources of oppression," giving expression to more
than one source of ethical identity.[20] There is also the possibility, which
is acknowledged in the case of white women and black men, that multi-

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[18] For a synopsis of the political battle waged by blacks in the struggle for voting rights, see
Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* 91-92 (Basic Books,
1987). For a discussion of an attempt during the Reagan Administration to undermine the
purpose and effect of voter legislation and its effect on black's rights, see Lani Guinier, *Keep-
ing the Faith: Black Voters in the Post-Reagan Era*, 24 Harv CR-CL L Rev 393, 400, 418
(1989).

[19] There are many ways in which my perceptions of the world and my values and beliefs are
different from those of the white women with whom I work. There is also much that we have
in common. I have listened to their stories and I have included many of them in this article. I
do not know whether that makes me an "essentialist" with respect to gender or not. For a
discussion of gender essentialism and feminist theory, see, for example, Harris, 42 Stan L Rev
581 (cited in note 1). Harris defines gender essentialism as "the notion that a unitary, 'essen-
tial,' women's experience can be isolated and described independently of race, class, sexual
orientation and other realities of experience." Id at 585.

I suppose on this point I agree with Leslie Bender who argues that it is "politically and
theoretically premature to give up the 'class' of women for our analysis," and suggests that
there is enough that is "cohesive and common about the category of women to bridge the
differences for purposes of political solidarity and legal analysis." Leslie Bender, *From Gender
Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 Vt L
Rev 1, 7 (1990).

[20] Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential
Method*, 11 Women's Rts L Rptr 7, 9 (1989).

ple consciousness may bring within one person the identities of the oppressor and the oppressed. The existence of "contradictory, antithetical selves"[21] can wreak havoc in any community. Competing loyalties come into play.

The recognition of difference and the risks that exist because of it do not change the principal oppositional category which orients and directs those who have an ethical identity. I am certain that if a conflict were to take place today which was perceived as a head-on collision between the dominant and a subordinated culture, the outcome would be predictable. The loyalty norms of ethical identity, the several identities born out of the experience of oppression and rooted in the reality of struggle, would prevail. Unfortunately, the conflict does not take place in those terms.

Among the educated, particularly in elite institutions like law schools, overt expression of gender and race bias is socially unacceptable.[22] As a result, the status norms of neutrality and objectivity have become the instruments of exclusion. These status norms can be used to silence as well as to exclude women and minorities. Presented with a choice expressed as a conflict between professional standards and political opinions, between virtue and unprincipled partisanship, women and minorities are compelled to choose between competing loyalties.

It was early in the morning and I was on my way to the faculty library. I saw a white woman colleague approaching and I braced myself to be cheerful and pleasant. This was the woman who brought me into law teaching. She had been more like a sister than a friend. Lately, our relationship had become strained. Being friends had become extremely hard work. I said hello and she walked by without responding. I felt as if I had ceased to exist.

My friend was on the Promotion and Tenure Committee that considered my application for retention. Personal loyalties and the norms of ethical identity collided with status norms and institutional loyalty.

I was advised by a senior member of the faculty that retention review was pro forma if you had an article accepted for publication. Then the review process began and the rules seemed to change. No. That is wrong. The rules did not change. I concluded that the Committee had applied the standards reserved for black faculty members. The only other black on the faculty had been reviewed for retention, not once, but every year for five years until he was tenured.

The Committee never heard of the law review in which my article would be published. My female colleague and friend pointed out to the Committee the respectable position of that law review on a list of "most

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[21] Harris, 42 Stan L Rev at 584 (cited in note 1).

[22] But see Charles Lawrence III, *If He Hollers Let Him Go*, 1990 Duke L J 431, which begins with a listing of the incidents involving racial slurs and hate speech which have occurred on college campuses in the last few years.

frequently cited" law reviews. (A male colleague who received tenure that year had his only law review article in a law review that was not even on the list.) Members of the Committee raised questions about the use of terms like "values" and "social structure" in my article. My friend painstakingly marked every mention of values and norms in a book co-authored by the same male colleague who received tenure.

She never wavered in her defense of me, but, in our personal relationship, I felt the erosion of her confidence in me. She lived up to her ethical obligation, an ethic which flowed from our friendship and from the identity we shared as women. I am not sure whether, in the end, she thought she had done the right thing. I think of our friendship and each of us individually as casualties in a cultural conflict.

The normative preferences, the values, and the aesthetics of the professional are defined by the dominant culture. The standards which are used by those who occupy the status of a professional do not exist outside of or apart from the culture of which they are a part. "Merit" is culturally defined and every meritocracy is influenced by politics. The mythic attributes of the "true" professional, neutrality and objectivity, are used to bludgeon those who question the fairness of the process by which others are excluded from the profession.

Many of us, women, blacks, and people of color, have fought hard to achieve professional status. Charges that one of us is behaving in an "unprofessional" manner can be devastating. It is an attack on the individual's reputation, on his or her judgment and integrity. It suggests that the guilty party does not really "belong" in that professional status, undermines his or her credibility, and creates a fear that the privileges may indeed be withdrawn. Our ability to demystify and demythologize the process is the only effective defense against that kind of assault.

The Diversity Ideal in Academia: The Politics of Identity
Part I

W.E.B. DuBois described his first awareness of racism as the realization that he was a "problem" for white people.[23] His initial response was to beat them at their own game, to achieve academically and professionally.[24] What DuBois ultimately discovered, what all black people have discovered, is that it is risky to play a game with opponents who can change the rules at any time.

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[23] W.E.B. DuBois, *The Souls of Black Folk* 43 (New American Library, 1969) ("*Souls of Black Folk*").

[24] Paradoxically, his success makes him an attractive vehicle for proponents of "Eurocentrism," who use excerpts from his writings without regard to the violence this does to the ideals contained in the body of this black leader's work. See, for example, Alan Bloom, *Western Civ and Me, An Address at Harvard University*, 90 Commentary 19 (Aug 1990) (quoting from DuBois on Shakespeare).

Although *The Souls of Black Folk* was written almost 80 years ago, black people, people of color, and women remain "problems" for the most enlightened institutions in our society, the law schools and universities where we teach. We are a problem even for the individuals and the institutions which have embraced the ideal of diversity, for administrations which wrestle with the problem of recruiting and retaining minorities and women. Task force after task force examines the problem. Reports are issued, remedies are proposed.[25] They promise not to overuse us, to provide us with mentors, to give us workshops that teach us how to write.

At the ACCESS 2000 conference a few years ago,[26] the good will and commitment of the participants were intoxicating. The number of people in attendance was large enough to assuage the feelings of isolation that many of us have suffered over the years.

At a workshop on minority recruitment and retention I suggested that disparate standards were being applied in both the hiring and tenure processes. I cited examples of interviews where candidates were asked for their law school transcripts although they had been in practice or teaching for several years. In some cases they were asked for their LSAT scores. The reason for these requests is obvious. The heightened scrutiny to which minority candidates are subjected reflects a widespread concern about the intellectual ability of people of color.

Anyone who has been in academia for a while has seen countless examples of the way in which these "objective" criteria are manipulated to obtain tenure for those individuals who are well-liked and to deny tenure to those who are unpopular for one reason or another. People can be unpopular because of their personalities or politics, but the issues which concern me here are gender and ethnicity. Unconscious and conscious racism and gender bias eat away like acid at the integrity of the hiring and tenure processes.

In tenure deliberations, debates over the quantity and quality of scholarship, supposedly objective criteria, reveal just how subjective these measures of performance really can be. A debate which focuses on quality may include itemized lists of grammatical errors—quantifying split infinitives or dangling participles. Some white male colleagues argue that we must compare the original draft to the final product to

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[25] Two such groups include the ABA Commission on Opportunities for Minorities in the Profession and the AALS Belton Special Committee on Recruitment and Retention of Minority Law Teachers. See also Marina Angel, *Women in Legal Education: What It's Like to be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 Temple L Q 799 (1988), which grew out of her research in preparation for hearings of the ABA Commission on Women in the Profession.

[26] ACCESS 2000: The Challenge to Assure Diversity in the Legal Profession, a conference sponsored by the American Bar Association, the Association of American Law Schools and the Law School Admissions Council, which celebrated the 20th anniversary of the Council on Legal Education Opportunity (CLEO), took place in Washington, D.C., Oct. 13-15, 1988.

make sure that the article was not written by student editors. An error in the footnotes, in contrast, can prove either a deficient understanding of the law in some profound way or gross negligence in reviewing the work of incompetent law review editors to whom the responsibility for cite checking and form have been delegated.

If a woman writes a textbook, it is not scholarship but a collection of cases. If a man writes a textbook, it is described as one which promises to be preeminent in the field. If a man co-authors a book which is a "seamless web" for purposes of distinguishing the work of the two authors, that is acceptable. If a woman co-authors an article, it is impossible to give her tenure because there is no basis for judging the quality of her scholarship. If a man takes five years to produce a long article, we know he was working on it all the time. If a woman takes several years between articles, we divide the number of pages by the number of years and apply some absolute standard of productivity.

Racism creates a profound skepticism about the abilities of blacks, a skepticism which is perpetuated even in the solutions which are proposed to cure one of the symptoms of racism: the absence in meaningful numbers of black people in law teaching. The idea that black law professors need some remedial help with scholarship is absurd. The problem is not ours. The problem is institutional. We exist in an environment where the decision not to write is eminently rational. We realize that our scholarship is suspect because our areas of interest are unacceptable, that average work, work comparable to that of our peers, is unacceptable. We cannot afford to make mistakes because everything we do is scrutinized with such attention to detail and minutiae that it would paralyze most creative people.

As long as we define the "problem" as something external to the white males who are the decision-makers in our institutions, as long as we ignore the biases of those who administer the process and the fact that the criteria of selection are manipulable, the problem will not go away. As it currently stands, the institutional position is one which condemns racism and sexism without seeking to eradicate them. Instead, it offers extra assistance to people of color and women so that they can compete and occasionally succeed on an unequal playing field.

I understand the frustration of faculty of good will whose colleagues are openly racist or sexist.

I heard the frustration in the voice of a white male at ACCESS 2000 who asked, "What can we do about our racist colleagues?" I don't think he was listening when I answered: Admonish them for their conduct. Confront them and tell them that their behavior is inappropriate. Develop standards which make it clear that certain behavior is unacceptable. Even as I spoke I realized nothing would be done. Confrontation is divisive and unpleasant. We value our collegiality so much.

Perhaps the realization that the "standards" we are asked to meet are not standards at all has given some of us the courage to pursue our own interests in our own way. If women and people of color have been a problem in the past, they are even more so now. The struggle for diversity has expanded beyond a head count of people of color and women. It now embraces the idea that different styles of scholarship and teaching have a place in our institutions.[27] "Counter-hegemonies" are abroad in the land and the "problem" is being redefined as a failure or refusal to assimilate.[28]

THE STRUGGLE FOR DIVERSITY: THE POLITICS OF IDENTITY
PART II

As I stand before a class of law students in which there are far too few students of color, I sometimes experience a feeling of total frustration, a kind of battle fatigue. I am diminished in the eyes of my women and minority students who perceive the difference in the amount of respect I receive from students as compared to my white male counterparts. I am diminished by the unreasonable demands of my white male students who think that because I am different from their white male teachers, I am deficient in some respect. The subtle demands for conformity from the former are well-intentioned; the demands from the latter are less benign.

"Burn the witch." I think of it as a voice from the collective unconscious. A stage whisper loud enough to reach the woman professor who was leaving the room. The professor paused momentarily as if to consider a response and then retreated as quickly as possible.

Louise Harmon told me the story of what happened to her as we prepared to teach her legal history class. The subject was the Inquisition and the execution of hundreds of thousands of women for witchcraft. We used her anecdote in the lesson as an illustration of the hostility with which some men respond to the use of power by women. Louise gave a male student the freedom to debate the correctness of an answer he had given on an examination. In the end she exercised her prerogative as an

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[27] See Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed Up Ground*, 11 Harv Women's L J 1 (1988); Milner S. Ball, *The Legal Academy and Minority Scholars*, 103 Harv L Rev 1855 (1990); Kennedy, 1990 Duke L J 705 (cited in note 13).

[28] "Counter-hegemonies" refers to the cultures of subordinated or marginalized groups in society. Lincoln, *Discourse and Construction* at 7 (cited in note 2). Lincoln lists three general factors that are necessary for counter-hegemonies to have an effect in reconstructing society. One is access to channels of communication. Affirmative action ensures access, but it does not guarantee the entrance of counter-hegemonies into the intellectual mainstream of the dominant culture. See the discussion of the value of affirmative action in sources cited in note 27. Counter-hegemonies gain exposure only when marginalized groups are admitted in sufficient numbers to still what DuBois called the "confusion and doubt in the soul" of the artist or scholar who appreciates the beauty she sees in the "soul beauty of a race . . . despised." DuBois, *Souls of Black Folk* at 47 (cited in note 23).

instructor to judge his performance and grade him according to her standards. Her decision was a clear exercise of power. His response, "Burn the witch," was an archaic reference to the punishment inflicted on women who were thought to have power. She reacted to his condemnation with fear.

Fear is the natural response when men invoke violence, the ultimate weapon in the arsenal of intimidation. Louise realized, as we all eventually do, that what we do is risky. Whether the comments disparage our teaching, calling our classes "romper rooms," or whether they condemn us for advancing feminist propaganda, our teaching is always seen as something subversive. Our teaching challenges the cultural preference for male leadership and dominance. Even women who deny the existence of any difference between men and women, women who adopt the culturally preferred styles, are at risk. Ultimately, it is not just what we do which is dangerous. It is who we are.

The greatest challenge in teaching is overcoming the obstacles to learning which students construct out of their racism and their gender bias. Their hostility finds expression in the classroom in subtle but disruptive ways: the noise level, the inattention, the answers which verge on disrespect. Even when students are attentive and interested, male colleagues who critique our teaching often focus on the issue of control in the classroom.

Women in law teaching have devised ways to deal with this. One woman I know used to complain about her height as though that were the source of her problems. One woman friend told me that she never changes her mind, admits an error, or expresses ignorance on anything that comes up in class. Another refuses to answer questions because questions introduce an element of unpredictability into what has to be a carefully controlled environment. There are women I know who avoid the issue of the legitimacy of their power by brandishing it like a sword from the first day of class. However, I know of no woman who resorts to personal attacks on students.

Many women I know have consciously rejected this form of intimidation as an alternative. Many more listen to the helpful suggestions about "control" from male colleagues and then ignore the advice because they do not share the belief that control is an essential element of good teaching.[29] Men and women alike agree that control is an issue of "style." At least some of us have asked ourselves, "If I changed my style, would that still be me?" and answered "No." Our "style" is very

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[29] See discussion of the rejection of the "God/Socrates" model of law professor by women in Angel, 61 Temple L Q at 810, 813, 832 (cited in note 25). See also Patricia Williams, *The Alchemy of Race and Rights* (Harvard U Press, 1991) (Chapter 1: Excluding Voices: A Necklace of Thoughts on the Ideology of Style).

much a part of our identity. The issue is not whether we can control, but whether we want to control.

If half of the current battle for diversity is acclimating students to a different style of teaching—teaching our students in spite of themselves—the other half is educating our well-meaning colleagues whose preference for existing models of scholarship and teaching cause them to trivialize our work. Even those who believe in the value of diversity are prone to habits of mind and unconscious assumptions which devalue other cultures or which assume the superiority of white male models of scholarship.

Our Dean asked me to dinner with a consultant on Touro's readiness for membership in the AALS. I was the only woman invited to this dinner. When I asked the Associate Dean what we were supposed to do at the dinner, I found that each of the men was responsible for providing information about some aspect of the school's operations. I was supposed to "charm" our guest. I guess I did my job because a few days later I was told by a colleague, Eileen Kaufman, that she had heard I was particularly "ebullient" that night.

I have no doubt that both comments were intended as compliments. As I told Eileen, in the past I would have been offended by them. I would have been upset by the implication that my social skills were more important than my intellectual ability. Both "charm" and "ebullience" refer to style, not to content. Eileen defended the choice of adjectives, explaining that what was meant, obviously, was that I would be able to engage our visitor in a conversation which was intelligent and thought-provoking, much more engaging than anything those men could have managed on their own. In her explanation, Eileen reconnected style and substance in a way which acknowledged the content in the form.

Style or manner of expression can be a product of gender or cultural differences.[30] The dominant culture includes notions of the appropriate choice of style. In a social setting, a style which is associated with women is often appropriate. It can make the difference between a successful event and one which is a dismal failure. Conversely, this "feminine" style has no place in the classroom, in faculty meetings or in scholarship because it is distracting.

Two years ago, I raised objections to certain practices used by our Academic Policy Committee in deciding petitions for academic probation. In the course of a very heated discussion, the Chair, a tenured white male and a long-time warrior in the area of civil rights, looked directly at me and said, "I can't understand you when you are emotional."

Both of these accounts serve to illustrate the extent to which value

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[30] For a discussion of the controversy over gender differences, see Bender, 15 Vt L Rev 1 (cited in note 19).

judgments are made with respect to a style of discourse. Although one comment was intended as a compliment and the other as a kind of criticism (whether of me or himself is unclear), there is an underlying cultural assumption in both contexts which unites them.

The style of discourse which I employ, one which includes emotion, personal anecdotes, digressions (in which I attempt to reconnect ideas that have been separated out for instructional purposes), and a style of delivery that is animated and full of gestures and which removes the physical distance between me and the student, is seen by some as distracting. It is thought to be inappropriate in a context which requires or demands discipline, structure and control, the use of dispassionate discourse, and linear logic. The male model assumes an antithetical relationship between certain kinds of style and knowledge that corresponds roughly to the false dichotomy drawn in Western culture between emotion and reason.[31]

A critique of style has become one of the major weapons in the hands of those opposed to diversity. Style has become the measure of quality. It is used successfully by evaluators who pretend that value judgments are not being made about the ideas which are promoted in the scholarship, that the objectification of standards of scholarship makes them value neutral, and that the ideas or political positions of scholars are irrelevant. The cultural preferences which currently dominate legal scholarship leave women and people of color open to attacks which trivialize their work. The theoretical or pedagogical strategies which they employ are dismissed or ignored.

Louise and I decided to present the class on witchcraft at a faculty colloquium so that some of our more traditional colleagues could see the value of an interdisciplinary approach to legal problems or issues. We used psychology, feminist literature, and anthropology in our discussion of the Inquisition. We discussed explanations which focused on the socio-economic and political conditions which existed at the time, and on psychological and feminist explanations which focused on the dynamics of power relationships between men and women. We talked about the relationship between the legitimacy of legal action and the belief systems which exist in a society. We tried to apply the knowledge we gained from our exploration of history to a contemporary legal issue, the treatment received by gays at the hands of the legal system in Bowers v Hardwick.[32]

A colleague who attended our presentation described it as "light-hearted and entertaining." Louise quipped in response that the death of 500,000 women who were burned at the stake lends itself well to a light-

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[31] For a discussion of legal culture and the opposition between emotion and reason, see generally Lynne Henderson, *The Dialogue of Heart and Head*, 10 Cardozo L Rev 123 (1988).

[32] 478 US 186 (1986).

hearted presentation. I just wondered what that faculty member saw and heard and why he saw and heard what he did.

In this battle for cultural control, my acknowledgment of the possibility that style can render substance invisible, that choice of style can create barriers to understanding, seems very dangerous. It is dangerous if you assume, as has been the case in the past, that the burden of removing barriers to understanding and of eliminating the potential for miscommunication should fall on those who are part of a culturally-subordinated group. Generally, the solution to cultural variation has been assimilation because assimilation reinforces the cultural preferences of the majority.

It is not perversity which informs my choice as a black woman to continue using a style which leaves me open to attack by those who claim to be the arbiters of quality and intellectual rigor. It is a commitment to the principle of diversity and to the idea that all of us, including white males, will be impoverished by the outright rejection of ideas, interests, styles, and beliefs merely because they are different. The abandonment of cultural differences does not increase understanding; it diminishes in a very real way the possibility of understanding. We gain nothing if we contract the universe of possibilities with respect to intellectual discourse or human interaction.[33]

ETHICAL IDENTITY AND THE DIVERSITY IDEAL

The struggle for equality began with an argument which denied the differences between men and women, between blacks and whites. Today, a different paradigm of equality is being offered.[34] In this paradigm, the struggle for equality embraces differences and demands equality, not in spite of, but because of those differences.[35] The struggle for equality has a cultural dimension. We no longer want to emulate those who control our institutions. We no longer want to talk like them, write like them, or teach like them. Blacks are "reinventing difference," reconstructing cultures which have been decimated by the pressure to assimilate.[36] Women are turning stereotypes on their heads, using gender difference as a vehicle for the reconstruction of society.[37]

Last Spring I helped a friend of mine who is in the foreign service pack to leave for Panama. I smiled as I packed her books. I had reason to

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[33] See, for example, Matsuda, 11 Women's Rts L Rptr 7 (cited in note 20).

[34] See generally Bender, 15 Vt L Rev 1 (cited in note 19).

[35] Affirmative action has been defended in these terms. See generally Matsuda, 11 Harv Women's L J 1 (cited in note 27); Kennedy, 1990 Duke L J 705 (cited in note 13).

[36] James Clifford has suggested that we are responding to something he calls "cultural entropy," the "homogenizing effect . . . [of] economic and cultural centralization." James Clifford, *The Predicament of Culture: Twentieth Century Ethnography, Literature, and Art* 15 (Harvard U Press, 1988).

[37] See Bender, 15 Vt L Rev 1 (cited in note 19).

smile. My friend went to Yale. I attended a private white college that was probably considered "mid-tier," but the words of Malcolm X and Martin Luther King reached us both. Our libraries are virtually identical. The books we both keep and cart around each time we move are those which have meaning for both of us. They are valued and cherished because they contain the information we need, the knowledge and the work which is the legacy of our progenitors, the "Negro" intellectuals who preceded us. It pleased me that the intellectual currents of the Sixties were not constrained by the hierarchies that exist in academia and elsewhere. We shared with an entire generation of black youth the rediscovery of our heritage, the recreation of black culture. That is part of my identity as well. I am an intellectual who has a responsibility to preserve and maintain and, if I am able, to add to the cultural heritage of my people.[38]

"I'm Black and I'm Proud" may have begun as a taunt thrown in the face of white America, a defense against the psychological assault of racism, but the slogans of people like Stokely Carmichael and H. Rap Brown altered our aesthetics and strengthened our sense of identity. Ours was a form of cultural nationalism.[39] We rediscovered our cultural traditions and rejected the myth that black culture was a "ghetto" culture. The expression of our culture became an affirmation of self. Today, the scholarship or pedagogy of black women and men can be an affirmation of self.

The battle for cultural dominance did not begin with the creation of something called "critical race theory." The clarion call of diversity would not have been heard if the ethos of cultural relativism had not been instilled in so many white students in the Sixties. These students, dissatisfied with the more repressive aspects of white middle-class culture, sought out courses in anthropology where they read such texts as Ruth Benedict's *Patterns of Culture*.[40] They learned not to use the word "primitive" to describe other cultures. They learned something about the extensiveness of cultural plagiarism by the West—the extent to which ideas, music, and art had been borrowed from other "inferior" cultures. They joined the Peace Corps. In some respects, while black youths like me were busy rediscovering our culture, these white students were inventing their own.

Distracted by hippies and yippies, drugs and demonstrations, and

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[38] "It is not the race politicians or the 'rights' leaders who create the new ideas and the new images of life and men. That role belongs to the artists and the intellectuals of each generation." Harold Cruse, *Crisis of the Negro Intellectual* 96 (William Morrow & Co, 1967) (*"Negro Intellectual"*).

[39] See generally, Franz Fanon, *Wretched of the Earth* (Grove, 1965) (*"Wretched Earth"*).

[40] Ruth Fulton Benedict, *Patterns of Culture* (Houghton Mifflin, 1989). The development of cultural relativism is described in Elvin Hatch, *Culture and Morality: The Relativity of Values in Anthropology* (Columbia U Press, 1983) (*"Culture and Morality"*). According to Hatch, "the thesis of relativism enjoyed its fullest flowering in the work of Ruth Benedict and Melville Herskovits." Id at 35.

responding to the fact that they were under siege, literally and figuratively, the presidents, trustees, and faculties of universities and colleges adopted a policy of appeasement. The policy of appeasement included the creation of Black Studies Departments and Women's Studies Programs. That policy has backfired. The information which was meant to be isolated and contained in specialized courses found its way into the academic mainstream. The principle of cultural relativism became part of identity politics, the politics of cultural pluralism.[41]

Cultural relativism has several new names in legal academia today: diversity, multivocality, intersectional analysis, critical race theory, and feminist theory. It exists because there are men and women of good faith who embrace rather than shrink from the ideal of true diversity.

With diversity has come the introduction of the counter-hegemonies—the cultural preferences, aesthetics, and taxonomies that exist in groups marginalized by the existing social order.[42] The power of counter-hegemonies is their ability to reclassify social categories. They offer alternatives to existing and dominant systems of classifications.[43]

For example, in the current controversy over the regulation of hate speech,[44] women and people of color have drawn on counter-hegemonic models to criticize the classification of hate speech as a protected category of speech.[45] They have also exposed and criticized the values that form the basis for the dominant culture's classifications of protected speech. In doing so, they have reclassified the venom spewed by bigots from protected speech to unprotected speech, assimilating it to other unprotected categories of speech like defamation, obscenity, and fighting words.[46]

The most important and valuable contribution of counter-hegemonies is the solutions they offer. They are more radical or revolutionary than the theories which expose and attack the political ideology that is

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[41] See Kennedy, 1990 Duke L J 705 (cited in note 13).

[42] See Lincoln, *Discourse and Construction* (cited in note 2).

[43] For a discussion of the significance of doctrinal classification in constructing how we think about law and legal problems, see Jay M. Feinman, *The Jurisprudence of Classification*, 41 Stan L Rev 661 (1989).

[44] Hate speech is speech which insults, denigrates, and threatens women, people of color, Jews, and gays and lesbians.

[45] For a discussion of the use of fighting words and group defamation doctrines by attorneys representing Holocaust survivors in their battle to prevent a march by Nazis through Skokie, Illinois, see Aryeh Neier, *Defending My Enemy: American Nazis, the Skokie Case and the Risks of Freedom* (Dutton, 1979). See also Catharine A. MacKinnon, *Feminism Unmodified: Discourses in Life and Law* 163-97 (Harvard U Press, 1987); Lawrence, 1990 Duke LJ 431 (cited in note 22); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich L Rev 2320 (1989); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 Harv CR-CL L Rev 133 (1982).

[46] See, for example, *In re R.A.V.*, Minn Sup Ct 1/18/91 - No. C8-90-1656 (court upheld ordinance that made it a misdemeanor to place, on public or private property, any symbol, object, or writing "which one knows or has reasonable grounds to know will arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" in a case involving a minor who burned a cross on the lawn of a black family.)

embedded in our law and reproduced by our legal system. For example, *Brandenburg v Ohio* and *National Socialist Party v Skokie*, the Klan and Nazi Party cases, legitimized speech which advocates the subjugation, oppression, or persecution of people of color, women, Jews, and gays and lesbians.[47] In response, some of us have questioned the meaning of the term "political" in such a system of classification, where the speech of the Klan and of Nazis receives protection.

The power of the counter-hegemonies which have been unleashed in our society can be measured in the intensity of the reaction to them in academia today. Those who sought to segregate the intellectual efforts of blacks and women have sounded a battle cry over the canons of literature and the intellectual impoverishment of the American student.[48] For those who wish to maintain the status quo, counter-hegemonies have a disruptive effect.

Cultural politics have erupted into open warfare. In the past, the struggle sometimes seemed like guerilla warfare fought by isolated and fanatical adherents who risked everything despite the cost.[49] Now that battle is being waged in the open. To borrow two phrases from a recent article by Henry Louis Gates, it is the "forces of oppression" against the "returning repressed who have challenged the traditional curriculum."[50] I would modify his very apt description only to recognize the significant role that the majority scholars who are allies of diversity play in this battle.

The most serious and credible attack on diversity and cultural rela-

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[47] *Brandenburg v Ohio*, 395 US 444 (1969) (the state of Ohio classified the obviously racist and anti-semitic speech of Klan leaders as political speech when it prosecuted them under a statute which made it a crime to advocate the use of violence "as a means of accomplishing industrial or political reform."); *National Socialist Party v Skokie*, 432 US 43 (1977) (the Supreme Court of Illinois rejected the classification of the speech of the Nazis as "fighting words." In the words of the lower court, "The display of the swastika . . . is symbolic political speech intended to convey to the public the beliefs of those who display it." 373 NE2d 21, 24 (1978)).

By contrast, the Supreme Court denied certiorari to a Second Circuit decision which refused to classify the speech of the homeless as political, although such speech calls attention to the plight of the most disadvantaged members of our society. See *Young v New York City Transit Authority*, 903 F2d 146 (2d Cir 1990), cert denied — US —, 59 USLW 3391 (1990). I wonder about the Court's conscious disregard of the political nature of begging as political speech, given the fact that a political agenda with particular ideological content created an underclass, and the fact that the power to remedy that situation lies with those individuals protected by the decision from speech which reminds them of the consequences of their political acts.

[48] See generally Alan David Bloom, *The Closing of the American Mind* (Simon and Schuster, 1988) and more recently, Alan David Bloom, *Giants and Dwarfs: Essays, 1960-1990* (Simon and Schuster, 1990). See also the response by Henry Louis Gates Jr., *Whose Canon Is It Anyway?*, NY Times Magazine 1 (Feb 26, 1989). See also Dinesh D'Sousa, *The Visigoths in Tweed*, Forbes 81 (Apr 1, 1991), describing contemporary liberal arts education as "brain-washing" which "deprecates Western learning and exalts a neo-marxist ideology . . . in the name of multiculturalism." (Adaptation of Dinesh D'Sousa, *Illiberal Education: The Politics of Race and Sex on Campus* (Free Press, 1991)).

[49] The cost could be extremely high. There are tributes in this volume to one who fought long and hard, Denise Carty-Benia. See Robin Barnes, in this Volume.

[50] Gates, NY Times Magazine at 44 (cited in note 48).

tivism comes from those who argue that relativism carried to its logical extreme renders us unable to make moral choices or that it disables political movements which advocate radical social change. If there are no absolute values, we will be unable to ascertain the difference between good and evil,[51] or, in the case of scholarship, the difference between excellence and ineptitude. If we abandon reason and objectivity, we will be unable or unwilling to continue the fight against oppression and injustice.[52]

These criticisms ignore the fact that cultural relativism is itself a moral choice. It is a choice which affirms human dignity and the principle of equality. Cultural relativism is resisted not because it makes cynics of us all, but because it compels uncomfortable value choices. These choices involve the recognition and accommodation of difference. These are choices which threaten to alter the power structure of our society.

The acknowledgement of cultural and social differences can result in such transformations as modifying the promotion and tenure process in ways which diminish the significance of tenure. At Touro, for example, the faculty chose to add untenured women and minorities to the tenure committee.[53] We considered other proposals, including participation and a vote by the full faculty on tenure matters. Whichever proposal was adopted, one of the privileges which distinguishes one class from another

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[51] See generally the discussion of ethical relativism in Hatch, *Culture and Morality* at 133–44 (cited in note 36). The position that Hatch takes is not inconsistent with mine, for he is concerned with relativism as a moral philosophy and the need for a framework for evaluating cultural value judgments in that area. He proposes a humanistic principle that refers to the "well-being" of a people. This principle would not interfere with a large portion of the "cultural inventory" of a people—where he admits diversity of values is found and tolerance should be the rule of thumb.

[52] Marvin Harris, *Cows, Pigs, Witches and Warriors* (Random House, 1974).

[53] *Touro Guideline: Proposed Amendment to Rule 7.1 of the Faculty Rules of Governance*

If at any time the Promotion and Tenure Committee does not consist of 40% minority members as defined by the Annual Questionnaire of the American Bar Association, the faculty shall elect two members from among the untenured minority members of the faculty to serve on the Promotion and Tenure Committee for that academic year.

If at any time the Promotion and Tenure Committee does not consist of 40% women members, the faculty shall elect two members from among the untenured female members of the faculty to serve on the Promotion and Tenure Committee for that academic year.

Such elected members shall be full, voting members of the Committee. If there are not two untenured minority or two untenured female members of the faculty, the faculty shall elect from all the untenured members those it deems to be most able to reflect the concerns of minorities or women.

If at any time 75% of the faculty are tenured and 20% of those tenured are minorities and 20% of those tenured are women, the above procedures shall cease.

The adoption of this change in the faculty rules of governance was viewed by one male faculty member as an example of "expressions by female faculty members of complete distrust of, indeed unrelenting hostility to the male sex." Subotnik, 12 The Restatement at 5 (cited in note 14).

The AALS established a committee to examine promotional tenure practices, but to date no report has been issued. See *President's Message: Beyond Diversity: Accepting Differences*, AALS Newsletter No. 89-2 at 1-3 (Apr 1989).

in our hierarchical community would be eliminated.[54]

At the University of Arizona, Barbara Atwood, on behalf of the Arizona Women's Faculty Group, drafted a proposal that changed the university's promotion and tenure rules. Both the law faculty and the entire university adopted the proposal. These rules allow a faculty member to postpone a tenure decision because of the birth of a child. Obviously this helps women whose work is often interrupted after they give birth, but the rules as written are gender neutral. They can also be used by men and, in fact, at the law school a man was one of the first people to invoke the rule. The rules suggest and may even encourage the assumption of child care responsibilities by men.

Reform like this can occur only when, as is the case at Touro, a faculty is willing to acknowledge the reality of difference, the value of this difference, and the fact that emotional and psychological commitment to the dominant culture can impede the recognition of the value of difference. A faculty has to be willing to accept the need for participation in the decision-making process by individuals who can see where aesthetic preferences come into play. Because members of culturally-subordinated groups exist in two cultures,[55] because we are forced to learn the dominant culture, we see the orthodoxy of the dominant culture for what it is—a product of acculturation, a conventional perspective that is an expression of preferences, not an absolute or universal standard.

ETHICAL IDENTITY AND ACTS OF BETRAYAL

A moral and ethical question is raised by the possibility of assimilation. Blacks and women must decide whether it is appropriate to characterize race and gender respectively as ethical identities and whether we have an obligation to affirm our identities. The answer to these questions will, I think, assuage the fears of many blacks and women who have chosen to assimilate.

Currently, it seems the demand for diversity, especially the advocacy for a place in academia for different voices, may become a divisive issue in the black community. This goal, which enhances the possibility

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[54] The best description I have read of the preoccupation with status and the "social segregation" that characterizes hierarchy in legal education appears in Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J Legal Educ 591, 603-04 (1982).

[55] See the discussion of "second sight" among blacks in DuBois, *Souls of Black Folk* (cited in note 23) and the discussion of the "double consciousness" that exists outside the "ethnic mainstream" in Lawrence, 1990 Duke L J 431 (cited in note 22). While the two authors discuss the same phenomenon, the difference in their perspectives is instructive on the issue of counter-hegemonies. DuBois was concerned with the negative self-image and insecurity that results from the internalization by blacks of the racist, dominant white culture. Lawrence illustrates the effect of liberation from self-hate. The belief in and emotional commitment to the values expressed in the dominant culture can be challenged through double consciousness.

of advancement for all blacks, has been indicted as a criterion of selection which will penalize those who cannot establish their credentials as "real" blacks, blacks with a strong sense of ethical identity. The question is whispered, "Who will judge?"[56]

One wonders whether the internecine warfare that is being chronicled on the pages of law reviews and books on the best-seller list is anything more than the latest example of an attempt to divide our communities, to turn us against ourselves.[57] It is a strategy which has been employed successfully in the past. It is a technique as old as slavery itself, as old as the distinction between house and field Negroes. It is as old as the psychological response to oppression, identification with the oppressor, and as old as the visceral reaction to supposed acts of betrayal which are presumed to be the price of elevation to more favored status. The strategy works because it breeds fear on both sides.

Fear can be dispelled if we examine the normative system that is ethical identity and if we distinguish between the "is" and the "ought" of ethical identity. Ethical identity does not preclude assimilation. There is no one among us who is not assimilated. We are all familiar with the majority culture. Our presence in academia is proof positive of our ability to assimilate.

If ever there was an advertisement for the benefits of assimilation, it was this gathering of black graduates of Harvard Law School—a judge, a partner in a major white law firm, law professors, investment bankers, and in-house counsel. We settle into our seats at The Piano Lesson *after dinner at the Harvard Club. I watch the audience watch the play and contrast the enthusiasm of the large black woman seated across the aisle (she's waving her hand in the air and I expect to hear "AMEN" at any time) with the visible discomfort of the men around me. My classmates seem offended by the portrait of black life, the superstitions, the fact that the protagonist is dressed in torn trousers and muddy boots and the fact that he sells watermelons off the back of a truck.*

I had seen this reaction before in the South when, as a naive Northern black, I enthusiastically undertook the task of seeking to designate a small black, inner-city neighborhood as a historic landmark.[58] *To me, the shot-*

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[56] If we lift our heads, like Baby Suggs in Toni Morrison's *Beloved*, we can scent resentment and disapproval in the air. Toni Morrison, *Beloved* 137-38 (Knopf, 1987). We should take heed of the message in *Beloved* and avoid the tragedy that follows from the loss of solidarity.

[57] See generally sources cited in note 59. I wonder where the fear that a commitment to diversity will harm assimilated blacks comes from. No one black person wields so much power that he or she has veto power over the appointment, retention or tenure of faculty. Any preference a black faculty member may have for a person with a strong ethical identity is balanced by the overwhelming attraction majority faculty feel for those who are most like them.

[58] Freedman's Town Historic District, roughly bounded by Genesse, W. Dallas, Arthur, and W. Grey Streets, in Houston, Texas, was entered on January 17, 1985 in the *National Register of Historic Places, 1966-1988* 700 (Washington D.C.: National Conference of State Historic Preservation Officers, 1989).

*gun houses in that neighborhood were the first homes built by newly-freed
slaves. To a black man, a native of the region who now held a position of
some importance, they were "slave houses."*

In fact, the existence of cultural and gender differences is a subject
which is highly contested and, interestingly enough, some of the most
outspoken opponents of the ideas are women and people of color.[59]

An explanation for the controversy may be the fact that ethical iden-
tity can be painful. For some people, ethical identity means identification
with attributes and characteristics which embarrass and shame them.
For these individuals, assimilation is not enough. They disassociate
themselves further by insisting that there has been no assimilation. They
insist that there are no cultural differences, or if there are differences,
these differences are a matter of class rather than ethnicity.

The loyalty norms of ethical identity are violated by those who con-
sciously disassociate themselves completely from their community. The
insistence by some blacks that there is no black community with a dis-
cernible or definable culture also violates the norms of ethical identity.
So deeply ingrained are the ethics of identity that those who violate them
must rationalize their behavior, justifying their abdication of responsibil-
ity.[60] Their argument that blacks do not have a "voice" is a form of self-
deception, supported by desire and a vision of the world which purposely
excludes knowledge or evidence which is contradictory.[61]

The denial of culture, the denial of community, goes beyond disasso-
ciation and a lack of involvement amounting to inauthenticity. It is more
like the act of concealment, the greater wrong, which is characterized as

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[59] The article that generated the most controversy is Kennedy's *Racial Critiques of Legal
Academia*, 102 Harv L Rev 1745 (cited in note 1). Responses to Kennedy's article are col-
lected in *Colloquia*, 103 Harv L Rev 1844 (1989). See also Shelby Steele, *The Content of Our
Character: A New Vision of Race in America* (St Martin's, 1990) (*"Content of Our Character"*)
and review of that book by Patricia Williams, *A Kind of Race Fatigue*, NY Times Book
Review 12 (Sept 16, 1990). For a thorough discussion of the debate over gender difference see
Bender, 15 Vt L Rev at 10-17 (cited in note 19).

[60] What Shelby Steele describes as "race fatigue" others would call disloyalty. See Steele, *Con-
tent of Our Character* (cited in note 58).
     Compare the assessment by Olivia Pearl Stokes, one of the subjects of the Black Women
Oral History Project, of the effect of upward mobility on blacks:
          We have moved from community good to individual fulfillment in terms of the
          acquisition of goods. The Blacks have gotten caught up in this, they are rugged indi-
          viduals and no longer the community people, remembering that their heritage was out
          of Africa, or their heritage was out of the struggle to survive the days of slavery.
Linda Perkins, "Shapers of a Better Future: African-American Women of Vision and Cour-
age" in Ruth Edmond Hill, ed, *Women of Courage: An Exhibition of Photographs by Judith
Sedwick* 1, 20 (Radcliffe College, 1984) (*"Shapers of a Better Future"*) (based on the Black
Women Oral History Project sponsored by the Arthur and Elizabeth Schlesinger Library on
the History of Women in America, Radcliffe College).

[61] I have heard the argument made that there is no such thing as black culture because white
musicians play jazz and Ralph Ellison's writing style is indistinguishable from that of white
writers. I was tempted to ask whether the use of rap music in advertisements for McDonald's
hamburgers makes it any less a form of expression that was created within the black commu-
nity or whether the fact that we all eat pizza, enchiladas, and bagels disproves the existence of
Italian, Mexican-American, and Jewish cultures.

dishonesty.[62] On the personal and individual level, this is an act of self-denial. On a more general level, it is a betrayal of the community which is the source of identity.

Assimilation does not prevent the retention of cultural practices and traditions which are compatible with the dominant culture. Most assimilated blacks retain some cultural practices which are associated with membership in the black community. Adherence at some level to loyalty norms is ensured by the fact that ethical identity has a strong emotional content. The price of acting in a way which is contrary to our most deeply-felt values is guilt, a most effective deterrent to acts of disloyalty.

I had a girlfriend in college who was an assimilated Jew. She never concerned herself with the dietary restrictions adhered to by the more orthodox members of her community. She could eat shellfish and bacon without the least qualm. She could not eat ham. It made her sick. She associated the pink color of ham with pigs.

It is easy to dismiss the behavior of my college classmate as silly, but her dislike of ham is the best example I know of cultural preferences, the "cultural markers of difference," that exist even among the most assimilated of us.[63] For some of us, even for most of us, the process of *total* assimilation would require a negative answer to the question, "But would that still be me?" There is no "me" which is separable from my experience as a black woman or from the aesthetics, the values, the beliefs which are a part of the culture to which I belong.

I think it is important to distinguish between my description of existing norms and my advocacy for a redefinition of loyalty. I believe that ethical identity should prevent the abandonment of difference. The abandonment of difference is an acknowledgement of the superiority of the aesthetics, values, and beliefs of the dominant white culture. If we abandon difference, the real meaning of diversity, we legitimize the principal rationale for the subordination of our communities. However, ethical identity currently does not require blacks or women to actively participate in the struggle; it does not preclude the total abandonment of difference.

My son once told me that he did not want to be black because all black people worked in McDonald's. He said this in spite of the fact that I had taken great pains to create play groups with the children of other black professionals. Sometimes the honesty and the insight of children is fright-

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[62] For a discussion of these distinctions, see Appiah, 87 J Philosophy 493 (cited in note 6).

[63] Manning Nash, *The Cauldron of Ethnicity in the Modern World* (U Chi Press, 1989). Nash is concerned with the issues of three ethnic groups in modern nations, including Jews in the United States. Nash examines the cultural categories that delineate ethnic groups and calls the cultural characteristics that mark the boundaries between groups "markers." These indices of difference must be "visible to members of the groups as well as to nonmembers." Id at 10. Among American Jews, *kashrut*, the dietary law, is one of the "fences" between Jews and non-Jews and one of the ways in which Jews affirm their own identity. Id at 68.

ening. I could not fool him. It didn't matter how many black doctors and lawyers we knew, he could see and experience the meaning of membership in a black community. The overwhelming difference in absolute numbers of blacks who are unskilled, underemployed, economically disadvantaged, and of obviously lower-class status made him want to disassociate himself from his community.

I could point out to the acolytes at the altar of assimilation that there is a relationship between liberation, independence, and cultural nationalism.[64] I could warn them once again about the internal contradictions of the politics of integration. There can be no real equality when assimilationists "subordinate themselves to the very cultural values of the white world that are used either to negate or deny the Negro cultural equality, and to exploit his cultural ingredients and use them against him."[65]

The ethics and morality of identity, a matter of cultural politics, should not be separated from the struggle for social and economic equality. Assimilation requires us to leave other members of our community behind. There is no promise made that they will be offered the means or the opportunity to join us in significant numbers. Assimilation has limited efficacy unless the assimilated are able to disassociate themselves somehow from the members of the group who were left behind, the people who are poor or uneducated or violent or any of the other things that go with poverty and membership in an underclass. As a political strategy, assimilation does not offer much hope for the elimination of injustice or the ultimate reconstruction of society.

Assimilationists are as fervent in their beliefs as those who are advocates of cultural pluralism are in theirs. The assimilationist is driven by a fear that the acknowledgment of differences risks all that we have gained; that it creates social distance which will make integration unattainable. Purity of motive has not been enough to insulate people like Randall Kennedy from the righteous anger of other members of their community. This is not just a matter of political ideology or intellectual debate. There is a moral divide which separates the two groups.[66]

The norms of ethical identity currently do not impose an affirmative obligation on members of the group. The acts of oppression, exploitation, and exclusion which have characterized the relationship between the white community and black people, however, have made solidarity in the pursuit of equality a political necessity. Once again, one need not be

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64 See generally Fanon, *Wretched Earth* (cited in note 39).

65 Cruse, *Negro Intellectual* at 100 (cited in note 38).

66 Given the fact that he criticized Mari Matsuda for misunderstanding the significance of a similar schism between DuBois and Washington, one can only suppose that Kennedy understood the consequence of his own actions—the fact that he was embarking on a course that would take him across that moral divide. See Kennedy, 103 Harv L Rev at 1785 (cited in note 1).

active in the struggle. One need not voice support for those who actively pursue the goals of political and cultural equality. But what we may do privately we cannot do publicly. Two things are forbidden: (1) the public criticism of those who have chosen to confront the majority, to condemn cultural domination and the more coercive aspects of the politics of assimilation and (2) conduct which offers apologies for injustice, belittles or ridicules members of the group, encourages evil-doing (discrimination and prejudice), or aids and abets acts of oppression.[67] Each of these is an act of betrayal tantamount to treason.

The traitor is subject to the most severe punishment: public condemnation, shaming, and ostracism. Some of us heard Robert Williams publicly criticize Randall Kennedy. His scathing allegory of betrayal delivered in Kennedy's presence in front of Kennedy's peers, members of the community of minority scholars, is an example of such a sanction.[68]

Kennedy's article provides white society with a rationale for denying blacks and other people of color a meaningful participation in the social, economic, and political institutions of this nation. The promise that we will be judged by the "content of our character" becomes a veiled threat. Now we can be excluded, not because of the color of our skin, but because we do not act "white" enough. To steal a line from August Wilson's *The Piano Lesson*, we are being admonished not to "show our color." We must not show it by writing about race or gender or by adopting an unconventional teaching or writing style. The damage that can be done when one who is a member of the group lends his voice and authority to the criticism of those who defend the legitimacy and value of difference is incalculable. In the simplest terms, as in Williams' allegory, it puts everyone at risk.

Issues of loyalty and betrayal can also threaten the alliances which are built among groups and individuals committed to cultural equality and the principle of diversity. White men and women often find themselves wounded by what they perceive to be unwarranted attacks by blacks and other people of color who have sought their support. What they react to is the level of emotion they hear in our voices, the anger that seems inexplicable and irrational. It is not the same kind of anger which can be heard in the condemnation of acknowledged bigots. It is harsher, hotter, more bitter.

This is an anger which finds its source in the friendship which exists between the individuals or the groups, in the belief that the friendship has been betrayed. It is anger at the inability of a friend to recognize the

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[67] See W.E.B. DuBois' criticism of Booker T. Washington in DuBois, *Souls of Black Folk* at 91-95 (cited in note 23).

[68] The allegory is reprinted in a footnote in one of the articles printed in the Harvard Colloquy. See Scott Brewer, *Introduction: Choosing Sides in the* Racial Critiques *Debate*, 103 Harv L Rev 1844, 1846, n10 (1990).

source of your pain; it is bitterness at your inability to communicate that pain or to create a basis for understanding something which is profoundly felt.

One of the most painful memories of my childhood involves a conversation with a white girlfriend when I was about twelve. Her parents were selling their home and I must have asked her whether they would be willing to sell it to my family, or maybe I asked something more general about their willingness to sell to a black family. She answered that her parents would never sell to blacks without the consent of their neighbors. She defended her parents' position. I have known this woman for almost 40 years. To this day, I have never completely forgiven her for taking that position.

I know, as a student of anthropology, that empathy is a skill that can be cultivated.[69] I also know that some individuals have more talent for it than others.[70] I know that it takes hard work to understand the point of view of someone from a different culture, someone whose world view is different from your own. The most powerful tool in attempting to bridge cultural barriers is the narrative, a form which has been said to have the power to translate experience from one culture to another, to bridge the gap in understanding.[71] We can only hope that the use of the narratives like this one and the others included in this volume will expand the limits of empathy and diminish the distances which exist between us all.

ON BEING A WARRIOR WOMAN

There were times when I was in law school and later when I was in practice when I would experience a mild case of dissociation. I would look around me and think, "How did I get here?" I had the feeling that I was in a dream because my life had this surreal quality. It was not exactly a Fellini film, but for me it was almost as unnatural. That feeling disappeared when I began to teach. It was as though I had emerged from some sort of maze having successfully negotiated my way to the end without any idea of how I managed to get there. I did not know, at first, why I should feel so differently about teaching. I just felt like I belonged: I was doing what I should be doing, what I was supposed to do all along. Years later,

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69 E. E. Evans-Pritchard, *Fieldwork and the Empirical Tradition* in *Social Anthropology and Other Essays* 79-82 (Free Press, 1962).

70 See debate over the role of empathy in the legal process in Julius G. Getman, *Colloquy: Human Voice in Legal Discourse*, 66 Tex L Rev 577 (1988); Mark G. Yudof, *Tea at the Palaz of Hoon: The Human Voice in Legal Rules*, 66 Tex L Rev 589 (1988).

71 See, for example, Hayden White, *The Content of the Form: Narrative Discourse in Historical Representation* (J Hopkins U Press, 1987). This form of discourse, White notes, may involve "ontological and epistemic choices with distinct ideological and specifically political implications." Id at IX. See generally, *Pedagogy of Narrative: A Symposium*, 40 J of Leg Ed No. 1 & 2 (March/June 1990).

when I worked on the Women of Courage Project, a part of the Black Women Oral History Project of the Schlesinger Library, I began to understand the cultural tradition which is part of the collective unconscious in the community of American black women.

At a conference on Women of Color in the Law, Denise Carty-Benia read a poem which began

> I've had enough
> I'm sick of seeing and touching
> Both sides of things
> Sick of being the damn bridge for everybody.[72]

We all know that Denise was an outspoken and aggressive advocate for social reform. The poem she chose to read, however, describes a diplomat, a counselor, a mediator, a healer, someone worn down by the demands of selflessness. Denise's example both inspires and frightens those of us she left behind. We know that we put pressure on ourselves, that we are driven in part by our acceptance of the tradition to which we belong, the tradition of black women as educators and advocates of social change.[73]

Historically, black women have been driven by a sense of purpose, a desire to "uplift" our people and improve our social condition.[74] In the nineteenth and early twentieth century, the goal was to prepare us for the millennium, the great day when we would be more than free, we would also be equal. Today, we as black women have ventured beyond our own communities. Many of us still operate on the basis of a belief that we are involved in something important, something more significant than our individual or particular circumstances.[75]

Perhaps it is the confluence of two sources of ethical identity which heighten the concern of black women with justice. It is our commitment to principles of justice which often places black women at the vanguard of reform movements, at the center whenever a storm of controversy erupts at a particular institution. Perhaps it accounts for frequent descriptions of black women as "warriors," a reference heard most recently at the memorial service for Denise.[76] There are some who will be offended by my analogizing cultural politics to a war. There are even more who object to the description of black women as warriors. It is an image that most of us would reject. It does not describe how we feel about ourselves. But nevertheless, it reflects our embattled position in society and our commitment to the struggle for social change.

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[72] Donna Kate Rushin, *The Bridge Poem*, in Chérrie Moraga and Gloria Anzaldúa, eds, *This Bridge Called My Back: Writings by Radical Women of Color* xxi-xxii (Persephone, 1981).

[73] See generally Perkins, *Shapers of a Better Future* (cited in note 60).

[74] ". . . the devotion to race and the placing of group needs before personal desires are perhaps the most common characteristics found in the interviewees." Id at 16 (cited in note 60).

[75] See Anita Allen's discussion of black women as an "ethical template" in this volume.

[76] Tribute by Dean Haywood Burns at SALT dinner, January 5, 1991.

When I began this narrative, I thought I was writing two separate articles—one about my experiences as a woman, the other about my experiences as a black. I worried that there might not be a way of combining them. But they are combined in me. My experiences as a woman and as a black person have their separate sources. Yet, they pour into my conscious mind and are combined in me in the things I do; in what I have to give to those around me, to my students, my family, my colleagues; and in the things I believe, the ideals I hold, and the way I conduct my life. I am a black woman teacher. This is my ethical identity.