

RACISM AND RACE RELATIONS IN THE UNIVERSITY

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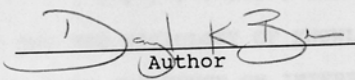
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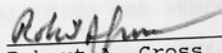
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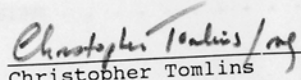
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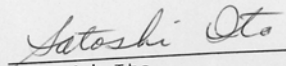

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This form of racial conflict is examined in a particular context: the predominantly white, racially integrated American university. This paper examines paradigmatic incidents of racial tension in which a conscious, malicious intent is not the source of the problem. Rather, this paper argues the problem arises from conflicting interpretations of an action or event, and that interpretations conflict because they originate from significantly different racial experiences.

Finally, this paper examines the social power structure of predominantly white universities to explain how students of minority racial groups, whose interpretations of events do not underwrite institutional structures, are harmed by racial conflict. It offers some tentative proposals for revising institutional life to alleviate this harm.

ABSTRACT

This paper takes as the focus of its examination a particular form of racial conflict. That conflict can be seen as one of interpretation. The working premise is that racial or ethnic heritage influences the interpretation of language and events; the meaning that we find in any "text" -- written, spoken, or lived -- is not the inherent content of that text but rather an interpretation, a reading, that is affected by the racial perspective from which we observe the text. To explore this point, the paper borrows from recent studies in interpretative theory developed in literary and social criticism.

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Finally, this paper examines the social power structure of predominantly white universities to explain how students of minority racial groups, whose interpretations of events do not underlie institutional structures, are harmed by racial conflict. It offers some tentative proposals for revising institutional life to alleviate this harm.

INTRODUCTION

...the university) is great; it's
...I just want to get my education and get
...this is their place, not mine."

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

RACISM AND RACE RELATIONS IN THE UNIVERSITY

...are not racist."

--white student at a major state
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...col. 3.

...university of Virginia student

INTRODUCTION

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

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

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

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

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

¹ Wilkerson, Campus Blacks Feel Racism's Nuances, N.Y. Times, Apr. 17, 1988, § 1, at 1, col. 3.

² Cavalier Daily (University of Virginia student newspaper), Oct. 4, 1988, at 1.

social order, woven into the fabric of society and everyday life. Professor Lawrence has suggested that this aspect of racism is "in large part a product of the unconscious" that is "arises from the assumptions we have learned to make about the world, ourselves, and others as well as from the patterns of our fundamental social activities."³ It is a racism frequently less intentional, and very often--to white people--less obvious. But its victims insist that it is no less real, harmful, or in need of remedy.⁴

Confrontation of such racism has led to debate over the very definition of racism. Consideration of the issue, however, has also engendered a significant "backlash," premised on the assertion that all the racism that needs to be eradicated has been; that we have gone too far in recognizing, and still pay too much attention to, a phenomenon that is no longer a problem. The argument is even extended to contend that the continuing remedial efforts themselves have become the problem, as has the overuse of the label "racism."⁵

³ See Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317, 330 (1987).

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

⁵ See M. Omi & H. Winant, *Racial Formation in the United States* 1-6 (1986); *id.* at 109-35 (focusing attention on three main "currents" of reactionary and conservative tendencies in the 1980's that share the "similar ambition" of "discredit[ing] the

The conflict over racism's form and existence implicates the entrenched American belief in equality of opportunity. The degree to which we believe in the existence of equality of opportunity informs

key ideas and objectives of the 1960's minority movements"); id. at 71, 134 (noting recent definition of "reverse discrimination," and observing that the biggest reversals have taken place in affirmative action policies such that now it "is the liberals who are guilty of racism"); Trescott, Is Social Racism Now Becoming 'Acceptable?', L.A. Times, June 12, 1981, § V, at 2, col. 1 (observing that "the veiled insult, contempt masquerading as a joke, [and] the direct slur . . . [are being] recycled as a protest against minority gains") Kennedy, Persuasion and Distrust: A Comment on the Affirmative Action Debate, 99 Harv. L. Rev. 1327, 1344 (1986) (observing that the "Reagan Administration's policies reflect, reinforce, and capitalize on widespread feelings that blacks have received an undeserved amount of the nation's attention"); Kluegel, If There Isn't a Problem, You Don't Need a Solution: The Bases of Contemporary Affirmative Action Attitudes, 28 Am. Behav. Scientist 761, 770 (1985) (proposing that "whites will continue to believe that because they themselves are not prejudiced (in the traditional sense) and because racial prejudice seems to be diminishing in general, there is no longer a problem"); Abram, Affirmative Action: Fair Shakers and Social Engineers, 99 Harv. L. Rev. 1312 (1986) (arguing that the civil rights movement "should turn its attention back to first principles--the zealous regard for equal opportunity and the promotion of color-blind law and social policy--and away from color-conscious remedies that abandon principle and lead us further from a society free of the bane of racial discrimination").

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

antidiscrimination law and the assessment of racism's persistence, because truly equal opportunity would mean many social and economic disparities between racial groups are the result of something other than racism. If one assumes the existence of a functioning meritocracy, achievement and social condition are direct results of individual effort and ability. But if one sees the "thoroughly political--which is to say contestable--nature of 'merit,'" then race becomes an appropriate and unavoidable consideration in that calculus.⁶

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

⁶ Kennedy, *supra* note 5, at 1333; see Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1380 (1988); Rhode, *Perspectives on Professional Women*, 40 Stan. L. Rev. 1163, 1199 (1988) (asserting that "[m]erit is a social construct that reflects a range of characteristics over which the individual has no control").

Although the students were granted a few private meetings with the administration and an eventual brief apology, they faced the indignant denials (in the student newspaper and elsewhere) by many white students and the professor that anything offensive ever occurred, as well as angry chastisement for inaccurately alleging such injurious charges.⁷

To most white students in that debate, racism was defined as an act of intentional maliciousness; if the professor intended no racial offense (or at most, if the offense wasn't so obvious to white people that the professor should have noticed it), then none occurred. Black students, by contrast, had a completely different idea in mind: They sought to express their deep dissatisfaction with "the substantive dynamics of the classroom."⁸

⁷ See Prof's Alleged Remarks Prompt Petition, Va. L. Weekly (University of Virginia School of Law student newspaper), Apr. 15, 1988, at 1; Va. L. Weekly, Apr. 22, 1988, at 2, col. 1 (student letter to editor expressing doubt that allegations of professor's discriminatory remarks were true, because student "never heard any discriminatory remarks from the man in his class last term"); id. at 3 (professor's open letter addressing specific allegations of racist and sexist remarks, commenting on each "incident" because professor felt he had "engaged in no conduct for which I need feel ashamed or apologetic"); id. at 5, col. 1 (letter from student observing that "many students (not just the minority students who receive affirmative action) are voicing concerns about the offensive statements"); id. at 1-2, 5-6 (letters declaring public petition initiated by several student organizations protesting professor's remarks to be "invidious," "reckless," and offensive to "basic notions of fairness and due process").

⁸ Crenshaw, Foreword: Toward a Race-Conscious Pedagogy in Legal Education, 11 Nat'l Black L.J. 1, 2 (1988-89). As Crenshaw notes, "[i]n many instances, minority students' values, beliefs,

One of the problems underlying such debates over racism is epistemological: How do we know "racism"--what events, statements, behavior, and social conditions will "count" as racist? The definition of racism is a policy choice. The question of how we interpret--and whom we let interpret--social events and behavior in order to identify racism is the underlying struggle in the construction of our understanding of race.⁹

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

and experiences clash not only with those of their classmates but also with those of their professors." Id. at 2.

⁹ See M. Omi & H. Winant, *supra* note 5, at 57-66. The authors observe that "race has been a matter of political contention," id. at 57, "a pre-eminently sociohistorical concept. Racial categories and the meaning of race are given concrete expression by the specific social relations and historical context in which they are embedded." Id. at 60. Further, the "seemingly obvious, 'natural' and 'common sense' qualities which the existing racial order exhibits themselves testify to the effectiveness of the racial formation process in constructing racial meanings and racial identities." Id. at 62.

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

ones, issues such as the substantive dynamics of classrooms for students of color will be ignored, and the discomfort black students experience in many white-dominated classrooms will be denied.

As racist incidents and tensions have increased on real college campuses in recent years, university Second, it is administrations, state governments, and student and civil rights groups have searched for ways to combat racism in the university, as well as to improve campus racial climates. Ad-hoc student groups frequently have formed on individual campuses to combat racist incidents. A network of many such groups from colleges in the Northeast met at Yale University in the spring of 1988 to form the organization Campuses Against Racial Violence and establish a databank on racial incidents. State government and university administration officials gathered for two conference on racial and ethnic relations in higher education. At the same time, there is a seeming lack of recognition among some higher education officials that racist incidents occur on their campuses, even as reports of such incidents recur in the popular press.¹⁰

¹⁰ See Grasso, Racism on Campuses Discussed at Conference, N.Y. Times, Apr. 24, 1988, § 23 (Connecticut Weekly), at 6, col. 5. Among government agencies and private groups that have gathered data and studied the issue of racism on campus are the National Institute against Prejudice and Violence, the Southern Regional Education Board, and the U.S. Civil Rights Commission. The New Jersey Department of Higher Education surveyed State Higher Education Executive Officials (SHEEO's) in every state about racial incidents occurring on their college campuses.

This thesis aims to provide a description of racial dynamics on college campuses that will illuminate why but institutional responses are needed to address racism, in its elusive and controversial forms as well as its blatant ones. First, the goal is to document that racism on campus is real and substantial enough to require a remedy. Second, it is to argue that while sanctions against racist actions and now speech, crafted within the parameters of current antidiscrimination law, can be helpful, a more fundamental restructuring of the institutional arrangements on life integrated campuses may be the only way to ease racial life tensions on such campuses. Underlying this thesis' analysis is the assertion that the problem of combating racism on campus is not simply a question of correcting individual racist attitudes or punishing racist behavior versus that protecting free expression; it is also a question of whose expression will be empowered by institutional structures, and whether all racial groups will be allotted equal may have institutional power within universities. bles of racism in:

Sixteen states reported no racial incidents in the last three years, and another 11 did not respond to that question on the survey. Yet, incidents of violence or allegations of racial prejudice, occurring in the spring of 1988 alone, were reported in the popular press in 10 of those 27 states. See Marcus, State-Level Efforts to Improve Racial/Ethnic Harmony on Campus 19 tables 1 & 2 (1989) (unpublished paper available from the Office of Institutional Affairs, New Jersey Department of Higher Education).

Marcus concludes from the survey that SHEEOs exhibit a tendency to underreport the incidence of racial tension, and that "it is clear that the number of incidents cited by the SHEEOs in the survey does not approach their actual level." Id. at 19-20.

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

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I. RACISM AND THE SOCIOLOGY OF KNOWLEDGE

Even in the wake of anti-objectivist critiques, there persists throughout the sciences, humanities, and law a faith in the objective meaning of language and social events. Despite modernism's undermining of the faith in authoritative values and foundations that would allow us a constant framework within which to understand social life across time and context, people have difficulty relinquishing the Platonic belief that they can get to the true, real essence of things if they only look hard enough. One epistemological assumption of that belief is that the meaning of words and texts exists prior to their interpretation by individuals, that such words and texts have inherent content that is discerned rather than created. Truth, in other words, is out there to be discovered, and knowledge is "looked upon as the instrument by which to take possession of the Absolute."¹¹

¹¹ Hegel: The Essential Writings 44 (F. Weiss ed. 1974). Traditional epistemology, which is the study of the nature of knowledge, entails "belief in the existence of transcendent, objective truth," Williams, Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells, 62 N.Y.U. L. Rev. 429, 430 (1987). Professor Williams adopts Wittgenstein's label of the "picture theory" to refer to the traditional Platonic, objectivist view that language provides a picture of reality. Id. at 433-34 & n.21. According to this view, "human understanding is reached when language captures the 'glassy essence,' the [Platonic] Form, of a particular object. For example, the word 'tree' links an actual tree with the essence of what it means to be a Tree." Id. at 434 (footnotes omitted).

Likewise, meaning in social life is experienced as fixed, objective, or "really there" because our language, texts, and modes of behavior are "reified." Our language and social practice construct and institutionalize what we think of as "obvious," "common sense," and "natural."¹²

When this way of thinking is applied to the problem of

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

¹² [R]eification is the apprehension of the products of human activity as if they were something else than human products--such as facts of nature, results of cosmic laws, or manifestations of divine will The reified world . . . is experienced by man as a strange facticity, an opus alienum over which he has no control rather than as the opus proprium of his own productive activity.

P. Berger & T. Luckmann, *The Social Construction of Reality* 82-83 (1966); cf. M. Omi & H. Winant, *supra* note 5, at 57-66 (arguing that many racial theories seek "to remove the concept of race from fundamental social, political, or economic determination," and suggest instead "that the truth of race lies in the terrain of innate characteristics").

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

racism, people start from the assumption that a phrase or event either is or is not racist, because racism either is or is not the inherent, positive content of the phrase. Disputes about meaning can degenerate into something like, "you say a remark is racist, but I know it is really not. If you understood its meaning correctly, you would agree."¹³

Once one abandons traditional epistemology, the question of which social forces most influence the institutionalization of language and social experience

¹³ Professor Fish explains the broader problem:

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

Fish, *Is There a Text in This Class?*, reprinted in H. Adams & L. Searle, *Critical Theory Since 1965*, at 525, 532 (1986).

Berger and Luckmann note that there are certain "social circumstances that favor dereification," that is, that make it easier for one within an institution to see the contingent construction of the social order instead of seeing it only as "the way it's done." Such circumstances include "the overall collapse of institutional orders, the contact between previously segregated societies, and the important phenomenon of social marginality." P. Berger & T. Luckmann, *supra* note 12, at 85 (footnote omitted). The last two circumstances are particularly relevant for understanding American racism, because whites and blacks have had vastly different experiences under racist practices and ideologies. Whites in particular have little knowledge of how blacks' understanding of the social world is affected by that experience.

becomes crucial; it leads to the examination of the relationship between knowledge and power. Reliance on community agreement--e.g., "since so many people agree that the remark is not racist, it must not be"--begs the question of the community's composition.¹⁴

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

If we acknowledge the divisions within a community, then consensus over what that community constructs as its shared assumptions becomes problematic. It is likely to be a consensus among only parts--the most powerful parts--of

¹⁴ Berger and Luckmann reason that "[i]f the integration of an institutional order can be understood only in terms of the 'knowledge' that its members have of it, it follows that the analysis of such 'knowledge' will be essential for an analysis of the institutional order in question." P. Berger & T. Luckmann, supra note 12, at 61.

the community. In such a case, the presuppositions that serve as the unacknowledged starting points for interpretation are exercises of social power by the groups able to put them in place. With particular attention focused upon the university setting, this thesis suggests that on the issue of race, we must examine the history of "racial formation" and the ideologies growing out of it, in order to understand how differing racial identities and histories affect the interpretive understanding of--and remedial efforts to address--the problem of contemporary racism.¹⁵

¹⁵ See M. Omi and H. Winant, *supra* note 5, *passim*. Removing the implication of conspiracy, presuppositions that form the prevailing parameters around the issue of racism begin to look like Gramsci's notion of ideological hegemony. See generally J. Femia, *Gramsci's Political Thought: Hegemony, Consciousness, and the Revolutionary Process* 23-60 (1981) (discussing Gramsci's doctrine of ideological ascendancy or "hegemony," essentially grounded in the idea that the dominant class must establish its own moral, political, and cultural values as the conventional norms of practical behavior).

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

The same project could be done with forms of racism other than American black-white relations, and for gender discrimination. See, e.g., Rhode, *supra* note 6, at 1191 (noting that the "same biases . . . that disadvantage women also operate against minorities"); Weiss & Melling, *The Legal Education of Twenty Women*, 40 *Stan. L. Rev.* 1299 (1988) (analyzing why many women find law school alienating).

II. RACISM AS AN INFLUENCE ON INTERPRETATION

A. Historical Origins

Racism so pervades our social history and cultural experience that it has fundamentally shaped our collective unconscious, with the result that "a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation." As Professor Lawrence has suggested, racism can be understood as an "illness [that] affects almost everyone," but it might help to think of racism in a less aberrational sense as well. One's race gives one, almost unnoticeably, a perspective on racial issues different from people of other races. Such unconscious racial perspectives affect definition and recognition of racism.¹⁶

The disparity in perceptions between blacks and whites on issues of race continues to result in blacks and whites assessing incidents--even well-known public events--in radically different terms. Judge Higginbotham, for

¹⁶ Lawrence, *supra* note 3, at 321-22; see also Brooks, *Anti-Minority Mindset in the Law School Personnel Process: Toward an Understanding of Racial Mindsets*, 5 J. L. and Inequality 1, 8-11 (1987). Professor Brooks argues that whites generally think of racism as intentional belief in white supremacy, but that because "the state of mind of one who perpetuates minority subordination makes little difference to those who suffer from minority subordination--i.e., minorities--racism is defined by minorities to include minority subordination." *Id.* at 9.

instance, has contrasted the "predominantly white perspective" on the Declaration of Independence as "the greatest achievement in the history of man" with Frederick Douglass' famous remarks on that document:

This Fourth of July is yours, not mine. You may rejoice, I must mourn. To drag a man in fetters to the grand illuminated temple of liberty, and call upon him to join you in joyous anthems, were inhuman mockery and sacrilegious irony. . . . I am not included within the pale of this glorious anniversary. . . .¹⁷

The history of racism helps to develop, and in turn is perpetuated by, a shared psychology and culture of which racially affected ideology is a constituent part. One blatant aspect is a persistent set of images, myths, and stereotypes that historically constituted white and black racial identities: industrious/lazy, intelligent/unintelligent, moral/immoral, enabling culture/disabling culture, law-abiding/criminal, responsible/shiftless, virtuous/lascivious. As Michael Omi and Howard Winant have explained, "[r]acial beliefs operate as an 'amateur biology,' a way of explaining the variations in 'human nature.'" Our society tends "to view race as something fixed and immutable--something rooted in 'nature.'" Thus we mask the historical construction of racial categories, the shifting meaning of race."¹⁸

¹⁷ A. Higginbotham, In the Matter of Color 5 (1978).

¹⁸ M. Omi & H. Winant, supra note 5, at 62-64 (footnote omitted). The list is taken largely from Crenshaw, supra note 6, at 1373. A more complete development of these traditional race characterizations appears in J. Kovel, White Racism: A

The traditional formulation of racial identities serves to perpetuate what Professor Crenshaw terms a "white race consciousness" that "legitimizes prevailing injustices and constrains the development of new solutions that benefit Black Americans." Crenshaw traces the transformation of this consciousness into the unconscious "white norm" that is taken as a neutral standard even after the demise of explicit white supremacy ideology.¹⁹

White race consciousness, experienced as neutral and practiced without malicious intent, defines whites' interpretation of racism and social life. Black Americans' understanding of race is similarly defined by historical

Psychohistory 51-92 (1970).

For a related discussion of the development of ideologies of racial identities, see M. Omi & H. Winant, *supra* note 5, at 57-69. For an explanation of the human tendency to create irrational categories of racial and ethnic characteristics, see G. Allport, *The Nature of Prejudice* 17-27 (1954). This landmark study also provides excellent analyses and theoretical explanations from a psychological perspective of the preferential thinking, creation and perception of group differences, as well as sociocultural factors that are part of the complex process of forming prejudices.

¹⁹ Crenshaw, *supra* note 6, at 1369. She elaborates:

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

experience; neither is neutral. Yet, one conception will be inevitably privileged in that it will be utilized as the basis for understanding and acting against racism, as well as serving as the basis for understanding written texts, legal doctrine, and social life generally.

Professor Wasserstrom provides an example of the way such "conceptual racism operated in Brown v. Board of Education. He argues that, logistically, most school districts could have been integrated within a few days of the Court's decision. Most counties had two high schools, one white and one black, and "[t]here was nothing difficult about deciding that--as of the day after the decision--half of the children . . . who lived in the southern part of the county . . . would go to [one high school] and all those who lived in the northern half would go to [the other]." Yet the Court justified its order of desegregation "with all deliberate speed," by citing "problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts . . . and revision of local laws."²⁰

Wasserstrom's point is that administrative problems (in many places) could be easily handled, and building conditions were only a problem because the Court could not

²⁰ See Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. Rev. 581, 599-601 (1977); *Brown v. Board of Education*, 349 U.S. 294 (1955).

envision ordering white children to attend school in the same substandard facilities black students had endured. The Supreme Court allowed an infamously slow remedial process because of an unacknowledged conclusion that white students could not be made to attend inferior black schools. Until all schools could be upgraded, black students would have to (continue to) endure inferior facilities. Because black lives were implicitly valued less than white ones, the Court ignored the more obviously just intermediate remedy: ordering white students, who had long had the benefit of better facilities, to use the inferior ones while black students, who had unconstitutionally been relegated to the poor schools for generations, gain the temporary benefit of better facilities. Yet to the Court, leaving students in current facilities until all schools were improved seemed neutral.²¹

B. Implications of Interpretation Through Race Consciousness

Our society has established a national consensus against blatant, intentional racism, and in the decades

²¹ An obvious factor--no doubt considered by the Court--complicates Wasserstrom's thesis. Immediate integration simply would not have been carried out by local officials, and it might not have been enforced by the executive branch. Also, such a decision certainly would have ignited violent resistance from some whites. The Court was at the limits of its institutional powers. While this point may undermine Wasserstrom's assertion about the ease of immediate integration, it does not affect his insight that black children's experience was valued less than white children's.

since Brown v. Board of Education has developed a sizable set of legal remedies to address it. Even when remedial mechanisms do not reach such racism--as, for instance, when black people cannot win tort actions for intentional racial slurs--we at least have the conceptual apparatus to recognize that racism exists.²²

We have no such recognition, however, for more subtle racism--the unconscious, usually unintentional racial bias that infects the taken-for-granted concepts, categories, and assumptions with which we make sense of the world. Law and much of our social discourse recognize racism only in the form of an overt expression of white racial superiority and deliberate efforts to denigrate, segregate, or deny opportunity on the basis of skin color. The law and popular understanding have incorporated into the idea of racism neither contemporary descriptions of the psychology of unconscious racism nor recent theoretical thinking that has displaced traditional epistemology with a debate over hermeneutic approaches. Neither have they acknowledged the importance of racial identity--of one's membership in a distinct racial group rather than a colorblind "humankind"--in the interpretation of racism. The result is racism--aversive, conceptual, and unconscious--that cannot yet be

²² On tort actions for racial slurs, see Delgado, Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling, 17 Harv. C.R.-C.L. L. Rev. 133 (1982).

acknowledged, and thus not remedied.²³

Yet while it is not acknowledged, it is often felt, even by whites. Many blacks inevitably feel an anxiety in predominantly white institutions even though the institutions are now integrated and formally neutral in matters of race. Some whites feel a collective guilt for the sins of their ancestors, and for the dimly recognized possibility that their own social status is due partly to the historical subordination of blacks. Alternatively, some whites resent the expectation of guilt and feel no responsibility for racial tensions they did not intentionally cause. This mixture of emotions and attitudes can be the cause of awkward situations in which race issues arise in integrated groups, not only because an arguably offensive remark has been made, but because the tremendous disparity in the social histories of blacks and whites make efforts at empathy and understanding difficult, particularly for whites.²⁴

²³ Kovel defines the aversive racist as "[t]he type who believes in white race superiority and is more or less aware of it, but does nothing overt about it. An intrapsychic battle goes on between these sentiments and a conscience which seeks to repudiate them." J. Kovel, *supra* note 18, at 54-55. On conceptual racism, see Wasserstrom, *supra* note 20. On unconscious racism, see Lawrence, *supra* note 3; Lawrence, "Justice" or "Just Us": Racism and the Role of Ideology, 35 *Stan. L. Rev.* 831 (1983).

²⁴ For a description of such an incident and a development of this argument, see Steele, *I'm Black, You're White, Who's Innocent? Race and Power in an Era of Blame*, *Harper's Mag.*, June 1988, at 45; Steele, *The Recoloring of Campus Life*, *Harper's Mag.*, Feb. 1989, at 47, 53-55 [hereinafter Steele, *Recoloring*].

Antidiscrimination law, and particularly equal protection doctrine, is formulated explicitly to address only intentional racism. Professor Freeman, in an influential article, has called this approach the "perpetrator perspective." As he describes it:

[R]acial discrimination [is seen] as something that is caused by individuals, or individual institutions, producing discrete results that can be identified as discrimination and thereafter neutralized. . . . The perpetrator perspective . . . presupposes that apart from the misguided conduct of particular actors the rest of our society is working All we need do is root out the villains. Having done so, we can say with confidence that it was all their fault.²⁵

The landmark equal protection decision of Washington v. Davis is exemplary in this respect. In Davis, the Court ruled that state action is not unconstitutional "solely because it has a racially disproportionate impact." Rather, discrimination "must ultimately be traced to a racially discriminatory purpose." In other words, the perpetrator's intent, and not the victim's injury, is the law's concern. If an identical racial harm were caused unintentionally, the equal protection clause would offer no remedy. The principle was quickly extended by the Court to other equal protection claims.²⁶

²⁵ Freeman, School Desegregation Law: Promise, Contradiction, Rationalization, in Shades of Brown, supra note 9, at 71, 74-75.

²⁶ Washington v. Davis, 426 U.S. 229, 239-40 (1976). For cases in which the Davis principle was extended, see, e.g., Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977) (segregation of schools must be shown to be the intent of the school board); Village of Arlington Heights v. Metropolitan Housing Dev. Corp.,

Such a conception of racism might be adequate if perpetrators always made manifest a racist intent. But not only does such a theory privilege the perpetrator's experience of racism over the victim's, it also does not begin to aid in recognizing more subtle, aversive racism. The perpetrator perspective sheds no light on a situation in which a black person feels the injury of a racist remark or action, yet the white "perpetrator" intends or recognizes no racism. Concomitantly, the law's perpetrator perspective conceptualizes racism as a discrete and specific act, an act committed by one individual, group, or institution against another whose injury can be identified. It ignores the possibility that "race" is structural and interstitial, that it can be the root of injury even when not traceable to a specific intention or action.²⁷

429 U.S. 252 (1977) (housing segregation must be racially motivated).

²⁷ See Brooks, supra note 16, at 9-10 (noting that "whether the harm is backed by a racial animus does not change its existence or ameliorate the pain suffered by its victims," that "when individuals and institutions having 'good' intentions engage in a pattern or practice of granting low priority to matters of keen importance to minorities--such as real access to quality jobs, education, and housing--that is subordination and, hence, racism, as far as minorities are concerned" (footnote omitted)). Cf. Bumiller, Victims in the Shadow of the Law: A Critique of the Model of Legal Protection, 12 Signs: J. Women in Culture & Society 421, 439 (1987) (concluding that "[t]hough antidiscrimination law may have produced positive social change, legal strategies put unacceptable burdens on disadvantaged groups with little promise of success"); Rhode, supra note 6, at 1193 (observing that although "they have been effective against the most overt forms of gender discrimination, traditional equal opportunity frameworks have not confronted the deeper institutional and ideological forces that contribute to gender

A large body of sociological research on law has found overwhelming evidence that legal institutions discriminate against blacks in ways that cannot be explained on the facts of the cases or through legal doctrine. It is well known, for instance, that death penalty sentences are given more often to black defendants than to whites, and more often to the killers of white victims than to those of black victims. That racial disparity holds up across the handling of lesser crimes as well. Intentional prejudice cannot explain that data. But the realization that race affects thought and experience in things seemingly unrelated to race (such as whether a particular act constitutes an "aggravating circumstance" sufficient to justify the death penalty over life imprisonment) sheds light on such disproportionate results.²⁸

Such racism requires attention, for it is a disadvantage that blacks are "oversensitive." As one white MIT student (half my buddies on the [high school] football

²⁸ See Bowers & Pierce, *Arbitrariness and Discrimination in Post-Furman Capital Statutes*, 26 *Crime and Delinquency* 563 (1980). Even under revised death penalty statutes approved by the United States Supreme Court, "race of both offender and victim ha[ve] a tremendous impact on the chances that death sentence would be handed down." *Id.* at 596-97. The discrepancies "have been extreme in magnitude, similar across states and under different statutory forms, pervasive over successive stages of the judicial process, and uncorrected by appellate review." *Id.* at 629. The death penalty is given most often in cases in which a black has killed a white, next most often when a white has killed a white, then when a black has killed a black, and least often when a white has killed a black. See D. Black, *Sociological Justice* 61 (1989). For data on lesser crimes, see D. Black, *The Behavior of Law* 17, 21-22, 24-25 (1976).

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

Outside the law, the absence of a recognition of race consciousness, which is in part an understanding of racism limited to the perpetrator perspective, helps to explain vocal resentment of whites to charges of racism and provides insight into allegations that the term "racism" has been so misused and overused that it has lost its meaning. When whites conceive of "racism" as requiring an intentional racist motive for which they deserve personal blame for a personal fault, they get angry because they know they had no racist intent. They plead that they were misunderstood, or that blacks are "oversensitive." As one white MIT student complained, '[h]alf my buddies on the [high school] football team were black, and I come here and read every other day in the paper that I'm a racist. It irritates me.'²⁹

This misunderstanding of the nature of racism is the basis of a problematic confrontation in black-white relations: a nonmalicious remark or action by a white person to which black people take offense or feel injury. A white speaker's reaction, in turn, is either uncomprehending

²⁹ School Colors, supra note 5, at 17.

puzzlement ("How could that possibly be seen as racist?") or some mixture of vocal denial and backlash ("I didn't mean of any harm, and it angers me that you accuse me of it"). The dilemma hinges on differing interpretations of the cultural or symbolic value of social events.

Consider the debate over the Confederate flag. Black students at schools where white fans wave the flag and sing "Dixie" during football games see the Confederate emblems as symbols of an era in which their ancestors were enslaved by whites. Many white students, on the other hand, seem to take the flag as representative merely of their Southern heritage, a cultural identity distinct from Northern or urban lifestyles. Such whites do not see themselves as endorsing, through the flag, a return to slavery. They simply do not see what the big deal is about celebrating the Confederate flag once one concedes that violent racial subjugation is a bad thing. As defined by their intentions, many whites do not view their use of the Confederate flag as problematic. Nor is it made so by the banner's frequent appearance at Ku Klux Klan rallies -- or its use by white students at the Citadel as an act of defiance in the wake of a racial incident on campus.³⁰

³⁰ See, e.g., Aitken, Racism on Campus: Beyond the Citadel, People Mag., Dec. 15, 1986, at 58, 65-66 (recounting a Citadel football game where "brand-new rebel flags were waved defiantly by white students and alumni" three weeks after white students there dressed in white sheets had burned a cross in the room a black student; one alumnus observed that the action was tantamount to chanting "n-gger, n-gger"); The Stars and Bars Is

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

Not A Racist Symbol, Wash. Post, Feb. 13, 1988, at A17, col. 1 (justifying display of the flag).

Black groups have made efforts in recent years to have the Confederate flag removed from Southern state houses and other public buildings. See, e.g., Confederate Flag in Norfolk Draws Protests, Wash. Post, Feb. 14, 1988, at B2, col. 6 (reporting on an attempt to remove the flag from Norfolk City Council chambers); Hill, Symbol of Dixieland Has Blacks Seeing Red, Wash. Post, Jan. 15, 1988, at A3, col. 1; Eubanks, Ole Miss Is Still Torn 25 Years After Meredith, Wash. Post, Sept. 27, 1987, at D1, col. 4, D2, col. 4 (Confederate flag for black students at Ole Miss "represented Mississippi's racist past" while for the writer it was a "harmless symbol of a bygone era").

III. RACISM IN THE UNIVERSITY

A. The Evidence and Experience of Racism

Educational institutions have been a primary context in which the judicial system has grappled with the problem of remedies for the historical subordination of black people. In many respects universities have equaled or surpassed other institutions in efforts to remedy the effects of past racism in a variety of ways, including affirmative action policies, minority scholarship programs, Afro-American and other non-European courses of study in the curriculum, and minority cultural centers on campuses. Nevertheless, universities exhibit the shortcomings of remedial efforts. Some universities have not met court orders for enrollment of minority students. Many do not have minority student bodies equivalent to the minority population of their states, and figures for minority faculty lag even further behind. Resistance to calls for curriculum revision persist.³¹

Race is peculiarly problematic in the context of higher education. In its most limited definition, to which many

³¹ Landmark antidiscrimination cases that arose educational institutions include *Brown v. Board of Educ.*, 349 U.S. 294 (1955); *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978). On universities' efforts at integration, see Vobejda, *School Integration: 4 States Pass, 6 Fail*, *Wash. Post*, Feb. 11, 1988, at A3, col. 1.

whites still subscribe, racism is an attitude held mostly by the unenlightened or uneducated, that is, an isolated position peculiar to the culture of Afrikaaners, some Southern state officials, or some working class white ethnics in the outer boroughs of New York. Given that definition, it is difficult to admit the presence of racism among society's most sophisticated and intellectually gifted. And indeed, despite persistent problems, many blacks find college campuses better than many other white-dominated social spaces. Still, many black students experience campus life as a disturbing or even hostile atmosphere that at a minimum distracts attention and energy from academic pursuits.³²

The university is also a singularly powerful institution in the distribution of wealth. Its primary products, credentials in the form of college degrees, are limited and valuable commodities. Most students, especially

³² Steele, *Recoloring*, supra note 24, at 47-48. Steele recalls:

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

those ambitious enough to compete for admission to top-ranked schools, are aware of this fact. Those who go to college make more money, on average, than those who do not; those who graduate from elite institutions usually make more than those who earn diplomas from second- and third-tier schools. White students who believe that admissions criteria based on grades, test scores, and the status of one's high school are objective, fair and neutral indicators for college admissions resent scarce (and valuable) seats being filled by minority students admitted through affirmative action policies (though there is little opposition to affirmative action for athletes and children of alumni.) Both faith in the meritocratic processes that are supposed to govern the university's intellectual task and the self-interest that intensifies competition for the university's key commodity mesh with a particular racial ideology to contribute to questioning by whites of the legitimacy of black students' presence in academia. White acceptance of the ideology of equal opportunity and unproblematic meritocracy helps eliminate the need to see racism as a key factor in an economy and social structure that distributes rewards with tremendous disparity.³³

³³ See Wrong Message from Academe, Time, Apr. 6, 1987, at 57 [hereinafter Academe] (statement of Adele Terrell, program director of the National Institute Against Prejudice and Violence) (contending that students "are competing for scholarships and grants that are drying up". . . with a resulting reaction by whites against perceived rivals"); Mangan, At Texas: An Undercurrent of Hostility Amid Efforts to Promote

In addition, the current divisions in the understanding of racism on university campuses serve as an accurate paradigm for race issues in the larger, national context. Today's white students missed most of the civil rights movement and legally enforced segregation. Many feel no direct responsibility for institutionalized racism and believe that with formal legal barriers to integration now dismantled, students of color stand on an equal footing with them. As Professor Fleming observed:

Most [students] would like to ignore the subject [of racism], just like most of society. That attitude is at the source of the racial incidents. The average student doesn't feel responsible for the racial climate or civil rights. They don't feel responsible for anything that they don't have direct knowledge of. They have been taught systematically to ignore race as a subject.³⁴

As with most white people generally, white students' conception of racism is constructed from the images that the civil rights movement confronted: enforced segregation,

Multiculturalism, *Chron. of Higher Educ.*, Apr. 26, 1989, at A29, col. 1 (statement of Michael L. Davis, director of Minority Information Center, University of Texas-Austin) (noting that "[t]here is an undercurrent of antagonism, maybe even frustration, with programs and moneys specifically set aside for minorities, especially when money is tight"); Crenshaw, *supra* note 6, at 1380 (footnote omitted).

Professor Kennedy notes that many beneficiaries of affirmative action recognize that "merit" is "a malleable concept, determined not by immanent, preexisting standards but rather by the perceived needs of society," and rightly insist that "considering a black's race as part of the bundle of traits that constitute 'merit' is entirely appropriate." Kennedy, *supra* note 5, at 1333.

³⁴ Quoted in Magner, *Blacks and Whites on the Campuses: Behind Ugly Racist Incidents, Student Isolation and Insensitivity*, *Chron. of Higher Educ.*, Apr. 26, 1989, at A1, A29.

physical violence, blatant hateful epithets, and an overt denial of racial equality.

With such barriers now either gone or greatly diminished, many whites tend to think that racism has largely disappeared, at least in any form that could serve as an impediment to opportunity and achievement. White students have a very hard time understanding how their predominantly white campuses can seem hostile to people of color; how their campus social life is a distinctly "white culture," even when the major institutions within it are not explicitly labeled the "white student union," "white student newspaper," or "white debating club." It does not occur to most white students that their indifference or hostility to the Martin Luther King national holiday, for example, is evidence of attitudes on racial issues that differ tremendously from their black colleagues. It does not occur to most white students that the major, campus-sponsored concerts of white music groups constitute distinctly white cultural events.³⁵

A white University of Texas student voiced an attitude not uncommon among whites when he complained, "I don't like a black-student center any more than I would like a white-

³⁵ Cf. B. Blauner, *Black Lives, White Lives: Three Decades of Race Relations in America* 3 (1989) (observing that although an "extremely significant achievement," the national celebration of Dr. King's birthday "makes it easier to avoid facing squarely the evils of racism, economic injustice, and war that he struggled against").

student center." The hostility, or at least puzzlement, one hears among many white students toward distinctly black cultural centers, student groups, and social events arises from white students' lack of recognition that the overwhelmingly white campuses themselves are in some sense large white cultural centers--ones in which black students are likely to have difficulty feeling at home. Thus, white students' assertions that they only want all people treated the same, without the separatism of institutions such as black cultural centers, are often experienced by minority students as demands that they assimilate into white-dominated institutions and culture. That white norm extends even into the classroom.³⁶

The reports of racist incidents on college campuses recur continually in the popular press. The National Institute Against Prejudice and Violence collected reports of seventy-eight incidents of racial violence or allegations of prejudice that occurred in the spring semester of 1988 alone, and that did not purport to be a comprehensive survey. The recurrence of old-fashioned intentional racism on campuses is the most obvious form of hostility, and a sampling demonstrates the ferocity of some such incidents,

³⁶ See Mangan, *supra* note 33, at A29, col. 2 (comment of University of Texas student). An overtly hostile reaction to black campus institutions is reported in Magner, *supra* note 33, at A30, col. 1 (white students at Temple University form a "White Student Union," created "to oppose affirmative action and encourage white pride"). On racial dynamics in the classroom, see Crenshaw, *supra* note 8.

which have variously involved: graffiti containing swastikas and antiblack epithets; cross-burning; the protesting of an all-white fraternity's "White History Week" party; the shouting of racial slurs; the distribution of openly hostile leaflets; racial brawls; and black student class boycotts and protests. The comprehensive list of such incidents is much longer, and that list does not include unreported incidents, which may well be the majority.³⁷

³⁷ See Academe, supra note 33, at 57 (reporting several incidents: black academic counselor finds words "death n-gger" scratched on office door; a wooden cross doused with fuel was found in front of the Black Cultural Center at Purdue University; whites shouted slurs at rally for Rev. Jesse Jackson at Northern Illinois University; at the University of Massachusetts, 1,500 students "swirled into a white-black brawl" after the last game of the World Series; at the University of Michigan, leaflets appeared with the message "Get your black asses back to Africa"); Racism Flares on Campus, Time, Dec. 8, 1980, at 28 (black students at Williams College received messages such as "stinking black n-ggers"; Harvard University black student leader found racist phrases written on her office calendar; letter sent to a black student dormitory at Wesleyan University urged "wip[ing] all g.d. n-ggers off the face of the earth"); Aitken, supra note 30, at 58 (white students at the Citadel dressed in sheets and burned a cross a black student's room); Horwitz, Black Students Protest GWU Party, Wash. Post, Feb. 8, 1987, at A15, col. 1 ("white history" party thrown during black history month); Doe v. University of Mich., 721 F. Supp. 852, 854 (E.D. Mich. 1989) (leaflets on Michigan campus referred to black students as "saucer lips, porch monkeys, and jigaboos").

Black Students in Ohio Boycott Classes, Wash. Post, Apr. 12, 1988, at A14, col. 2 [hereinafter Boycott] (black Denison University students boycott classes to protest what they perceived as lenient treatment of white students involved in a racial incident). Students at Penn State, Hampshire College, and University of Massachusetts have occupied college buildings in attempts to win redress for a variety of racial problems on their campuses. See 91 Protestors Arrested, Wash. Post, Apr. 10, 1988, at A4, col. 5 (Penn State sit-in); Students to Continue Racism Protest, Wash. Post, Feb. 25, 1988, at A16, col. 4 (occupation of campus building at Hampshire College); Protesting Students To Meet with Chancellor, Wash. Post, Feb. 16, 1988, at A10, col. 1 (occupation of campus building at University of Massachusetts).

Such blatant incidents frequently meet with some form of condemnation from college administrators, even though there is often disagreement on the appropriate punishment or remedial action when (and if) the perpetrators are caught. Such events are less problematic as an interpretive matter because they usually have clear perpetrators and obvious racist intent. Whites usually accept such incidents as racist, though they often differ from African Americans in their assessment of the incidents' effect, importance, and need for remedy. For instance, while many blacks tend to see racial incidents as evidence of a recurrent problem, and as the most overt manifestation of an attitude that takes many subtler forms, many whites tend to see such incidents as isolated aberrations that can be dismissed as the actions of kooks who should be ignored. They tend to view racial incidents on campus the way a federal judge described such incidents on the University of Michigan campus: "There was no evidence to suggest that these were anything other than isolated and purposeless acts." Regardless of what makes a series of events "isolated," acts such as distributing a

More comprehensive lists of such incidents can be found in Marcus, supra note 10, at 19 & table 2; Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320, 2333 n.71 (1989) (collecting a variety of incidents and examples of "hate speech"); Shenk, Young Hate, CV Mag., Feb. 1990, at 34, 36-39 (chronicling 30 days of racial incidents in a "month in the life of campus bigotry" and reporting estimation of Howard Erlich of the National Institute Against Prejudice & Violence that "'up to 80 percent of harassed students don't report the harassment'").

flier declaring "'open season' on blacks," in which it referred to blacks as "saucer lips, porch monkeys, and jigaboos" were not purposeless. The clear intent was to demean and threaten black students, creating a hostile environment that they would want to leave, and an understanding that they were unwelcome if they chose to stay.³⁸

As to forms of racism that are more frequent--the subtle manifestations of attitudes and preconceptions shaped by white race consciousness that materially affect institutional practices and interpersonal relations--there is even less recognition; there is disagreement over whether racism exists or has any effect at all. Black students often report they are "reminded every day" that they don't belong by low-key events such as whites saying "he speaks well for a black" or expressing "shock[]" when I say something intelligent." Many white students frequently do not recognize the offensiveness of such reactions, one study reports they are much less aware than their black counterparts of blatant, public incidents of racism that occur on their campuses.³⁹

³⁸ Doe v. University of Mich., 721 F. Supp. 852, 854 (E.D. Mich. 1989) (emphasis added).

³⁹ See Wilkerson, supra note 1, § 1, at 1, col. 4 and at 34, col. 1 (reporting that "[s]everal days spent with black students and faculty members at the University of Michigan showed that racism is a constant in their lives and takes an enormous psychic and emotional toll"); id. at § 1, at 34, col. 4 (reporting on a recent study by Dr. Howard Erlich "of students at

One does not have to talk to many black college students before hearing stories about some suspicious official asking them to show IDs at the entrance of their own campus buildings because he suspected they did not belong there; of white students moving to a new seat when a black classmate sat too close; of black students rarely being invited to join study groups with whites; of white fraternity members handing out invitations on a campus sidewalk but not offering them to minority students. The phenomenology of black students' experience with racism on predominantly white campuses leaves little doubt of the existence and effect of subtle or unconscious racism, despite institutional policies of formal equality and racial neutrality.⁴⁰ As one college administrator concluded:

the University of Maryland in Baltimore County, [where] two-thirds of white students said they had not heard about certain racial incidents on campus, while 80 percent of black students said they had").

⁴⁰ See, e.g., Aitken, *supra* note 30, at 58 (black student at Yale says he is regularly stopped on campus and asked for identification, and comments "I expect it, but I don't accept it"); Wilkerson, *supra* note 1, § 1, at 34, col. 1 (University of Michigan student notes, "Sometimes [white students will] walk to the other side of the street if they see you coming, or they don't want to sit next to you in class"); Wright, *Black History Month: Unconscious Racism at UVA Law*, Va. L. Weekly, Feb. 10, 1989, at 3, col. 3 (suggesting that whites' frequent categorization of all blacks as affirmative action beneficiaries along with the reluctance of many blacks to speak up in class, results "in fairly common exclusion of blacks from white study groups"); Magner, *supra* note 34, at A32, col. 1 (black students not handed invitations to open parties); Collison, *Black Students Cite Finances as Chief Reason for Dropping Out*, *Oberlin Study Finds*, *Chron. of Higher Educ.*, Sept. 28, 1988, at A34 (citing Oberlin College study in which black students said "racial prejudice and discrimination inhibit[ed] their success as

[Black] [s]tudents are hard put to give you a specific, overt incident [of racial prejudice]. But what they share is their subtle experience of rejection based on color that many professors and white staff may not be aware that they are sending to the student.⁴¹

The complaints of minority scholars who experience racism as they try to forge careers in a university setting from which they have traditionally been excluded also belie the assumption that racism has been effectively eliminated among the enlightened elite of the academy, especially the faculty. A group of leading minority law professors has argued in an "Open Letter to Our Colleagues of the Majority Race" that "racial indifference or insensitivity, if not more overt racist motives, not only exists among white law professors, but is increasing." Most of the cosigners

students," and was one reason for dropping out).

Scholarly research confirms these anecdotal reports. See Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 *Rutgers L. Rev.* 673, 689 (1985) (reporting that "[r]esearch on nonverbal behavior shows that white college students often sit further away, use a less friendly voice tone, make less eye contact and more speech errors, and terminate the interview faster when interacting with a black rather than a white") (citation omitted); Weitz, *Attitude, Voice and Behavior: A Repressed Affect Model of Interracial Interaction*, 24 *J. Personality & Soc. Psychology* 14-20 (1972) (noting that in a study of behavior of whites interacting with blacks, "[e]xtremely favorable verbal attitudes were coupled with subtle signs of rejection of blacks"); Word, Zanna & Cooper, *Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction*, 10 *J. Exp. Soc. Psychology* 109, 111-19 (1974) (arguing that a white person's expectations about a black person may influence the white's actions, and in turn induce the black to behave in a way that confirms the original false definition).

⁴¹ Collison, *supra* note 40, at A34, col. 4; cf. Lacayo, *Between Two Worlds*, *Time*, Mar. 13, 1989, at 58-68 (chronicling the subtle racial slights black professionals face in white-dominated middle-class life).

stated that they had "experienced indignities at the hands of their white colleagues" and that they felt a sense of "decreasing institutional support and increasing challenges to our legitimacy as teachers in the classroom." Correspondingly, Professor Brooks has asserted that an "anti-minority mindset" is present among some white law professors that involves "a predisposition to assess minority performance in a negative or hypercritical fashion" and affects hiring and advancement of minority scholars, as well as the hospitality of both the institutions and the profession in which they work.⁴²

⁴² See Lacayo, supra note 41, at 66 (observing that "[a]t some colleges, black faculty feel so isolated that they have negotiated telephone allowances into their job contracts to help them stay in touch with blacks teaching at other campuses around the country"). For an argument that scholarly discourse is often presumed to be free of racial bias but often is not, see Kennedy, supra note 4, at 1338-39.

For the open letter from minority faculty, see Brooks, supra note 16, at 11. On Brooks' theory of the anti-minority mindset, see id. at 2-3.

For a report on the perspective of minority faculty generally, see Blum, Tenure Rates for Black Professors Found to Lag at White Institutions in 9 Southern States, Chron. of Higher Educ., Sept. 21, 1988, at A13, A13-14 (reporting that "[i]n overwhelmingly large percentages, black faculty members felt that there was insufficient minority faculty representation on faculty search committees, in their academic departments, and at their institutions as a whole").

Professor Delgado makes the related argument that elite white professors have made little use of civil rights scholarship written by minorities, members of the very groups that are the raison d'etre for such legal doctrine. Delgado's survey revealed that minority scholars are rarely cited by the most prominent white professors whose work dominates the field. Delgado, The Imperial Scholar: Reflections on a Review of Civil Rights Literature, 132 U. Pa. L. Rev. 561 (1984).

The difficulty of dealing with racism experienced by black students that arises from a white professor's antiminority mindset, selective indifference, and insensitivity is exacerbated by the tendency of university administrators often to acknowledge more quickly racially offensive behavior by students than by their colleagues. Also, the distribution of power between students and faculty compounds the problem; students fear retaliation in the form of classroom hostility, bad grades, poor recommendations, or worse, for confronting or reporting professors who make offensive remarks. That undoubtedly results in underreporting of racial tensions in the classroom.⁴³

In numerous subtle ways, professors can demonstrate on campus and in the classroom an insensitivity that is experienced as hostility. In a particularly blatant incident, a University of Michigan dean publicly stated that although he agreed the college should pursue affirmative action goals, such efforts should avoid creating an institution to which "minorities would naturally flock in

⁴³ See D. Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (1983) (containing analysis of unequal institutional power between students and law faculty, and the corresponding effect on student-teacher relationships); Bell, *Black Students in White Law Schools: The Ordeal and the Opportunity*, 1970 U. Tol. L. Rev. 539, 547 (noting that "frequently an insensitive teacher's remarks and conduct are borne in silent resentment"); Matsuda, *supra* note 37, at 2370 n.249 ("The typical university student is emotionally vulnerable for several reasons. . . . A negative environmental response during this period of experience could mar for life an individual's ability to remain open, creative, and risk-taking.").

much greater numbers.'" It is hard not to see that statement as implying minority students are undesirable. In addition to such remarks, minority students may also face professors who publish papers that claim scientific proof of the intellectual inferiority of blacks, such as Jensen's infamous Harvard Education Review article, or a more recent one by a City University of New York professor. Universities face an intractable tension between preserving an atmosphere open to all points of view and maintaining an environment in which all students are equally unburdened by attitudes of bias.⁴⁴

Classroom episodes are usually more subtle. In some situations, letting pass without comment material such as old court cases in law school casebooks that contain racist language and assumptions can be offensive or uncomfortable for minority students. And the tone need not be as blatant

⁴⁴ Dean's Remark Protested, Wash. Post, Jan. 15, 1988, at A18, col. 5; see D. Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (1987).

Jensen, *How Much Can We Boost IQ and Scholastic Achievement?* 39 *Harv. Educ. Rev.* 1 (1969); Mooney, *Controversial Professor Says CUNY Pressure to Quit Course Violated Academic Freedom*, *Chron. of Higher Educ.*, Nov. 23, 1988, at A11, col 1 (noting philosophy professor Michael Levin's article in the Australian journal *Quadrant*, which asserted that "there is now quite solid evidence . . . that the average black is significantly less intelligent than the average white").

See also *Ex-Baseball Official Slur Protested*, Wash. Post, Apr. 7, 1988, at A11, col. 3 (University of Kentucky trustee observed in a board meeting considering the school's divestment from South Africa that "Zimbabwe is all n-gger now"); *Feinberg, Student Loan Crackdown Defended*, Wash. Post, Mar. 25, 1988, at A22, col. 1 (federal education official defends remark concluding that historically black colleges with higher-than-average student loan default rates "contain a high level of thieves").

as that found in Plessy v. Ferguson or State v. Mann. Black students are less likely than whites to feel disconnected from (or not even to notice) behavior actions in court cases (or fiction, or historical narratives) that are clear examples of racial bias. In Davis v. Mississippi, the court recounted a police roundup, without warrants, of at least 24 black youths, and interrogation of 40 or 50 others, after a rape victim "could give no better description of her assailant than that he was a Negro youth." Such action likely resonates with what some minority students may know first- or second-hand. Among a group of whites, an assumption may silently evolve that such tactics are sensible or necessary, whereas in a black-dominated room there would more likely be reaction to the event as unjustified and racially biased. Which attitude prevails in a college classroom reveals who is dominating the agenda and who is likely to sense alienation.⁴⁵

Those racially tinged classroom dynamics can be set off in a variety of materials and discussions. Introducing the race of a defendant in a rape case or of the victimized party in an unconscionable contracts case as one who is illiterate and on welfare can palpably play on traditional racial mythologies of black sexuality and violence or ignorance and irresponsibility. In State v. Smith, the

⁴⁵ Plessy v. Ferguson, 163 U.S. 537 (1896); State v. Mann, 13 N.C. (2 Dev.) 263 (1829); Davis v. Mississippi, 394 U.S. 721, 722 (1969).

court repeatedly referred to the defendant and other assailants as "the largest negro" and "the negroes," making the race of those parties the exclusive marker of their identity. Patricia Monture, a Native Canadian scholar, recounted a law school class in which a court opinion described a criminal defendant as "Indian," "drunk," and "illiterate," as if "all of that belongs in one mouthful." But unlike the classroom discussion of rape, during which the professor made an effort not "to inflict any harm on any women in the class," there was no mention of alienating the power of the racial stereotype.⁴⁶

At the University of Virginia, law students in a contracts class were concerned about the professor's racial treatment of Williams v. Walker-Thomas Furniture, particularly the identification of the woman as "'probably black'" when her race was nowhere mentioned in the decision. The case involves a low-income woman who purchased items on credit pursuant to a contract that the court ruled was "unconscionable" and thus unenforceable by the merchant. The white professor (and many white students) made the plausible argument that a defendant's race could be relevant to speculation on the motivations of a decisionmaker such as the merchant. Nevertheless, the assumption of race based in large part on such facts stated in the case as the debtor's

⁴⁶ Smith v. State, 229 So. 2d 551, 553 (Miss. 1970).
Monture, Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah, Canadian J. Women & the Law 159, 164 (1986).

poverty, illiteracy, and acceptance of welfare payments provided black students with a strong argument that the discussion was based on an offensive stereotype.⁴⁷

The problem is the inevitability of history and context. Discussions of race take place amidst well known myths of racial characteristics that traditionally labeled blacks as ignorant, lazy, and irresponsible. The stereotype is perpetuated as individuality is diminished. There is probably no way to approach this topic that is not charged with racial tension. To ignore it is not to eliminate the problem; it is to give control of the classroom to those with the power to dictate that this issue of no concern. The result is one version of the hegemony of a white racial perspective in the classroom, and, concomitantly, one version of racial subordination. A public confrontation of the debate at least acknowledges the problematic disagreement and allows some voice to each perspective.

Professor Brooks has made a related point. When "individuals or institutions having 'good' intentions engage in a pattern or practice of granting low priority to matters of keen importance to minorities . . . that is subordination, and, hence, racism as far as minorities are concerned." One of the central premises of this thesis is

⁴⁷ Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965). For an account of student reaction to the discussion of Williams, see Va. L. Weekly, Apr. 22, 1988, at 1, col. 1.

that the sincerity of white students and teachers is not always the issue. Often, whites' denial that they see racism in a situation where blacks complain of it is genuine. It is simply an interpretation of a social situation that has been formulated from a "second-hand" knowledge of racism at best, from the history of a group that has never experienced racial prejudice. It should be uncontroversial to assert that many whites have made little effort to understand the experience of their black counterparts. I do not argue that whites have an incapacity for empathy or understanding that could lead to a congruence of vision with people of color. But because white as a group, and white institutions, have not made much effort toward such an understanding, their protestations of innocence when blacks complain of racism receive a chilly reception. What students of color seek, I think, when they complain of racism in the university is not only prevention of similar incidents and perhaps punishment for past ones, but also for recognition of their experience of racism, for their understanding of racism that arises from being on its "receiving end."⁴⁸

B. The Effects of Racism in the University

The daily repetition of subtle racism and subordination in the classroom and on campus can ultimately be, for

⁴⁸ See Brooks, *supra* note 16, at 9-10.

African Americans, more productive of stress, anxiety, and alienation than even blatant racist acts. One University of Colorado student expressed a common complaint. "When I go to class, . . . I'm never just a student. I'm always a black student. If a black issue comes up, I have to represent the black people." The subtle, institutional racism and white racial perspective that pervade predominantly white campuses should be viewed as an equal protection problem -- an infringement of black students' right to equal enjoyment of an education.⁴⁹

When racially insensitive behavior occurs in the classroom or elsewhere in the university, black students (or other minority groups) are deprived of the opportunity to receive an education in an environment free of harassment, hurt, and humiliation. The perpetual lack of awareness that, for example, a "White History Week Party" or a Black Sambo caricature on a white fraternity's poster is offensive

⁴⁹ Lederman, On a Campus That's Almost All White, Black Athletes and Non-Athletes Struggle to Cope with Isolation, Chron. of Higher Educ., Feb. 15, 1989, at A33, A35 (statement of black student at the University of Colorado); see also The Pull of Black Colleges, Wash. Post, Nov. 11, 1988, at B2, col. 4 (statement of American Council on Education Official) ("What concerns [black] students is the day-to-day hostility. When you are in a dorm and the white students don't speak to you. When you go to class, you become invisible, and then you answer a question and they ask, how did you know that. It leaves the students exhausted."); School Colors, supra note 10, at 17, col. 3 (statement of professor of Afro-American Studies) ("I feel racism all around me. . . . But it's hard to pin down. It's like AIDS. Ask most people if there's an AIDS problem, and they'll say they don't feel it. But people who have AIDS say otherwise.").

to black students is a clear indication that black perspectives are not part of the campus culture or community consciousness. Black students may attend class (and take exams) having just confronted offensive reminders of either overt racial hostility or subtle racial insensitivity--perhaps in the campus newspaper, on posters at the bus stop, the structure of classroom discussion--that serve as distractions from academic performance that white students do not endure. Institutions premised on a white norm must be continually reminded, on occasions when the white norm manifests itself too blatantly, that their lack of awareness is not harmless.⁵⁰

Language has the power to cause injury. Professor Fraser has put the point this way:

Control over language is power The ability to create, disseminate and alter discourse is essential to the exercise of hegemonic power. A group can control experience by controlling discourse and language for through language we understand, articulate and indeed experience experience.⁵¹

⁵⁰ See Cavalier Daily, supra note 2, at 1, col. 3. An all-white fraternity advertised a party using a poster illustrated with a "Fiji islander" caricature (resembling Black Sambo art) standing near a sign warning that no "short wops" and "nega babes" would be allowed into the party. After black students complained, the fraternity president lamented, "It bothers us that we have to defend ourselves against racism when we know we are not racist."

⁵¹ See Fraser, What's Love Got to Do With It?: Critical Legal Studies, Feminist Discourse, and the Ethic of Solidarity, 11 Harv. Women's L.J. 53 (1988) (footnote omitted); see also Matsuda, supra note 37, at 2335 ("From the victim's perspective, [a variety of overt and covert means of expressing racism, including sanitized racist comments] inflict wounds, wounds that are neither random nor isolated.").

Language and behavior that demonstrate an obliviousness to minority communities stigmatize those communities and marginalize individuals' value as community members. As institutional practices they marginalize black concerns and perspectives and hinder black students' participation in community life because they are implicitly excluded from fully contributing to the creation of community norms, values, assumptions, and perspectives. Toleration of racial insensitivity "den[ies] recognition to sensibilities essential to [black students'] identities [and] fails to respect their personhood." Racial insensitivity diminishes the equal standing of some community members, and thereby diminishes the ideal of equality that is the community's foundation.⁵²

A notorious and much-discussed example was the incident arising from Harvard Law Professor Derrick Bell's visiting professorship at Stanford Law School in 1986. After white students complained that Bell's constitutional law course lacked "balance" because of the attention Bell gave to

⁵² Note, A Communitarian Defense of Group Libel Laws, 101 Harv. L. Rev. 682, 691 (1988) (noting, id. at 690, "[r]eligious and racial affiliations are central to the identities of many individuals.").

Racial identities lead to distinct minority experiences in integrated universities. See accounts of black students in Yale Alumni Mag., May 1969, quoted in 1 The University Crisis Reader 385-86 (I. Wallerstein & P. Starr eds. 1971) (One student suggests, "Yale can do some things for blacks; one thing Yale can't do is provide inspiration for blacks." Id. at 386.). For evidence that times have not changed, see Wilkerson, supra note 1 and accompanying text.

issues of race and slavery, the faculty organized several "enrichment" lectures to "supplement" Bell's teaching. Bell was not informed of the student complaints nor of the purpose of the lecture series, which was canceled after Stanford's black law student group protested.⁵³ White faculty took the word of their white students --rather than their black colleague--that Bell's course was not "balanced," meaning that it was not "neutral" according to traditional curricular priorities practiced by white professors. The result was a confrontation that ended in a humiliating experience for the Stanford faculty as well as Bell.

The racial dynamic--arising out of occasional blatant racism, recurrent subtle remarks or unconscious behavior, and an ever-present hegemony of an institutionalized white norm and racial perspective--conspires to create a cognizable injury to black students in predominantly white schools. It alters students' conditions of education just as courts have recognized racial harassment on the job alters conditions of employment. Racism adds to the stress and anxiety that diminish any person's ability and desire to excel in an academic environment, especially one leading to a professional world known to contain further racial roadblocks to career advancement and hospitable working

⁵³ For a more detailed account of the incident, see Brooks, supra note 16, at 1-2.

conditions. The racial dynamic to which black students are subjected at predominantly white colleges contributes to stress that has a detrimental effect on personal well-being as well as academic performance.⁵⁴

Such an injury is exactly the one found cognizable under Title VII for employees who endure racial harassment on the job; psychological well-being is statutorily protected. It is also in effect the same injury that the

⁵⁴ Racial harassment that creates a hostile work atmosphere has been found to alter the terms or conditions of employment in violation of Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (1982). See, e.g., *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

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

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

See also Fleming, *Blacks in College* (1984), cited in *Wash. Post*, Nov. 11, 1988, at B2, col. 4 (study concluded black students show more intellectual growth and do better at black colleges than at predominantly white schools).

For a revealing personal account of the operation and effects of racial dynamics in an academic setting, see Monture *supra* note 46, at 163-66.

The self-defense or survival mechanisms that black students develop are not, as Professor Bell has argued, "conducive to the intensive, purposeful effort needed to succeed in law school. These attitudes are actually detrimental, constituting the most serious deprivation the black student faces," a handicap "growing out of the black student's highly developed sensitivity to racist viewpoints" Bell, *supra* note 43, at 548.

Low expectations of minority students from faculty and other students can lead, for a variety of reasons, to self-fulfilling prophecies. See generally R. Rosenthal & L. Jacobson, *Pygmalion in the Classroom: Teacher Expectation and Pupils' Intellectual Development* (1968) (discussing how teachers' expectations for students affect student performance).

United States Supreme Court found to be caused by wrought segregation in Brown v. Board of Education: "a feeling of inferiority as to their status in the community," which may "affect[] the motivation of [black students] to learn . . . and to deprive them of some of the benefits" they would enjoy in an educational setting free of racial harassment and subordination.⁵⁵

Language and behavior that arises from a lack of awareness of particular racial perspectives (within a larger institutional white norm that denies its own racial nonneutrality) hinders minority students' participation and opportunity in the university. The resulting racial tension and occasional hostility, in addition to the preexisting conflict in racial viewpoints, further preclude the possibility, for all races, of race-neutral behavior. Institutional racism requires an institutional commitment to recognition and remedy:

Official tolerance of racist speech in [the university] setting is more harmful than generalized tolerance in the community-at-large. It is harmful to student perpetrators in that it is a lesson in getting-away-with-it that will have lifelong repercussions. It is harmful to targets, who perceive the university as taking sides through inaction, and who are left to

⁵⁵ Text of Title VII is at 42 U.S.C. §§ 2000e-2000e-17 (1981); see also *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972) (holding Title VII protects "employees psychological as well as economic" rights and "the emotional and psychological stability of minority group workers"); *Davis, Race Harassment Discrimination: A Problem that Won't Go Away?*, 10 *Empl. Relations L.J.* 415, 418 (1985).

Quotation is found in *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).

their own resources in coping with the damage wrought. Finally, it is a harm to the goals of inclusion, education, development of knowledge, and ethics that universities exist and stand for.⁵⁶

IV. POSSIBILITIES FOR REMEDIAL ACTION

A. Strategies to Sanction Racist Speech and Behavior

The most egregious forms of racist language and behavior--the forms closest to traditional intentional racism--can be combated with traditional legal sanctions. One promising route for expansion of existing options would be legislation covering university students and mirroring Title VII imposition of liability for contributing to racially hostile environments. Federal courts have vindicated claims of a "hostile environment" caused by racial or sexual harassment as a form of race or sex discrimination actionable under Title VII. The United States Supreme Court also has imposed liability for "toleration and tacit encouragement of racial harassment" after finding that a labor union failed in its "affirmative duty to combat employer discrimination in the workplace."⁵⁷

⁵⁷ For an excellent summary of existing legal remedies available to combat racial harassment on campus, see Note, Student Discriminatory Harassment, 16 J.C.U.L. 311, 314-19 (1989) (identifying the utility of federal statutes including 16 U.S.C. § 145 (1982) and 42 U.S.C. § 1983 (1982)).

For Title VII hostile environment cases, see Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (sexual harassment); Rogers v. EEOC, 454 F.2d 334, 338 (5th Cir. 1971), cert. denied, 406 U.S. 937 (1972) (racial harassment).

See Goodman v. Lukens Steel Co., 482 U.S. 656, 665-67 (1987) (liability for union's "toleration" of and failure to combat employer bias).

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Walter B. Connolly, Jr., an attorney speaking to the National Association of University Attorneys, warned that universities could be held liable under recent Supreme Court

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

Another option would be sanctions for intentionally racist insults, such as those proposed by Professors Delgado and Matsuda. Professor Delgado's proposal for a tort action imposing liability for intentional racial insults would be as feasible a tool to fight campus-based racism as it would be against racism generally. As he defines it, the cause of action would require the plaintiff to prove that "[l]anguage was addressed to him or her by the defendant that was intended to demean through reference to race; that the plaintiff understood as intended to demean through reference to race; and that a reasonable person would

Title VII doctrine for not effectively combating racial harassment on campus. Fields, Colleges Advised to Develop Strong Procedures to Deal With Incidents of Racial Harassment, Chron. of Higher Educ., July 20, 1988, at A11.

recognize as a racial insult." And Professor Matsuda has recently argued for a narrow criminal statute to punish intentionally racist speech. Her proposal would limit guilt to cases in which "[t]he message is of racial inferiority[,] . . . is directed against a historically oppressed group[,] . . . [and] is persecutorial, hateful, and degrading."⁵⁸

Finally, there is the option of institutional remedies for racially offensive speech and behavior, an option with which several universities are now struggling. In Doe v. University of Michigan, a federal district court struck down the University of Michigan's policy to combat campus racial harassment, finding that it violated the first amendment on vagueness and overbreadth grounds.⁵⁹

The court's reasoning suggested the constitutional limits of any university policy, and thus the limited utility of such a policy for addressing the varieties of racial tension on campuses. First, any limitation on speech

⁵⁸ For Delgado's seminal study of the tort for racial insults, see Delgado, supra note 44, at 179. He collects a wide array of evidence to suggest that such insults produce psychological, sociological, and political harms that merit legal protection, and that they are at least on par with other cognizable inflictions of severe emotional distress. *Id.* at 135-49.

For Matsuda's proposal, see Matsuda, supra note 37, at 2356-58, 2370-73.

⁵⁹ Doe v. University of Mich., 721 F. Supp. 852, 861-67 (E.D. Mich. 1989).

In addition to the University of Michigan policy, policies have been debated or enacted at Stanford University, the University of Wisconsin, and at the State University of New York-Buffalo Law School. Copies are on file with the Virginia Law Review Association.

that includes the threat of formal, institutional sanctions cannot be applied to speech that "disseminates ideas" or to statements that are made in the course of classroom academic discussions. The Doe court cited Michigan's resolution of complaints against students making offensive remarks in the classroom as examples of the policy's overbreadth and infringement on protected speech (even though the University did not apply formal sanctions in any of the three cases cited by the court). Thus, a university could not formally punish statements motivated by racism when they are purportedly part of a serious idea or theory offered in the university classroom or other formal forum. (The University of Michigan policy excluded from regulation anything published in university-sponsored publications such as the Michigan Daily newspaper.) The Doe court implied, however, that a university might be able to sanction "conduct such as racial slurs and epithets in the classroom directed at an individual victim."⁶⁰

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

⁶⁰ 721 F. Supp. at 864-68.

unconstitutionally vague. It said that those terms "elude precise definition," and that "[i]t is not clear what kind of conduct would constitute a 'threat' to an individual's academic efforts."⁶¹

(The plaintiff in Doe was a graduate student in "biopsychology," whose study focused on "controversial theories positing biologically-based differences between sexes and races [that] might be perceived as 'sexist' and 'racist' by some students, and he feared that discussion of such theories might be sanctionable" under the university's antidiscrimination policy. Such offensive but academically oriented discussion is clearly what the court was most interested in excluding from any chilling effects of an antidiscrimination policy.⁶²)

Thus, if Doe represents the interpretation of current first amendment doctrine that universities will face in combating racist conduct, it is clear that even a revised, more carefully crafted antiracism policy could not reach more subtle forms of racism with formal sanctions, especially in the classroom. Universities, then, will have to develop two-part policies. One part can address egregious, blatant speech and conduct that is legally sanctionable under the first amendment. Universities have taken a variety of actions to discipline racially offensive

⁶¹ Id. at 867.

⁶² Id. at 858.

behavior by students, including suspensions, mandatory community service, and mandatory attendance at racial sensitivity seminars, that could be incorporated into such a policy. When dealing with student groups such as fraternities, a university could revoke charters or deny privileges granted by the university, such as permission to use campus meeting rooms and other facilities. In comparatively rare cases, colleges have reprimanded such behavior by faculty as well, with public reprimands, prohibitions on teaching certain courses, and even suspension. At the City University of New York, for example, the Faculty Senate of City College (at which 40% of the students are black) passed a resolution "disavow[ing] and reject[ing] the abhorrent sentiments" of a professor who published an article asserting that "the average black is significantly less intelligent than the average white." Schools can also employ a variety of other sanctions against faculty: a bar from teaching certain classes, temporary suspensions, a letter noting the incident placed in the professor's permanent file, a mandatory apology, and temporary ineligibility for research funding, sabbaticals, or merit-based salary increases.⁶³

⁶³ See Mooney, supra note 44, at All; see also Raphael, T.A.'s 'Racist' Remark Results in Firing, The Nat'l College Newspaper, Oct. 1989, at 2 (University of Maryland teaching assistant fired for describing student's classroom performance as "typically black"); cf. Winfrey v. Metropolitan Util. Dist., 467 F. Supp. 56, 60 (D. Neb. 1979) (letter placed in file of foreman by employer as part of sanction for racially insensitive remark

The second part of an institutional policy would aim to deter nonsanctionable and more subtle conduct that is nevertheless offensive, i.e., behavior that will never be reached by formal adjudication but which the university needs to recognize, condemn, and discourage. The development of this second aspect of an antiracism policy will be the more difficult to formulate. Yet, to recognize only deliberate, intentional racism is to give to deny the injurious force of subtle racism and an institutional white norm. The absence of such a policy signals that the community--more specifically the dominant forces within it--does not care about other forms of racism that continue to permeate university life and subordinate minority interests. Such a policy also would serve the educative function of the criminal law; it would express a societal judgment on the inappropriateness of some behavior, and define such behavior as beyond collective norms.⁶⁴

Universities can formulate a wide variety of responses to nonsanctionable behavior. A "minority concerns" committee could, for instance, approach a professor or student whose conduct in the classroom had offended a community member, make the offender aware of the offense to an employee).

⁶⁴ See generally E. Durkheim, *The Division of Labor in Society* 39 (W.D. Halls trans. 1984) (stating that "an act is criminal when it offends the strong, well-defined states of the collective consciousness").

while preserving the complainant's anonymity, and ask to meet with the offender. It could ask for an apology or voluntary attendance at a racial awareness seminar. Such a committee could also periodically and publicly report the type of offensive incidents and behavior that minority community members experience, in an effort to raise awareness and spark discussion of the type of offenses minorities suffer on campus. Finally, universities can make--and in some cases have made--affirmative use of their first amendment prerogatives, publicly and officially condemning offensive behavior that they are otherwise unable to sanction.⁶⁵

There will no doubt be charges that drawing attention to and institutionally responding to subtle, racially

⁶⁵ The University of Michigan developed an "interpretive guide" to supplement its antidiscrimination policy, which was condemned by the Doe court as including constitutionally protected behavior. Examples from the guide included: "A male student makes remarks in class like 'Women just aren't as good in this field as men,' thus creating a hostile learning atmosphere for female classmates. Students in a residence hall have a floor party and invite everyone on their floor except one person because they think she might be a lesbian. . . . You display a confederate flag on the door of your room in the residence hall."

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

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

charged remarks made during the course of classroom discussion will "chill" discussion of sensitive topics by students and faculty. But such a concern must be weighed in light of the fact that the discourse of black students and other offended groups who suffer the offense of such remarks and endure an uncomfortable or hostile classroom and campus atmosphere is already being chilled. Their participation, their points of view--including the view that certain remarks are offensive--are marginalized, devalued, made more difficult and less legitimate to express. The issue is not simply one of punishing offensive behavior versus free expression; it is also a question of whose expression will be most privileged by institutional structures.

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

An affirmative strategy to make racist expression unwelcome and uncomfortable could work in conjunction with the many other educative efforts aimed at eliminating white awareness and sensitivity about racial harassment.

cultural hegemony on campus. A sampling of such efforts might include: working toward curriculum diversity and the inclusion of minority writers in "core" reading lists; periodic programs to promote racial awareness, including cultural awareness seminars or public debates on racially charged subjects for students and faculty; and permanent campus hotlines to which students and others can report racially offensive incidents.⁶⁶

All that, however, is likely to bring about fundamental change in university race relations only in concert with a more basic restructuring that empowers the black community to define a portion of institutional life according to its own racial norm and perspective. That was the aim of Vincent Harding's proposal for "The Institute of the Black World," which was designed to respond to "our own [predominantly black] institutions being destroyed" and would have been "a place where Black students and professors who went to [elite, predominantly white universities] could spend a year in a predominantly Black academic setting." It is also the central purpose of historically black colleges.

⁶⁶ See Detlefsen, supra note 10 (chronicling, though commenting negatively upon, Harvard University's "Actively Working Against Racism and Ethnocentrism" (AWARE) week); Mangan, supra note 33, at A32, col. 3 (noting that the University of Texas plans to offer a program of multiculturalism for all entering freshmen during orientation session); Fields, supra note 56, at A12, col. 5 (attorney specializing in equal-employment litigation recommends "yearly training programs for administrators, faculty members, and students to raise people's awareness and sensitivity about racial harassment").

The ability of a black community to achieve such an assertion of identity depends, however, on all groups recognizing that white-defined "neutral" perspectives are, instead, often white-dominated racial perspective to which there are alternatives.⁶⁷

B. An Alternative Strategy

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

⁶⁷ See Lawrence, Education for Black Power in the Eighties: Present Day Implications of the Bakke Decision, 10 Nat'l Black L.J. 58, 62-63 (1987).

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

equivalent to that of white students. *the same event.*

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

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

and part of social perspective, Stan. L. Sch. J., May 3, 1986, at 5 (describing the unfavorable reaction of students and faculty to Professor Derrick Bell's teaching, in which he "tr[ie]d to bring to my classrooms . . . my experience and perspective as a black man in this country").

create divergent interpretations of the same event.⁶⁸

It is up to our universities to help white students realize that their institutions are not culturally and racially neutral, and that minority students have an equal right to institutional structures and practices informed by their own experience and history. At the same time, however, it will not be a sustainable arrangement to force whites into a posture of perpetual guilt and contrition; such a development would likely result either in a barrier to interracial communication, because well-intentioned whites would be overcautious in broaching any racially tinged topic, or in further backlash by those who feel no personal guilt. Efforts are needed by white students and faculty to reformulate white self-awareness toward a more secure identity that is not threatened by black cultural institutions and that can recognize the racial nonneutrality of the institutions which whites dominate.

Thus, an alternative strategy for combating racial tension on campuses would include a restructuring of the university to give minority students as much of a feeling of belonging, as much of a feeling that the university is "their place," as white students usually experience. The

⁶⁸ Crenshaw, supra note 8, at 1-2; see also Bell, *The Price and Pain of Racial Perspective*, Stan. L. Sch. J., May 9, 1986, at 5 (describing the unfavorable reaction of students and faculty to Professor Derrick Bell's teaching, in which he "tr[ie]d to bring to my classrooms . . . my experience and perspective as a black man in this country").

strategy would include substantially increasing the number of black faculty members so that the experience in many classrooms is no longer premised on an unspoken norm of white race experience. It would likely include increasing other minority-focused institutions on campus, such as cultural centers and events, African-American study programs, and perhaps even separate disciplinary procedures, since it is a common complaint from minority students that official (even student-run) disciplinary systems including disproportionately and unfairly sanction minority students. It would include, in short, the power to define a portion of institutional life by a black norm, a black race consciousness, concomitant to the white norm with which white students and teachers now (mostly unconsciously) infuse campus and classroom experience.⁶⁹

of "individual values, experiences, and world views" to classroom discussion and textual interpretation.⁷⁰

Competing conceptions of what racism is and efforts to structure institutional and social life around one or more of those conceptions are arenas of struggle. With a normative commitment to empower those whose experience has not previously informed university life, the dominant group—here, whites—can achieve a better understanding of others' experiences. The project will require a dialogue free from

⁶⁹ See, e.g., Honor Seeks More Diversity, Cavalier Daily, Oct. 10, 1989, at 1 (reporting on Honor Committee's Minority Concerns Team status report and efforts "to improve and establish a more positive [minority] presence" in the honor system).

community strong enough to enable each group to entrust its fate to the good faith and decency of the other.⁶⁹

V. CONCLUSION

Racism must be struggled against not only through the formal procedure of a committee for complaints (although establishing a committee will serve as a signal of institutional commitment). Universities must grapple with racism through the recognition of the distinct groups within the community and of their struggles for power, including the power to define racism and its injury--and to impose a cultural norm that will be the premise of classroom debate as well as social life. Universities must also acknowledge the relevance of race to aspects of the institution, particularly classroom pedagogy, in which a "norm of perspectivelessness" now prevails that denies the relevance of "individual values, experiences, and world views" to classroom discussion and textual interpretation.⁷⁰

Competing conceptions of what racism is and efforts to structure institutional and social life around one or more of those conceptions are arenas of struggle. With a normative commitment to empower those whose experience has not previously informed university life, the dominant group--here, whites--can achieve a better understanding of others' experience. The project will require a dialogue free from suspicion and committed to empathy--"a sentiment of

⁷⁰ See Crenshaw, *supra* note 8, at 2-3.

community strong enough to enable each group to entrust its fate to the good faith and decency of the other."⁷¹

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

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⁷¹ Kennedy, *supra* note 4, at 1345; see generally Crenshaw, *supra* note 6, at 1370-76 (discussing "the Politics of Otherness").

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