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Legal Education and the Politics of Exclusion

Richard A. Epstein*

I. THE FRAGILITY OF COMPETITION

In economic affairs the social advantages of competition are least apparent to disappointed competitors. Domestic firms call for protection against low price imports: Let there be tariffs and import quotas. Skilled workers lobby for protection against low wage rivals: Let there be minimum wage laws, maximum hours laws, and collective bargaining. Businesses work overtime to keep out new rivals: Let there be exclusionary zoning and licensing. Pitted in opposition to these legislative fixes is a shrinking band of market economists who celebrate the systematic gains that competition generates over its rival forms of social organization. The only protection that anyone is entitled to have against economic competitors is to offer customers lower prices or higher quality services. The disappointed competitor may lose, but those private losses are more than matched by the vitality that is given to the system as a whole. Persons who fail at one endeavor can pick up the pieces, refine their act, shift their occupation, and try again.1 In the wake of short-term competitive dislocations is a vigor that ripples its way through the economic and social system.

The unending struggle between competition and protection also exists within the academic setting. Here too the forces of exclusion have gathered strength in recent years. The pressures, however, are not those of the usual economic groups concerned with trade in standard goods and services. Rather, these pressures stem from greater demands from women and members of minority groups for increased position, voice, and influence inside the academy. A generation ago, those groups appealed to the language of open market competition for a more intensive role, underscoring the injustice of passing over more qualified women and minority candidates because of their race or sex. The charge was that universities in general, and law schools in particular, were tight little islands dominated by a group of like-thinking

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1. See Laura Mansnerus, Why Women Are Leaving the Law, WORKING WOMEN, Apr. 1993, at 64, on women lawyers who have abandoned, without regret, their legal careers to take other jobs, usually with lower wages and higher personal satisfaction.
individuals who, either consciously or unconsciously, excluded individuals unlike themselves. Accordingly, the initial demand of women and minorities was to remove barriers based on race and sex (or, as is usually said, gender), so that appointments and promotions could be made on the strength of individual merit and achievement, not on irrelevant personal characteristics.

That first wave of changes to sweep over universities resulted in change for the better. Any form of exclusion from the marketplace of ideas is to be deplored, for the larger the potential pool of talent, the greater the strength and vitality of academic institutions. However, no stable competitive equilibrium occurred; the shift from open competition to new forms of preference and exclusion has proceeded apace. Today's emphasis in appointments and promotions is largely on results. Although no one should be so rash as to claim that personnel issues are solely issues of race and sex, such considerations loom very large indeed. Desperate rear guard maneuvers to insist upon merit independent of race or sex are too often regarded as quaint or evasive; lengthy explanations that extensive searches do not produce suitable candidates are greeted with suspicion in all cases, and derision in some. Scarcely a week goes by without a story in the New York Times addressing the glacial rate of advancement of women and minorities in universities, and always the numbers are said to tell much, if not all, of the story. Having more women and minorities in academia is "progress" for the times, and those institutions lagging behind—usually the most distinguished ones—are

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2. The use of the word "sex," not "gender," should be construed as a modest political act. It is meant to express my disagreement with the dominant views on the social and biological origins and significance of sex differences. For an elaboration, see Richard A. Epstein, Gender Is for Nouns, 41 DePaul L. Rev. 981 (1992).

3. For one such claim, see Anthony DePalma, Rare in Ivy League: Women Who Work As Full Professors, N.Y. Times, Jan. 24, 1993, at A1. The story works on two levels. One is an account of the position of Phoebe S. Leboy, chairman of the University of Pennsylvania Department of Biochemistry in the Dental School, and its only woman member. The second is a numerical account of the gender gap in hiring that shows that only 10% of full professors in the Ivy League Colleges are women. There is no effort to compare the credentials of the best woman and the best man applicant competing for any given position. Instead the story makes it appear as though only blind resistance accounts for the absence of women in Ivy League ranks:

Then there is the pipeline argument, which says that universities would like to hire more women but that candidates are simply not available. Out-of-work Ph.D.'s and a whole generation of female scholars find that one argument hard to swallow, since women receive 36 percent of the 38,000 doctorates conferred each year.

Id. at A11.

Even if we put aside its know-it-all tone, the article does not account for the division of Ph.D.s and jobs by field. A shortage of women or minorities in mathematics cannot be corrected by hiring individuals with doctoral degrees in education or economics. The article fails to correct for any quality differentials among Ph.D.s, regarding them as more or less fungible. It also fails to measure, corrected by field, the number of male and female Ph.D. candidates that are hired relative to the available pool. The clear implication is that the current imbalances are the result of unconscious discrimination or hidebound attitudes. The only grudging concession DePalma makes is the observation that it takes time to correct these imbalances. Never does he recognize the possibility that reverse discrimination occurs within universities.

For a similar story on the paucity of women in theoretical economics, see Louis Uchitelle, In Economics, a Subtle Exclusion, N.Y. Times, Jan. 11, 1993, at D1.
condemned as inexcusable "backwaters."  

The transformation from competition to exclusion never takes place without some protective coloration. In and out of academic circles, those seeking immunity from competition often assert some special reason for dispensing with the general rule: Infant industries need protective tariffs; the rural way of life requires farm subsidies; workers need protection from exploitation by giant corporations. In universities, the justification of race- or gender-based preferences, goals, and quotas was once said to rest on the need for affirmative action.

Today, however, this language has grown stale. The case for affirmative action fits in best with the belief that some social steps should be taken to correct some past, discrete wrong. To be sure, there is difficulty even in this quarter, given that the remedy in question is often awarded against persons who themselves were not wrongdoers. But even if one passes by that difficulty, the age of explicit and overt discrimination against women and minorities is now, largely, a generation past. There are few if any persons who can credibly claim to be victims of overt discriminatory practices, as the formal, institutional preferences run in the opposite direction. One might in principle seek to justify the pervasive level of explicit affirmative action, but it is not possible to deny the extensive use of the practice. Affirmative action also carries with it the gnawing implication that lower standards are used to admit particular members to the faculty ranks, implicitly creating a second class academic citizenry. No one wants to be introduced as an "affirmative action colleague," and no one wants the dubious privilege of having to make such an introduction.

The newer appeal to "diversity" avoids both of these potential embarrassments. No longer are present hiring preferences linked to past injustices; no longer is there a question of lower standards. Instead, diversity projects a far more positive image, claiming a more general appeal, by introducing new academic views strengthening different perspectives on social problems and increasing the vitality of discourse and debate.

So viewed, diversity is not merely a messy political compromise. Such institutional justifications ease the sting of what is evident to all: that women

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5. There have been some studies, not in educational markets, that have sought to show that various forms of discrimination still persist. Perhaps the most notable of these is Ian Ayres, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 HARV. L. REV. 817 (1991), which has generated an enormous amount of publicity. Ayres relied on testers following standardized bargaining strategies, not on real market prices. He also noted that his studies did not reveal any form of intentional discrimination by race and sex. Indeed, his black male customers got their best deals from white female sellers, as did black females from white male sellers. Id. at 841. I have urged caution against the extrapolation of his results. See Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws 51-54 (1992). For a second round of debate, see Ian Ayres, Alternative Grounds: Epstein's Discrimination Analysis in Other Market Settings, 31 SAN DIEGO L. REV. (forthcoming 1994), and my response, Richard A. Epstein, Standing Firm on Forbidden Grounds, 31 SAN DIEGO L. REV. (forthcoming 1994).
and minorities are considered first,\textsuperscript{6} and others are asked to stand silently at the back of the queue, in the teeth of an antidiscrimination statute that was initially drafted with the opposite intention.\textsuperscript{7}

\section*{II. The Law School Environment: The Struggle over Discourse}

The battle over appointments and promotions is, however, only one portion of the struggle for control of modern universities. One should pay equal attention to the nature of academic inquiry and social discourse within the university, for the change in the composition of university faculties has brought with it strong pressures to reexamine the customary practices of doing business. This is especially true in the humanities, the social sciences, and of course, in the law, given the close connection between legal rules and political power.

In dealing with the question of diversity, I shall direct my attention to legal education, as it is the field I know best. In examining the dangers lurking beneath the surface appeal to diversity, I begin with a caveat: I do not wish to defend or to restore each and every feature of the conventional style of legal education from a substantive point of view. The days when a legal curriculum could concentrate—exclusively or dominantly—on property, contracts, torts, and other private law subjects is over. It will no longer do to have in the curriculum one course on agency, another on partnerships, a third on vendor and purchaser, a fourth on leases, a fifth on trusts, and a sixth on mortgages, even if all these courses were staples in the legal curriculum as recently as World War II.

This massive shift in emphasis from private towards public law may be regrettable as a matter of first principle, but it is inescapable, and given the current tenor of the times, probably irreversible. With the rise of the modern welfare state comes an unavoidable shift in curricular emphasis. English lawyers, in contrast, are not required to plumb the depths of political theory to practice law. The cardinal principle of Parliamentary supremacy has spared the House of Lords many of the political judgments that are routinely made by our own Supreme Court. And as the courts go, so do the academics in their wake, devising theories equal to the enormous challenges posed by cases such as \textit{NLRB v. Jones & Laughlin Steel Co.,}\textsuperscript{8} \textit{Brown v. Board of Education,}\textsuperscript{9} and \textit{Roe v. Wade.}\textsuperscript{10} Each of these cases introduced major changes in the structure of American law. \textit{Jones & Laughlin} ratified the

\begin{itemize}
\item \textsuperscript{6} The trend today seems to be to give preference to minorities over women when a second order conflict arises.
\item \textsuperscript{7} The Civil Rights Act of 1964 makes it illegal for any employer "to fail or refuse to hire . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1988).
\item \textsuperscript{8} 301 U.S. 1 (1937).
\item \textsuperscript{9} 347 U.S. 483 (1954).
\item \textsuperscript{10} 410 U.S. 113 (1973).
\end{itemize}
massive expansion of the commerce clause; *Brown* forced an end to segregation in the South; *Roe* gave abortion constitutional protection. Whether right or wrong, each gave rise to interpretive difficulties that required a rejection, or massive reinterpretation, of the traditional theories of interpretation that rely either on plain meaning or original intention.11

The consequences have been profound, not only for the shape of constitutional law, but for the entire structure of legal discourse. As legal education has become more far-reaching, approaches to it have drifted from their narrower doctrinal roots. Academics now import principles from economics, political theory, sociology, history, and more recently from feminism and critical race studies, so much so that some scholars wonder whether anything is left to law as an autonomous discipline.12

How does the current round of innovation in legal thought differ from those preceding it? Principally, it has less to do with the new substantive directions within the law, and more to do with the analytical presuppositions and social attitudes that are brought to these substantive issues. The key methodological feature shared by the new approaches is the denial that legal knowledge is universally accessible to anyone choosing to acquire it.

Central to this position is the proposition that law is a study in which it is possible to make intellectual progress in understanding the nature and operation of legal institutions and legal rules. To be sure, the exercise of political power within a legal system has been and always will be part of rational discourse. But the study of the determinants of individual and group behavior is facilitated by such discourse, in accordance with general, universally accessible principles. Indeed, the only long-term viable conception of a university is one in which there is a single community of scholars searching for an objective truth—modestly conceived and with a small "t"—that could be understood, tested, challenged, and confirmed by scholars of all political viewpoints and persuasions. To deny truth at this level is to insist that all academic discourse is a disguised use of power. To insist on truth with a capital "T" is to impose a rigid orthodoxy that will surely stifle intellectual advances and the free inquiry on which such advances depend.

The position that I have taken here rests in large measure on my belief in the universality and transferability of knowledge across both time and culture. My own studies of Roman law and English legal history persuade me that the differences in values and structure across cultures are far less important than might appear at first blush. The basic conceptions of property,


both public and private, that are set out in the *Institutes of Justinian*,\(^{13}\) for example, easily provide a legal foundation for speaking of the conceptions of property developed by John Locke in the *Second Treatise of Government*.\(^{14}\) The similarities extend, I believe, beyond Western cultures steeped in both the civil and the common law. At the most obvious level, the importation of common law and civil law principles into Asian cultures has proceeded apace well before the rise of modern multiculturalism. MacCauley was able to draft an excellent code of criminal law in India in 1837.\(^{15}\) And the Japanese looked to the German civil code as a model for their fundamental law.\(^{16}\) Even on matters of customary law, the convergence across legal systems is striking. The disputes over water law in Japan, for example, have a structure very much like those which took place in England and the United States;\(^{17}\) whatever the cultural differences, the physical properties of water are invariant across cultures. Robert Ellickson’s recent comprehensive study of property rights in land again illustrates the same point.\(^{18}\) His work includes “case studies of the land regimes at the Jamestown, Plymouth, and Salt Lake settlements; Hutterite colonies and Israeli kibbutzim; Mexican *ejidos*; and medieval open-field villages.”\(^{19}\)

Across these cultures one general proposition holds that would warm the heart of William Blackstone: Those regimes work best where those who sow are entitled to reap. While this does not always point to a system of private property within close-knit groups,\(^{20}\) it does suggest that the external imposition of collective farms and similar institutions is an invariable recipe for disaster, precisely because it ignores the culturally invariant relationship between output and incentive.\(^{21}\) Any comparative or historical study of legal institutions that ignores these general relationships in an effort to invent anew is asking to go astray.

The sense of cultural continuity is apparent in the political arena as well. The rhetorical success of the *Declaration of Independence* during the convulsions of Eastern Europe illustrates that the articulation of certain principles of political governance can transcend both time and culture, at least insofar

15. See *Indian Law Commissioners, A Copy of the Penal Code Prepared by The Indian Law Commissioners* (Hertford, Stephen Austin 1851) (1837).
19. *Id.* at 1319.
20. *Id.* at 1320.
21. Ellickson instances Stalin’s collectives, Mao’s great leap forward, and the collective schemes of land ownership in Kampuchea and Ethiopia. *Id.* at 1318.
as they deal with the central problem of the law: the reconciliation of political power with individual liberty.

I have taught and lectured on legal issues across this country and overseas. In the process, I have encountered many individuals who strongly disagreed with my positions on a variety of substantive issues. However, I have never found that such objections, no matter how intense or telling, were dependent on the special considerations of either a legal system or a social culture that was inaccessible to outsiders. The nature of the discourse has been surprisingly constant across institutional settings. It is important for us all to acknowledge the ease with which knowledge is transmitted across apparent cultural and social divides.

Given the nature of legal discourse, its academic objectives, and the possibilities of acquiring shared knowledge, it seems clear that no one should be excluded from participation for reasons of race or sex, and that we should exercise the utmost caution before giving anyone special preference, deference, or voice for those reasons. We should not relive our past institutional mistakes. The earlier history of American legal institutions was marked by patterns of exclusion: Blacks, Jews, women, and recent immigrants to the United States were systematically and overtly denied positions as students and faculty members. Such patterns of behavior are indefensible, even if (as I believe) the state should play no role in shaping the internal rules of universities and other private institutions. Open discourse, open competition, and open debate should prevail.

Now, paradoxically, as the doors of universities are opened wider than ever before, the opposite process has started to creep in. Over and over again, within the university there is an effort to first divide intellectual inquiry, and then human knowledge, such that certain members of academia are ineligible to participate in the common discourse, at least on matters regarding two of the most explosive issues of our time, race and sex. There is, of course, something of an irony here. Any effort to develop a set of public and coercive norms instructing private institutions whom they should hire, whom they should serve, or how their internal constitutions should be organized often backfires in painful illustration of the general principle of unintended consequences.

Matters of race, ethnicity, or sexual identification are so strong and so powerful that it is almost fruitless for the legal system to endeavor to stamp these impulses out. However, any appeal to X-blind principles will be selective and skewed. One cannot discriminate against me because of some universal norm, yet the norm does not preclude similar discrimination in my favor. Certain preferences will be ruled out of bounds; others will be exalted

22. For the most open attack, see Epstein, Forbidden Grounds, supra note 5.
23. See Robert K. Merton, Social Theory and Social Structure 115-16 (rev. ed. 1968), referring to what has become known as the unanticipated consequences of purposive social action. The antidiscrimination laws qualify in this regard because, by their two-sided interpretation, they induce some firms to engage in discrimination in favor of protected classes in order to avoid charges of discrimination against persons from these same groups.
as necessary truths.\textsuperscript{24} Old beliefs, whether true or false, will be dismissed as irrelevant shibboleths, and a new orthodoxy will emerge that proves every bit as intolerant as the one it replaces. Sooner or later, someone will peek out from behind the veil of ignorance and observe that certain traits are preferred or protected, leaving others to the mercy of the public institutions arrayed against them. The law is a blunt instrument that overwhelms more subtle forms of social control.

III. EXTERNAL LAW VERSUS INTERNAL GOVERNANCE

With all this said, I do not think that the same rules should apply to private institutions as apply to their publicly administered counterparts. It is not the job of the legal system to question whether certain conduct is or is not desirable. Rather, its task is to determine whether such conduct is so undesirable that public force should be directed against it, notwithstanding the dangers of increased state power. Conversely, the inquiry faced by any law school, university, or indeed any private institution, is quite different: How do we choose to govern ourselves? The principle of autonomy gives no clues about how to answer this question of internal choice, or how these institutions should be organized. All too often, the academic response to any hard question of appropriate conduct is to suggest that it be left to the market, but in this instance, lawyers and law professors are not in their habitual position of seeking to regulate the conduct of others. As members of faculties, they constitute “the market,” and it is their job to find the set of rules that should govern the internal life of the institutions to which they belong.

To recognize that these institutions should have the benefit of a principle of freedom of association against the external world is not to instruct them how to use their power for matters that should, or do, fall within their exclusive jurisdiction. Indeed, one reason for abandoning state antidiscrimination laws is that private institutions have a comparative advantage in preventing or minimizing asocial and destructive sorts of behavior. Stated otherwise, if there is an evil from discrimination that can be detected by those who enforce the law, then that evil can also be detected and controlled by those who operate law schools and universities at large. There are a thousand different ways that one might choose to deal with the question of discrimination.

\textsuperscript{24} For example, Richard Delgado has suggested that facially neutral or meritocratic rules, because they predictably handicap blacks, are insufficient tools for fighting so-called “procedural” discrimination:

Realizing that racism has these different guises [both substantive and procedural] explains much of the gulf between Kennedy and myself... He detests (as do I) intentional favoritism based on race: If a white is given a benefit over an equally or more deserving black, Kennedy is quick to condemn it.


Note that the universal principle illustrated is discrimination against blacks. One wonders whether Delgado “detests” discrimination against whites. Or do contingent social circumstances again justify this deviation from a universal moral rule?
Why complicate matters with a set of external coercive practices that could well make matters worse than before? The mere introduction of a government program introduces a set of high administrative costs that need not be borne where the program is done on a voluntary basis. And it imposes a heavy straightjacket, so that all institutions of the same class are driven to adopt the same form of affirmative action, regardless of the distinctive differences in their own positions. We should not expect a law school located in the South to have the same percentage of Latino students as those located in the Southwest. And we should not expect to see the same type of affirmative action program in a physics department as we find in a Law School or humanities program. Government officials are typically insensitive to these variations; the same is likely to prove true of accrediting agencies that now treat programs of this sort as relevant to the accreditation process.

The question then remains, why might a law school or a university adopt some general X-blind norm with respect to its ordinary activities? There is no universal answer here. For instance, religious institutions may well think that adherence to their beliefs is a necessary predicate for teaching and studying them. I fully endorse that right, even though I may disagree strongly with their particular beliefs. In the end, however, no academic institution that adopts such a position will reach the first rank, at least on those topics posing a genuine conflict between fixed dogma and freedom of inquiry. One enduring advantage of the secular university is that it is spared the task of mediating between demands for loyalty and demands for open exchange.

The job of creating or finding new knowledge is never an easy one. It takes the ablest of individuals to generate and to verify ideas that no one else has thought of before. The accumulation of knowledge, moreover, has both individual and collective dimensions: No academic can prosper in an environment that is unreceptive to new arguments, evidence, or ideas. The best faculties and the ablest students must constantly test their ideas against each other, learning both from the insights of others and from their own mistakes. The scholar who flees from risk, or ducks competition in ideas, will quickly fall by the wayside, much like a heavyweight boxer whose skills atrophy because he enters the ring only against weaker opponents. Only those who are prepared to take the risk of embarrassment will be able to make, alone or with others, the bold leaps necessary for intellectual advance. The road to personal success and intellectual achievement is not the path of caution. Any scholar worth her salt has to be prepared to take on the world. One cannot do that by following a practice of exclusion or preference that saps law schools, and the universities to which they belong, of their ablest members. The open university or law school is the surest way to secure the greatest intellectual advances. The mission of a university is to set a stage on which all players may strut and fret; it is an impresario, not an advocate.

25. See ASSOCIATION OF AMERICAN LAW SCHOOLS, Bylaws § 6-4 & Executive Committee Regulations § 6.19, in 1993 HANDBOOK.
But it can do that job only when no one is excluded from playing, and only if no substantive position is ruled out of bounds a priori.

Another way to describe this position is to say that the university should foster a system of internal competition, thus producing advantages in the marketplace for ideas similar to those in the competitive marketplace for goods. There are many producers and consumers of ideas, and there is no central authority matching this producer with that consumer. Each is allowed to search for the best partner on the other side of the market, and those ideas with greater support will flourish. To be sure, novel ideas are likely to run into stiff resistance in the short-term, and even the soundest of conceptions may begin life as an unwanted or derided orphan. However, the genius of the competitive system is that a single determined individual need not knuckle under to the better judgment of his or her colleagues, and may, at the risk of shipwreck, continue to sail on alone until success is obtained, if it is to be obtained at all. There is no requirement that any idea or position be accepted by a majority of a relevant class of experts. Diversity of positions is assured by the stubbornness and creativity of individual actors on the academic stage. It is not orchestrated by senior administrators or currently popular scholars. The constant threat of new entry keeps all scholars on their toes. Entrants can gain recognition and fame by dislodging established ideas or extending old ones to novel circumstances; established scholars can show that their ideas withstand the barrage of the next generation or incorporate the best that these new ideas have to offer. No one has a vested right to loyalty, affection, or respect from the remainder of the academic profession, just as no seller in a market is guaranteed a market share in the face of new entry and persistent competition.

This ideal of a university has eroded significantly in recent years. The market for ideas has become increasingly compartmentalized, so that some of us are not, quite literally, allowed to trespass in fields occupied by others. It is not uncommon for scholars to claim that their positions should be immune to criticism by persons outside their experiential circles; for such persons do not possess the special insights and understanding that are necessary to deal with the issues in question. On matters of race and gender especially, this tendency for exclusion is very strong.

It is important to understand the arguments that are used to rationalize this practice, and why they are not only wrong, but wholly antithetical to the academic mission. The first such argument is a plea for deference based on the unique experiences and knowledge that women and minority members bring to the academic community. The second is an insistence that victimization and subordination are routine features of the academic order. The third is a demand to limit the ability of scholars to make statements that others regard as insensitive or offensive. In each case, the intent is the same:

to create a monopoly over discourse and debate on some set of critical issues. Thus, the tension between competition and rent-seeking behavior is not confined to economic affairs. It flourishes today in the world of ideas.

A. Experience

One source of exclusivity is an attempt to redefine the relationship between experience and knowledge. Under the traditional view, there is the class of necessary truths, but these are concerned with mathematical ideas, syllogisms, and definitions. In and of themselves, they tell us little about the external world, even though they supply the analytical tools and the conceptual framework that are indispensable for understanding the world that lies beyond their ken. Once sharpened, these tools must be applied to data that is gained through a combination of observation, testing, and critical intelligence about some natural or social phenomenon. By insisting that knowledge is acquired through experience, classical philosophers understood the limits of pure deductive reasoning: Nothing could be found in the conclusion that was not already contained in the premises. Human experience gave the link to the external world.

An integral component of the role of experience, however, was that all human experience mattered. There was no hint of exclusion. The power of language and science was that experiential information could be understood by all. Granted, differences in background and experience may well lead persons to have singular insights or observations about the external world; but the motivation whereby they obtained information about the world had little to do with the verification of the information they obtained, which itself could be checked through neutral processes and compared with the observations and theories of others in the relevant field. The heuristics and biases of various persons could only enrich the scope of knowledge by opening up a set of analogies and experiments that no one person, however insightful or clever, could develop alone. In short, it was possible to have separate and idiosyncratic ways of acquiring the truth while having universal means for understanding and verifying what constituted that truth. The diversity of

27. For a discussion of the issues thus raised, see TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (James M. Buchanan, Robert D. Tollison & Gordon Tullock eds., 1980).


29. The force of these lessons was impressed on me by my own great teacher, Ernest Nagel. See generally ERNEST NAGEL, THE STRUCTURE OF SCIENCE 547-606 (1961) (analyzing potential obstacles to the objective reporting of history); Ernest Nagel, The Logic of Historical Analysis, in THE PHILOSOPHY OF HISTORY IN OUR TIME 203 (Hans Meyerhoff ed., 1959).

30. See MERTON, supra note 23, at 607 (footnote omitted):

Universalism finds immediate expression in the canon that truth claims, whatever their source, are to be subjected to preestablished impersonal criteria: consonant with observation and with previously confirmed knowledge. The acceptance or rejection of claims entering the lists of science is not to depend on the personal or social attributes of their protagonist; his race, nationality, religion, class and personal qualities are as such irrelevant. Objectivity precludes particularism. The circumstance that scientifically verified formulations refer to objective sequences and correlations militates against all efforts to
perspectives therefore enriched the dialogue and showed the strength of open competition.

In the modern world of race and gender studies, this conception is regarded as wholly alien to the all important social inquiries. The thought that principles of verification can be neutral and universal has been replaced by a notion that truths, like people, are socially situated and constructed. Persons not possessing the requisite set of personal experiences are thought to be outside the loop: While they might be able to understand what insiders know or feel, they can never exercise independent intelligence to decide whether a claim is true or false. If one wants to understand what is meant by oppression, indignity, brutality or indifference, the argument goes, then one must be the victim of those experiences, or at least share the same race or sex of those who are. A statement of Mari Matsuda illustrates this position:

This article suggests that those who have experienced discrimination speak with a special voice to which we should listen. Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.\textsuperscript{31}

This brief passage reveals much of what is wrong with modern critical race theory. It begins with a plea that “we” should listen to those who speak with a “special voice.” Yet by the next sentence, the “we” becomes “critical scholars,” not the general community of academics. The knowledge that the disadvantaged possess is obtained by experience, but it is apparently immune to cross-examination, for “the falsity of the liberal premise” is something that they have “seen and felt” and thus rises by assumption to the status of a self-evident certitude beyond challenge by outsiders, even those who started at the bottom and may have risen by dint of hard work. Finally, even the task of “defining justice” appears to be one that falls to the critical scholars, as if the rest of us are unable to add anything of moment to the debate.

Matsuda’s passage also appears to reject the possibility of intelligent empathy, whereby one can think creatively about her own experiences to imag-
ine the predicament of others. It suggests that those without first-hand experience can neither discuss its implications nor evaluate the various proposals that are designed to correct whatever imbalances are perceived. Thus, people like myself who were lucky to grow up in privileged family circumstances cannot even rely on their own observation of other individuals and other communities to advance their own understanding or persuade others. There is, in short, a sustained effort to exclude outsiders from the debate, allowing only those with preferred wisdom and insight to enter a social discourse.

Forms of scholarship such as Matusda's are but one form of attack on the traditional aspiration to universal knowledge. So too, I believe, is the rise of narrative accounts by feminist and critical race scholars, of which Professor Delgado's contribution to this symposium is typical. In narrative, the address is personal and literary. The characters are of the author's own invention and can be easily endowed with whatever strengths and weaknesses best serve to advance the tale. The use of this art form cuts out any appeal to quantitative data or general theory, and is always congenial to strong expressions of personal belief. Because narrative adopts the perspective and voice of a single author, it cannot be easily refuted by the usual forms of social science evidence. Other authors have different voices and perspectives, and there is no contradiction between the proposition that "A believes X," and "B believes not-X," even if there is a contradiction between X and not-X. The author can hint that in his view the narrative does express some larger truth entitled to respect in its own right. Yet by the same token, his narrative does not lend itself to refutation by the forms of evidence and argument that can be raised against more traditional forms of scholarly discussion. When the going gets tough, the narrative becomes an art form, an exercise of literary imagination. When the waters are calm, it is transformed into an idealized account of a widespread social problem. Either way, the narrative adds its strength to the politics of exclusion by presenting a moving target to more traditional practitioners of the academic art.

The dangers of such an exclusionary approach should be apparent to all, but too often they are not. The most important questions of race and sex generally do not concern intragroup relationships. Rather, they address the relationships between persons of different groups: men and women, black and white, and so on. One cannot consider rape to be strictly a woman's question when the rapist is male and when the rules governing the crime of rape affect men who act with honorable intentions as well as those who do not. Indeed, on the critical question of consent to charges of rape, no complete account can ignore the behavior and perceptions of both individuals,

32. The classical examination of this subject is still ADAM SMITH, A THEORY OF MORAL SENTIMENTS (n.p. 1759).
especially when miscommunications can easily arise.\textsuperscript{34} Similarly, in dealing with issues such as the distribution of voting rights, the control of criminal and civil juries, or the operation of harassment or discrimination, interactions take place between persons of all races and both sexes. If one assumes that only those with unique experiences can participate in the dialogue, then \textit{no one} can speak with intelligence about these issues; for \textit{each of us} possess only partial knowledge, leaving open the possibility of both error and bias. Only by admitting \textit{all} interested persons into the academic discourse can we mitigate the inaccuracies caused by this sampling bias.

Furthermore, exclusionary practices can lead to a fragmentation of the political system. Many people now have strong and enduring reasons to distrust the opinions of others solely for reasons of their race, religion, ethnic origin and the like.

No matter how it is sliced, any exclusionary system has to lead to a skepticism that is inimical to the central academic mission of any university or law school. If each side can claim the uniqueness of its own insights, then there is no way to broker differences among persons who come from different backgrounds or begin with different beliefs. The form of relativism that allows for the special dignity of the black experience or the female experience makes it impossible to explain to skeptical outsiders why those insights should command special respect. Moreover, this philosophical approach implies that every narrative—including that of the white male, or even the fringe lunatic—should be exempt from outside scrutiny. But no one is entitled to the comfort of a risk-free position in public discourse. The diversity of experience and the distinctiveness of perceptions is both an opportunity for understanding and an obstacle to it. Nevertheless, the usual requirements of coherence in argument, articulation of theory, and the marshalling and evaluation of evidence must remain intact if the academic mission of a university or law school is to be fulfilled.

B. False Consciousness and Subordination

The impulse to exclude in academic settings is reinforced by yet another set of dubious philosophical presuppositions. All too often, we are told that on matters of sex and race (or some combination thereof), dominance and subordination are operative principles in practice.\textsuperscript{35} Accordingly, persons who accept the status quo in any particular case are subject to a false con-

\textsuperscript{34} One might wonder why problems of date and acquaintance rape seem so much more prevalent today. Part of the reason must be the greater willingness of women to speak about these problems when they do arise. But part of the explanation may lie in the increased frequency of ambiguous social signals. For example, the greater social acceptance of short-term sexual relationships creates the potential for misunderstanding, which was absent in an earlier age of stricter external sexual norms. Previously, sexual advances within a dating arrangement were easier to treat as falling outside the social contract than they are today.

\textsuperscript{35} See CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 240-42 (1989); see also Catharine A. MacKinnon, Reflections of Sex Equality Under Law, 100 YALE L.J. 1281, 1291 (1991) (speaking of the double disadvantage faced by black women who are neither white nor male).
sciousness because they are so blinded by the dominant norms, given the current distribution of power and privilege within an inherently unjust society. Therefore, for women or minorities to say that they are content with the status quo (whatever it may be) is conclusive proof of their own inadequacy. The only persons who would make such foolish statements are those whose subordinated positions obscure their real interests. The unstated premise of this view is that anyone with a clear sense of the current social arrangements would know that they are unjust; any who demur are captives to the very system that they ought to condemn and criticize.

This position is troublesome for a number of reasons. First, it adopts a presumption that no one should be able to bring to moral or political argument: that those who make radical critiques of the current structure have successfully broken the gravitational pull of an evil and corrupt system, and therefore deserve praise for their independence of mind and acuity of thought. Conversely, those who take the opposite position lack both the moral courage and the intellectual insight to reach a sound position. Claims of subordination are therefore nonfalsifiable. To challenge the doctrine is once again to fall prey to its power. The rhetoric of subordination thus reinforces the sharp division within academic territory by excluding from discourse anyone who concurs with the status quo. The more fervently one argues on behalf of the current social structure, the more evident it is that she accepts today's unjust arrangements of dominance, hierarchy, and patriarchy.

No balanced account should be so dismissive of the status quo. Institutions that have survived the test of time may not be perfect, but they may well contain hidden advantages that prove very important in practice, even if they are hard to identify in theory. While this generalization does nothing to justify slavery, it provides persuasive evidence that certain forms of consensual arrangements, whether in marriage or in markets, generate substantial gains for the parties that participate in them. It is regrettable that feminists and critical race scholars, who are so suspicious of market arrangements, should exhibit so strong an allegiance to socialism and various forms of collective ownership as one apparent avenue of escape from the travail of subordination.

Yet it should not be supposed that subordination is without advantages to the subordinated, particularly in the modern realm of learned discourse. Those who claim to have overcome subordination are free to enter a privileged debate from which the rest of us are excluded. But too often, real dialogue fails to materialize. Little is so placid as a debate among the various strands of feminism, as demonstrated by the initial panel presentation at this conference. Within feminist theory, there is a deep cleavage between radical and cultural feminists over the nature and the source of differences

36. The panel members were Margaret Jane Radin, Judith Resnik, Deborah Rhode, and Susan Williams, and the moderator was Susan Okin. For some of the panelists' contributions, see Judith Resnik, Ambivalence: The Resiliency of Legal Culture in the United States, 45 STAN. L. REV. 1525 (1993); Deborah L. Rhode, Missing Questions: Feminist Perspectives on Legal Education, 43 STAN. L. REV. 1621 (1992-1993).
between women and men. It is quite possible for feminists to have a spirited debate about whether these differences are biologically determined or socially constructed. They might also differ over whether special laws should be passed to take into account the natural differences between men and women, or whether women have some natural superiority because of their greater intuitive sympathy and appreciation of the situation of others. But this is a debate that men should enter only at their peril.

Also excluded (and even excoriated) are women who refer to the sociology or psychology of differences. The sociobiology of gender as applied to occupational choices should only be discussed in polite company. To urge that natural differences in aggressive behavior may account for occupational choice and occupational success is to invite ridicule. Here again, the debate is closed to one group, along with any conclusions that such a group might contribute. Any debate on such skewed terms is sure to lead to incorrect conclusions, both on matters of description and policy.

C. Sensitivity

The third element that contributes to the sense of separation among legal scholars is the expanded conception of harm used to assess the behavior of participants in public discourse. Many will argue that harm in this context does not refer simply to broken bones and broken promises. It refers as well to the offense people take at certain forms of behavior and at the articulation of certain ideas by others. It is thus important to ask what respect, if any,
private institutions should pay to bruised feelings and offended sensibilities. The ambiguity of these terms further complicates the basic inquiry.

Over and over again we are told that it is important to be "sensitive" about behavior on the delicate subjects of race and sex. Yet to say that someone is sensitive is to say one of two quite different things. On the one hand, it is surely a virtue to be sensitive to the feelings of others when dealing with them. *Ceteris paribus*, persons who display this form of sensitivity make the world a more pleasant place for those around them, and the demand for their time, company, and, services should accordingly increase.

However, there is a second sense to the word "sensitive" that rightly enjoys a negative connotation. Some individuals are too sensitive in that they place the worst interpretation possible on the words and actions of others. By being so sensitive to language with which they do not agree (as in the constant battles over the proper mix of "he and she"), they make it harder for others to place substance before form. Instead of expanding the circle of comfort for other persons, they narrow it; they create conflict and confrontation when a more oblivious attitude toward minor slights could keep matters on an even keel. An unfortunate characteristic of the modern feminist and black movements is that they use their own exquisite sensibilities to impose harsh rules of conduct on others who do not share their beliefs. Here turnabout is not always regarded as fair play. Brutal assertions that others are racist, sexist, homophobic, heterosexist, ageist, etc. are regarded as necessary outbursts of candor, startling a complacent majority out of its dogmatic slumber. Increasingly, this license with language has taken a far uglier turn that in time may work itself back into university life. Recent years have brought an increase in use of such terms as "queer" and "nigger" by gay and black groups so confident of their own position that they regard shock therapy as an appropriate form of discourse.43 This form of shock therapy is also common in branches of feminist scholarship which believe that the most harrowing narratives are the only way to shock the rest of us free from complacency.44

In legal education as elsewhere, it is impossible for a mutual dialogue to exist when one side labors under powerful verbal constraints while the other side has free-rein to express its sentiments in harsh and condemnatory language. The familiar reference to "dead, white, European males" or, as is said in some law schools "fungible, white males," involves the worst form of type-casting, stereotyping, and condescension imaginable, inappropriately lumping together persons of vastly different personal backgrounds, traits and intellectual temperaments. Distinguished writers and scholars who represent widely different methodologies and beliefs are summarily dismissed.

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44. See, e.g., Catharine A. MacKinnon, *The Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979) (illustrating her argument for the need for sex discrimination law with case studies).
from the realm of serious or respectable discourse. It is indeed ironic that strong critics of racial, sexual, and ethnic stereotypes often resort to the same practices they have found so hurtful in others.

It may be said that leeway should be given members of disadvantaged groups because white males, given their dominant position, are so hardy that insults do not inflict the same kind of psychological harms. As a psychological truth this is doubtful, but, whether true or false, it overlooks the grave institutional risks that occur when rules of common civility do not apply to all members of public debate. It is very difficult to fashion a set of social practices that adequately avoids excessive sensitivity to one's own personal feelings, while at the same time avoiding excessive indifference to the feelings of others. The effort to allow for dual standards of conduct based on the different social positions of parties to a debate is surely a recipe for disaster. One of the central contentions of the ongoing debate about subordination asks where the relative advantage is—and here the consistent decline in white male wages relative to the rest of the population in the past decade or so leaves that question very much in doubt.\footnote{See The Fourteenth Annual Salary Survey, \textit{Working Woman}, Jan. 1993, at 39, 40, 43.} It is an act of political foolishness to fashion the basic rules of discourse on the assumption that one side of the discussion is known to be correct before the debate itself begins. And it would be a task of pointless complexity to seek to create different rules of speech for different groups and to peg their respective privileges to their current success in the ongoing social revolution.

\section*{IV. AND FOR WHAT?}

The modern preoccupation with diversity has led to an excessive concern about matters of race and sex. Certainly within the legal community, the question of diversity has moved from being one consideration among many to a place of unquestioned dominance in university and law school life. Yet out of this diversity has come little insight as to what parts of legal and social life warrant further study. One instructive litmus test is to ask what the champions of law school diversity contribute to the intellectual study of law (or indeed any other discipline) on matters that have little or nothing to do with race or sex. Can the ardent feminist or critical race theorist say something, anything, about copyrights, patents, or trademarks? About bankruptcy, secured transactions, or reorganizations? About income, estates, or corporate tax? About contracts, property, or torts?

It is, of course, always possible to say that the applicable legal doctrines are so infected by hierarchy that any notions of corrective justice, efficiency, or participation are but disguised rationalizations of the status quo. One great advantage of such critiques is that they can be uttered with complete conviction, without bothering to distinguish between a nonrecognition exchange and a voidable preference. But even specific critiques that do rest on detailed knowledge of a substantive field must meet this challenge. For ex-
example, assume that there is a dispute between two (or more) people of the same race or the same sex and that a rule must allocate competing legal rights between them. Now identify the rules that allow these disputes to be resolved in a fashion acceptable to both sides. Are they different from those which would be adopted in a dispute between black and white, between male and female? If they are, then in what regard and why? Should we use strict liability between men, and negligence between women, or vice versa? Is efficiency, fairness, or participation a virtue that some understand but that others do not? At this point, strong critiques of the established doctrines lose their persuasive power. The dialogue that follows these questions will be one, I am confident, that retraces the steps of traditional civil and common law scholars: What is the relationship between justice, efficiency, utility, and participation? If such a dialogue is pertinent to persons within the same group, then why does it no longer apply to disputes between members of different groups?

In making these observations, I am not claiming that sex differences do not matter in the operation of the market economy. But it is critical to understand how they matter. For example, in one recent effort, Carol Rose attempts to show that women's strategies of bargaining cooperatively help explain the wage gap between men and women. Her point is that men obtain a larger share of the cooperative surplus because of their more aggressive strategies. I believe that she is wrong in that she ignores the frequency that men and women with different bargaining strategies are likely to enter into gainful arrangements in the first place. For these purposes it does not matter who is correct. Both her basic argument and my response rely on orthodox neoclassical economics. Even if Rose's efforts to link contracting practices to general wage differentials fail, it is highly likely that differences in contracting attitudes between men and women may influence their market behavior. For example, the cost of enforcement may be lower within groups than across them, reducing the likelihood of inter-group relational contracts. But that result is generated by the orthodox view of transaction cost economics—one that helps identify some of the costs of universally enforced antidiscrimination principles. What is needed is a distinctive contribution that helps explain phenomena that cannot be accounted for by the ordinary rules of discourse as applied to the problems of race and sex.

It is important to anticipate one objection. It may well be that feminists themselves acknowledge that they have little to say about vast areas of commercial law and taxation, and that their intellectual contributions come into their own when they address issues closer to the relationships between men and women. But even here, most of what is done is flawed by its failure to acknowledge, let alone apply, some of the basic principles of markets and

48. See EPTN, FORBIDDEN GROUNDS, supra note 5, at 59-78.
exchange. An illustrative example is the cultural feminist treatment of mandatory family leave legislation. It has been suggested that Carol Gilligan's account of the differences between men and women's voices argues in favor of such a bill. Even if Gilligan's account of sex differences makes sense, it provides no guidance as to who, if anyone, should subsidize this endeavor. Such subsidies are justified only in the presence of a market failure and the existence of external benefits. Accordingly, one must show that private contracting parties are unable to give leave to women (or men) whenever the gain to the employee exceeds the cost to the employer. A legislative solution requires us to believe that a uniform rule is preferable, even when the costs of leave may be far greater in some contexts than in others. Such an approach ignores the decisive advantage of a market solution: that legislation inefficiently provides family leave to all, regardless of how people value the benefit.

Even if I have mistaken the correct analysis of the family leave bill, the question remains whether a feminist approach to the subject generates insights that more conventional approaches miss. Here I am hard pressed to think of what it offers apart from a vivid account of why some women (and some men) strongly support the legislation. But the novel insights that might justify it are lacking. The same might be said of many other innovations attributable to feminist theory.

The final conclusion is, I think, a sobering one. The modern academic discourses of critical theory and new voices have thus far contributed nothing to the debate on substantive legal issues beyond the constant, repetitive assertion of their own relevance. Even on the issues most relevant to their own concerns, they lack the basic conceptual apparatus necessary for understanding. What we have are merely assertions that theirs is a large turf that outsiders may not share. What is needed is not another exhortation about the unique perspective that individuals from certain groups bring to the study of law. What is needed is not another effort to exclude outsiders from discourse. What is needed is delivery on the promise that persons of different backgrounds can develop distinctive methodologies in order to make contributions that enrich our common legal culture. How long will we have to wait?

49. Gilligan's basic argument is that women seek intuitive connection and relationships, while men seek the status of self-contained individuals. Gilligan, supra note 38, at 35, 62-63.
50. For instance, consider the following excerpt from Linda Lacey:

Cultural feminists draw upon Gilligan's work to describe women's "voice" in legal analysis as well as life experiences. Women's voices, they assert, emphasize positive values such as caring, nurturing, and empathy instead of competition, aggressiveness, and selfishness. Women intuitively seek connection and relationships, while men struggle for autonomous individualism. In more concrete terms, cultural feminists advocate a recognition of women's contributions to society, such as child-raising or care-giving. A great deal of their work emphasizes the need for laws such as mandatory child-raising leaves which will encourage these activities.