Critical of Race Theory: Race, Reason, Merit and Civility

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A hazard lurks in any but the most careful representation of another’s viewpoint. Call it “slippage” perhaps, or the “essentialist error,” the point is basically the same: communication rarely does complete justice to its object. The problem is compounded when the communication is mediated. We all know—without the benefit of theory (modern or postmodern)—that between the story and its retelling, something is apt to get lost in translation. In short, it is hard to be faithful to our representations, hard even when we try to do so.

Consider the cases of feminism, gay legal theory, and critical race theory, and their depictions in academic journals and the popular media. In this postmodern era, the distinction between academic scholarship and the popular press reporting of it is often blurred. Newspapers and news magazines recently have carried a spate of academic trash talk about these critical theories. George Will accuses critical race theorists of “playing the race card.” Jeffrey Rosen says that some of these critical race scholars indulge in “a vulgar racial essentialism,” and warns that “[t]he rhetoric of the movement is already reverberating beyond the lecture hall and seminar room. . . . Gangsta rappers call openly for race war.” Judge Richard Posner, of the United States Court of Appeals for the Seventh Circuit, weighs in by labeling critical race theorists and postmodernists the “lunatic core” of “radical legal egalitarianism.” Posner is less harsh on selected critical legal studies and radical feminist scholars, who simply “have plenty of goofy ideas and irresponsible dicta.”

This highly charged language is not relegated solely to the popular press accounts of legal theory, but is sifting into respectable academic texts. For example, Daniel Farber and Suzanna Sherry’s recent book, Beyond All Reason, argues that the Enlightenment foundations of the legal academy are under attack from a group the authors label “the radical multiculturalists.” In the “radical

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4. Id.
multiculturalist” camp are feminist, gay and lesbian, and critical race scholars who stand accused of attacking traditional concepts of objective truth, reason, merit, and the rule of law. According to Farber and Sherry, these “extremists” believe that reality is socially constructed, condemn reason and truth “as components of white male domination,” and prefer subjective epistemological methods (such as storytelling) over rigorous analytic scholarship. What this “motley group” of diverse legal theorists has in common “is an abandonment of moderation and a dearth of common sense.”

These critiques of critical theories, by columnists such as Will and Rosen, jurists such as Posner, and scholars such as Farber and Sherry, span the continua of reason and civility; what they share, however, is a tendency to caricature feminist, gay, and critical race theory, and to preempt the possibility of public dialogue. These critiques—the methods of criticism—suggest a breakdown in the civility of academic discourse and an extraordinary tolerance of intolerance.

Part I of this review essay sets up the basic debate between traditionalists and critical theorists. In Part II, this essay explores the ways in which traditionalist critics of feminism, gay legal theory, and particularly critical race theory (collectively “critical theories”), adopt the armor of the Enlightenment—professing truth, reason, and moral certainties—while accusing critical theorists of abandoning reason. It assesses the epistemological treatment of critical theorists primarily by focusing on a leading academic example, Daniel Farber and Suzanna Sherry’s *Beyond All Reason*. This essay questions how the traditionalist critique of critical theory fares according to its own criteria.

Using principles of reason—scientific method and logical or evidential evaluation—Part III examines whether “radical multiculturalists” engage in unreason when they urge a social constructionist or perspectival critique of systems of merit. In Part IV, the essay then explores the increasing intolerance critical theorists, particularly critical race theorists, face in response to their call for inclusion in society’s collective decisionmaking. The essay concludes with a discussion of whether attention to reason and the process of academic discourse can promote more fruitful discussions between traditionalists and critical theorists.

I. RADICAL MULTICULTURALISM IN THE AMERICAN LEGAL ACADEMY

The traditional critiques of critical theory center on both epistemology and methodology. Traditionalists are highly skeptical of feminists’ and race theo-
rists' arguments regarding the relativity of knowledge and the subjective dimensions of systems of merit. Equally abhorrent to traditionalists are the narrative methods some critical theorists use to illustrate their arguments.

According to the traditionalists, what radical multiculturalists, or “the radicals,” share is a collection of substantive beliefs: that racism exists and is pervasive; that law has, for the most part, been created by whites and males; and that meritocracies will benefit those who create them. The radical view is said to be one of a starkly racialized world where “[t]he beneficiaries of [the] covert oppression are usually described as straight white males, or, more pompously, ‘the white male establishment.’ Everyone else is either a victim, a collaborator, or an unwitting dupe.”

The traditionalists further assert that for feminists, gay legal scholars, and critical race theorists, knowledge is socially constructed, “intensely personal,” and politically biased. These outsiders are said to “have different sets of knowledge . . . and communicate them—in different ways.” Since knowledge is subjective, women and people of color allegedly perceive and experience sexism and racism when males and whites cannot, including situations in which it does not exist, and then blame majority group members for their insensitivity. Traditional scholars who disagree that situations are racially or sexually charged are “at some risk of being labeled racists and bigots.”

This highly personalized—even “paranoid”—approach is, to the traditionalists, the true threat to Enlightenment values of objectivity and reason. “The radical multiculturalists,” Farber and Sherry flatly declare, “deny the objectivity of knowledge” because they think that “all ‘standards are nothing more than structured preferences’ of the powerful.” Legal rules are not objective; they exist to serve the interests of their creators. And the “new radicals [find] . . . a deliberate concentration of power in the white male establishment.”

The radical “attack on objectivity” is also a challenge to the very concept of merit. Systems of merit are always artificial social constructs “created by the powerful to perpetuate their own power.” The radical critique of merit is deeper than the idea that racism and sexism infect current standards: “Radical multiculturalists deny that merit standards can ever be fair or objective.” How can we ever, the traditionalists respond, “conduct evaluations in the absence of

9. Id. at 7, 9, 10, 11, 12, 13.
10. Id. at 24.
11. Id. at 29.
12. Id.
13. See id. at 133.
14. Id. at 33.
17. Id. at 22.
18. Id. at 32.
19. Id. at 31.
some concept of objective merit standards."  

According to traditionalists, the multiculturalist challenge to meritocracies presents a full-scale assault on some of the most cherished constitutional concepts. The radicals attack the rule of law, say the traditionalist critics, particularly first amendment law and equal protection. Here, they refer to the "hate speech" and "pornography censorship" debates; some critical race theorists suggest that some speech containing racial slurs should not receive first amendment protection and some feminists advocate the regulation of pornography that degrades women.  

Traditionalists also reproach proponents of affirmative action who argue that current affirmative action law does not reach far enough because it cannot affect pervasive unintentional or unconscious racism. The radical multiculturalists, in short, are accused of wanting "new standards that will guarantee racial proportionality."  

In addition to proposing legal reforms that imperil the traditionalist vision of democracy, radical scholarship distorts public discourse. Their disdain for standards, objectivity, and truths leads the radical scholars to indulge in a form of writing that is blatantly subjective. Instead of offering theoretical or doctrinal analysis, radical multiculturalists tell stories. These stories are intended to "explode the dominant myths or received knowledge, disrupt'the established order, shatter complacency, and seduce the reader."  

Storytelling is inherently problematic, argue the traditionalists, because stories cannot be verified, are inevitably subjective, and may be atypical of real world experiences. Narrative methodology "reject[s] the linearity, abstraction, and scientific objectivity of rational argument." Stories may limit public dialogue because they may be told as conversation-stopping moves that brook no disagreement. Recounting a variety of stories told by feminists and critical race theorists—stories that range from experiential accounts to parables—Farber and Sherry accuse the storytellers of "careless treatment of factual issues," "inattention to facts," and "casualness about truth." David Hyman asks whether storytellers can even "tell truth from fabrication?" For the traditionalists, storytelling is neither legal nor academic, and threatens the credibility of the scholarly enterprise.  

Radical multiculturalism is thus dangerous to the legal academy: it is an epistemology that produces the inability to separate truth and fiction; it is a
simplistic power theory that sees only oppressors and victims; and it is paranoia that risks silencing dissenters.

II. REASON AND CRITIQUE

It is laudable to champion, as many of the traditionalists do, the use of reason in legal scholarship. The term “reason,” though, has many different meanings. Reason can mean little more than offering a rational justification for a conclusion.\(^{29}\) It can refer to the means-ends rationality of “practical reason,” the Aristotelian idea of good judgment, or practical wisdom recently repopularized in law by Richard Posner.\(^{30}\)

Conversely, legal reason could be used in the same sense as in the social and physical sciences: principles of scientific or logical inquiry and critical thinking that are the accepted bases for the methods of obtaining or evaluating knowledge. These “criteria of rationality” are a set of standards for theory-building; they can be applied to value judgments, moral choices, and theory-selection.\(^ {31}\) In addition to the basic requirement of internal consistency, a theory’s premises must be testable, refutable, and based on cumulative, comprehensive, and converging evidence.\(^ {32}\) The arguments that stem from the premises must be free of logical fallacies. Better theories are those that are simple,\(^ {33}\) possess sufficient explanatory and exploratory power,\(^ {34}\) and have depth.\(^ {35}\) Theories should also be fertile or extensible, which refers to “the ability of a theory to expand and apply to related fields.”\(^ {36}\) Finally, they “must be consistent with the generally accepted body of knowledge, both within its own discipline and in other areas.... Theories that


\(^{30}\) See Richard A. Posner, The Problems of Jurisprudence (1990). Posner advocates a judicial methodology in which a judge determines a goal and then selects the most appropriate means to arrive at it, using a “grab bag” of methods such as common sense, intuition, the test of time, introspection, experience, reasoning by analogy, anecdote, imagination, empathy, induction, imputation of motives, and reliance on authority, precedent, and custom. Id. at 30, 73.


\(^{32}\) See Levit, supra note 31, at 270-71. See generally Frederick Suppe, The Structure of Scientific Theories 62-64, 107, 559 (2d ed. 1977).

\(^{33}\) “The first criterion of theory confirmation is simplicity, which is also often referred to as economy or elegance.... Simplicity refers to the neatness of the conceptual package and the lack of exceptions or ad hoc explanations of phenomena inconsistent with the main precepts of the theory.” Levit, supra note 31, at 268.

\(^{34}\) A theory “must accurately explain the phenomena under study. A theory’s power is measured by its ability to advance understanding. An explanatory theory answers a study’s initial questions and spins out implications and connections.” Id. at 269.

\(^{35}\) “A deep thesis goes beyond merely stating or describing phenomena. It explains possible causal relationship among observable phenomena, arranges isolated events into general patterns and seeks underlying explanations.” Id.

\(^{36}\) Id. at 270.
rely on and relate to comprehensive and converging evidence from other disciplines are more likely to be valid.”

This review essay uses “reason” in this third sense, as referring to principles of scientific method and logic—the historically developing criteria of rationality.

Given the multiple definitions of “reason,” if one endorses “reason” and accuses others of “unreason,” it is critical to answer the question: “What do you mean when you say ‘reason’?” Unfortunately, many traditionalist critics, particularly Farber and Sherry, never directly answer this essential question; “reason” is a term they are maladroit at defining. The Enlightenment understanding of reason encompassed two strands: a scientific or empirical approach to solving problems (the empiricist tradition) and the idea of reason as an internal capacity rooted in a set of beliefs (the rationalist tradition). Traditionalists frequently assume the mantle of Enlightenment reason without addressing the conflicts between the two strands of reason. For example, Farber and Sherry most often use a “common sense” view of reason, coming close to the rationalist view of reason involving an internal set of beliefs. They assert that “‘reason’ does not mean only deductive logic. It also encompasses ways of thought that scholars, scientists, judges, and the rest of us use when we deliberate carefully.”

What are these ways of thinking that most “of us use”? They are common sense beliefs and ways of thought, not logic and science. The traditionalist meaning of reason is what the average person on the street would think about a given topic; it is a Victorian middle-class view of rationality. Rather than using the technical categories of the scientific method to discuss objectivity, reason operationally becomes what seems to be “reasonable” to the mainstream in modern culture.

Thus, reasonable positions, for traditionalists, are those based on typical experiences. For instance, in defending the meritocratic ideal against charges of subjectivism and bias, racism and sexism, Farber and Sherry simply state that

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37. Id.
39. For some indications of problems with using “common sense” as the touchstone of reason, see Clifford Geertz, Local Knowledge: Essays in Interpretive Anthropology 147-63 (1983); Stephen Toulmin, Knowing and Acting: An Invitation to Philosophy 143-62 (1976).
40. Farber & Sherry, supra note 5, at 48.
41. See Posner, supra note 30, at 133; Anne M. Coughlin, Regulating the Self: Autobiographical Performances in Outsider Scholarship, 81 VA. L. REV. 1229, 1286 (1995)
“we nevertheless can and do make widely shared judgments of merit,” and offer as exhibits Michael Jordan and Yo-Yo Ma. Later, the authors accuse radical multiculturalists who use narrative methods of rejecting typicality of experience as the standard of merit: “the storytellers fail to ask whether their stories are typical of the larger universe of law school or university hiring.”

The traditionalists’ argument is that the typicality of experience in a given culture is proof of the norm, and that if we acknowledge “atypical” experiences, then we lapse into variability, choosability, and a dangerous world of subjective free play. This consensus theory of reason is flawed in several respects. First, it is built on a structural circularity. Notice the choice the traditionalists are making: they are selecting the “typical” experience as the valid one. This is a decidedly circular form of reasoning; the mere typicality of experience is proof of its own validity. Traditionalism takes its own constructions as the standard or measure of reasonableness.

Second, the selection of typical experiences as the appropriate measure of merit is as subjective a methodology as that which traditionalists accuse critical theorists of adopting. They sanction beliefs and personal experiences, as long as they are typical ones, as the standard—which is precisely the subjectivism they fear from “radical multiculturalism.” Traditionalists thus demonstrate the very methodology they attack. They confound common or widely shared with objective or true, and portray their own beliefs as universals, when in fact, they offer merely a perspectival critique.

Finally, the traditionalist rejection of “different voices” violates the way evidence is treated in science, history, sociology, and comparative psychology. What is “atypical” in science is generally not rejected, but is accounted for by inquiry. The history of scientific reason is not one of excluding facts that do not conform to the theory. Traditionalists make the claim that rationality is

42. FARBER & SHERRY, supra note 5, at 54. These examples seem intended to demonstrate that merit is not racist, because here are nonmembers of the majority group who are thought to have great merit. Of course, exceptional cases do not prove or disprove dispositions. These extraordinarily selective examples—from sports and the arts—ignore the massive statistical evidence that racism and sexism are crucial factors in “merit” determinations in the events of ordinary life. See, e.g., Richard Delgado, Rodrigo's Tenth Chronicle: Merit and Affirmative Action, 83 GEO. L.J. 1711, 1740-42 (1995); Leslie G. Espinosa, The Bias of LSAT Narratives, 1 AM. U. J. GENDER & L. 121, 129 (1993); Portia Y.T. Hamlar, Minority Tokenism in American Law Schools, 26 HOW. L.J. 443, 468-513 (1983); Daniel G. Lugo, Don't Believe the Hype: Affirmative Action in Large Law Firms, 11 L. & INEQ. J. 615, 623 (1993); Kristen Poe, Note, Blinded by Results: Is Looking to GPA in Addition to Standardized Test Scores Truly a Less Discriminatory Solution to Merit Scholarship Selection?, 19 WOMEN'S RTS. L. REP. 181, 182-83 (1998); Jamie B. Raskin, Affirmative Action and Racial Reaction, 38 HOW. L.J. 521, 554 (1995).

43. FARBER & SHERRY, supra note 5, at 74.


45. This is why science is a cumulative, historical, and progressive discipline. Examples of theory modification to account for or accommodate seeming exceptions include cosmology, see, e.g., THE NATURE OF SCIENTIFIC DISCOVERY 430-57 (Owen Gingerich ed., 1975) (discussing the movement from the geocentric to the heliocentric theory of the universe), and physical theory, see, e.g., STEPHEN W. HAWKING, A BRIEF HISTORY OF TIME (1988) (describing the theoretical shift from the absolutism of
universal, but ignore the great weight of psychological, anthropological, and sociological evidence that people perceive situations and reason differently about them, depending on various facets of identity. Much of the work of feminists, critical race theorists, and gay and lesbian legal theorists discusses problems of negotiating among groups that see things differently.

III. MERIT AND SOCIAL CONSTRUCTION

A. "MERIT" OR THE ABYSS

When Farber and Sherry, Posner, and others attacking critical legal theories say that radical multiculturalists have eliminated objectivity in public discourse, they mean at least two interrelated ideas: first, that critical theorists have rejected typicality of experience as the standard of merit; second, that if we view systems of merit only as social constructs, no objective reality can exist. These are the problems of a constructivist theory. We must, traditionalists insist, either accept mainstream definitions of merit or risk the abyss of nihilism.

Are critical theorists "unreasonable" in urging a perspectival critique of merit? If reason means a consideration of empirical evidence and continued refinement of the methods of arriving at rational conclusions, we need to assess whether the critique of constructivism comports with the wealth of evidence in the historical and social record regarding the influence of perspectives on evaluative assessments. This inquiry entails considering the scientific, sociocultural, psychological, and constitutional history of facets of identity—race, gender, and differing abilities—and concepts of "merit."

1. The Social Construction of "Merit"

In many of our institutional structures (such as schools and jobs), and our evaluation methods (such as performance reviews or IQ and achievement tests), we assume that smart people are the ones who succeed. There is a large aspect of complacency to this: some people are smart; some people are not so smart; and that's just the way it is. This was the theme of the book The Bell Curve, and it is an assumption that has sifted into our collective consciousness. We think of smartness and merit as intrinsic qualities of betterness.

Newtonian physics to the relativity of Einsteinian physics). Modern sampling theory is constructed to accommodate, not dismiss, atypicalities in its requirements of representativeness and randomness, always limited to specified contexts. See Earl R. Babbie, Survey Research Methods 74-76 (1973); Gary T. Henry, Practical Sampling 26 (1990).

46. See, e.g., Laurence A. Hirsched, Race in the Making: Cognition, Culture, and the Child's Construction of Human Kinds (1996) (presenting an extensive interdisciplinary survey of research and theory in psychology, sociology, history, biology, and anthropology, showing that children do not naturally select color or race as dominant categories, and concluding that the concept of race is a social category).

Some critical theorists argue that this traditional interpretation of meritocracy is close to backwards. The causal relationship does not run from smartness to success. Instead, those people who have succeeded—for reasons of race, property ownership, or power—have been the ones who define what smart is. This realization does not mean that most critical theorists believe that "merit" is nonexistent or devoid of meaning. It does mean, however, that systems of merit may not measure well, or even much at all, what they purport to gauge—and that traditional indicia of merit may not be the best forecasters of occupational, educational, or other success, but instead predict "success" only on their own terms.

The myths surrounding the concept of merit began and were intertwined with the creation of our constitutional democracy. Our Declaration of Independence envisioned, and our Constitution later promised, equality. But declaring all men equal was not only a promise unfulfilled, it was a promise founded on a contradiction: the principle did not apply to women, slaves, and those without property. From the earliest days of the republic, those opposing manumission argued fervently about the "natural" differences between the races and their fears of racial intermingling. "A nation committed now to equality," Robert Hayman writes in *The Smart Culture: Society, Intelligence, and Law*, "remained fundamentally convinced that its people were, by nature, unequal."

At the founding, race was seen as an innate, inherent biological phenomenon, racism its natural offshoot, instinctive rather than learned. Racism was, and still is on some levels, accepted as natural animosity: people feel more comfortable around their own kind. It is an innocent and uncontrived instinct, one that seems perfectly natural. Whether the perceptions are accurate or not, those things that we perceive as "natural"—imbedded, intertwined somehow with biology—are sacrosanct.

We have thought of racial inferiority and superiority as fixed in biology. Yet, biologically, race is relatively unimportant. Variations among individuals within races far outstrip variations between races. Of the 150 identified bits of genetic coding, 75% are fundamentally identical in all humans. The remaining 25% of the genetic material varies among individuals. Only 8% of that 25% of genetic variation, "is between the 'tribes' or 'nationalities' that constitute conventionally described 'races.'" Other biological commonalities or differences, such as blood type for organ transplants or genetic markers for cancer, matter much


51. *Hayman, supra* note 48, at 76.

52. *Id.* at 128.
more. Physical developmental differences (from intra-uterine to nutritional to environmental) and social differences (in education, residence, and occupations)—*differences that we create*—matter most. Nonetheless, in America what we have chosen to make count are the visible characteristics of race.

The irony of this belief in the natural distinctions of races is that although we accept the notion of immutable racial differences, we deny the existence of racism. Or, perhaps worse, we deceive ourselves into believing that most racism is intentional: the aberrant product of a few misguided individuals. "Racism," Hayman argues, "thus embraces not only the continued tendency to make of race what it is not—something biological, immutable, and inferior; racism embraces as well the refusal to recognize what race is—a powerfully significant social and political reality." 53

The new racism is really the old racism, but it is so embedded that it now carries the force of tradition. The modern, righteously indignant and seemingly egalitarian calls for a color-blind society ignore the history and tradition of our treatment of race in America. To understand whether concepts of merit can ever be free from race (or gender or class), we need to trace the political, social, and pseudo-scientific underpinnings of racial supremacy. Scientists until the modern era (and, with *The Bell Curve*, it is now a resurrected idea) accepted the ideological commitment to a hierarchy of races. 54 In the political arena, eugenics-talk and xenophobic impulses combined as we indulged in segregative practices to create ethnic ghettos. 55 In academia and employment, we constructed tests to measure "neutral qualifications," but all the while, we were really measuring a host of other things too: the advantages and disadvantages of socio-economic class, prior educational opportunities, gender, whiteness, and power. 56

"Merit" in this conventional sense is, then, a definitional tautology: we identify certain characteristics, define those characteristics as intellect or worth, and then create worthy people—defined, of course, by the possession of the identified characteristics. In short, we call people "intelligent"; we select traits of gender and pronounce them significant; we label people "mentally retarded"; and we make "race" matter. 57 We have bought into the very idea that there is a meritocracy in any given arena of competition, from basketball to cello-playing to law school exam-taking. And thus we are wholeheartedly prepared to swallow the idea that the meritocracy reflects a natural and objective order.

53. *Id.* at 126.
Why are the myths of merit so widely accepted when the scientific evidence in support of the theories of biological supremacy and inferiority is so flimsy? The easy answer, according to the traditionalists, is offered by the critical theorists: there is an ideological project, founded on racism, justified by political expediencies. This easy answer is neat, plausible, and not at all what most critical theorists are saying.

Many critical theorists argue that viewing merit and racism in traditionalist, black and white terms will only lead in the wrong direction. At the heart of the myth of merit is the shibboleth of purposeful discrimination: if only we can eradicate intentional, malicious discrimination, the market, freed from discrimination, will guarantee equality of opportunity. The idea that racism and sexism are limited phenomena perpetuated by a few intentional bad actors is one of the most destructive myths of all. "Discrimination," says Hayman, "results simply from bureaucratic practices, from the unthinking repetition of the ordinary ways of operating in the world."

2. The Perspectival Critique of "Merit"

Do critiques of merit inevitably lead to the entropy of pure perspectivism? Traditionalists and critical theorists may differ markedly in their epistemological views of "reason," but may agree about the concept of merit more than traditionalists are willing to concede. The area of greatest divergence between traditionalists and critical theorists concerns the idea of constructivity itself. Traditionalists often downplay the idea that systems of merit are constructed. They seem to want to avoid peeking behind the curtains to see the inevitable judgment and choice of human beings in the selection of criteria of merit. ("Pay no attention to that man behind the curtain.") Instead, they speak almost as if standards were obvious or given, without the participation of people. Tradition- alists tend to waver between the purported immaculate objectivism in numeric systems (whether in measurements of IQ, grades, or employment tests) and the menace of pure subjectivism in the absence of agreed standards.

Most critical theorists have directed their attention to the kinds of choices made in the selection of particular criteria of merit. Some critical theorists may


59. HAYMAN, supra note 48, at 133.

60. THE WIZARD OF Oz (Metro-Goldwyn-Mayer 1939).

61. Farber and Sherry repeatedly refer to current standards for decision making (in education and employment) as "objective standards" and "neutral standards." FARBER & SHERRY, supra note 5, at 26, 31. Their only specific defense of selection criteria—"If a school is looking for faculty members who are good at writing conventional articles and teaching conventional classes, the conventional standards (prestigious law school, good grades, law review, and so on) are probably good indicators," id. at 125—defends the status quo unreflectively, without contemplating other possible selection criteria and without asking what sort of legal education "conventional" faculty offer or whether some other system of education might produce different or better lawyers.
actually question whether a neutral meritocratic ideal can or even should exist. Others, such as Richard Delgado, point out that merit is an instrumental concept, and that constitutional concepts of merit have sometimes required a “decisionmaker to ignore history [and] context.” Still others do not reject the concept of merit or the hope of such an ideal, but instead say that current standards or criteria of merit omit certain values, traits, and qualities while overemphasizing others. They are pointing out the sometimes subtle, sometimes not so subtle, influences of the architect on the product, arguing, as Daria Roithmayr does, that “historical preferences about what constitutes social value in a given industry or profession are necessarily subjective standards, socially constructed by professional leaders who have the status to make such choices . . . . Thus, merit can be viewed as a socially acceptable bias for certain kinds of qualities.”

It is here that traditionalists and critical theorists may not be very far apart in their views of the concept of merit. For example, Farber and Sherry state: “we do not claim that current standards of merit are ideal, or even completely objective and apolitical. We agree that merit is a slippery concept, and that it can be and has been abused in the service of racism and other ugly views.” They also acknowledge that “[m]erit is also notoriously hard to measure.” Farber and Sherry thus concede the historical messiness of merit, yet want desperately to hold onto the ideal. Critical theorists may be quite willing to


The idealized meritocratic world—in which, unlike even our best, real world attempts, “merit” could be readily defined in a way that corresponded perfectly with the job or educational opportunity at hand—would be an unattractive and unappealing place. Testing, re-evaluation, and reshuffling of personnel would be a constantly intrusive feature of work life. Nonmeritocratic factors, such as the cost of upset expectations of long-term employment, might still count for something, of course, in managerial calculations, but they would have to be constantly weighed against the meritocratic imperative to maximize productivity, competency, and performance. Loyalty between employer and employee would be irrelevant and counterproductive, and personal connections—of family, friends, and neighbors—would count for nothing.

63. Delgado, supra note 42, at 1719.

64. See, e.g., Raskin, supra note 42, at 554-55 (exclusionary practices have constructed systems of merit that omit consideration of qualifications such as volunteer work, knowledge of English as a second language, and commitment to serving impoverished communities).


[C]hoices about the way law is practiced, and more specifically about the way law is taught, were made in the context of the profession’s explicit effort to stem the tide of immigrants and Black men who sought to become lawyers in the early 1900s. Those choices still govern much of legal practice and education today.

Id. at 1455. See also Jody David Armour, Hype and Reality in Affirmative Action, 68 U. COLO. L. REV. 1773, 1186-87 (1997); Espinoza, supra note 42.

66. FARBER & SHERRY, supra note 5, at 53.

67. Id. at 54.
acknowledge the possibility of a meritocratic ideal, but disagree sharply on the empirical front about the use of certain standards of merit. Thus, critical theorists might want to recognize, for example, that certain facets of identity—a student's race or sex or being first in the family to attend college—is one important indicator of the value (or merit) of that student to the law school community. Yxta Maya Murray says simply, "At hand is an attempt to transform the meritocratic ideal by including what has been up to now excluded—the valuable, concrete, lived experiences of oppressed peoples." 68

This difference in views about standards for determining merit is just one example of perspectivism: depending upon one's social position or facets of one's identity, one may view particular criteria of merit as less or more important. But perspectivism is not tantamount to freewheeling subjectivism. Instead, it may be one avenue toward more enriched understanding of concepts, as Farber and Sherry themselves perhaps unwittingly demonstrate in Beyond All Reason. In one of their most far-reaching theories the authors suggest that radical multiculturalism will result in anti-Semitism and racism. The rejection of Enlightenment ideals will lead ineluctably to "pre-Enlightenment evils," such as anti-Semitism and anti-Asian sentiments. 69 Since Jews and Asians are often successful, their argument goes, those groups will be blamed as manufacturers of this fraudulent scheme of merit. The attack on merit, in other words, has anti-Semitic implications: "[I]f standards of merit are the socially constructed creations of a racist society, the radicals must necessarily condemn Jews and Asians for succeeding. For to the extent that Jews and Asians do even better than white gentiles at the merit game, they are that much more implicated in racist values than are others." 70

The lurking anti-Semitism argument is extended well beyond any construction that critical theorists actually offer. Farber and Sherry do not cite to any critical race, feminist, or gay legal theorists actually scapegoating Asians or Jews. A number of critical theorists have addressed the ways in which "race" is constructed differently for different groups, 71 but certainly none have condemned Asians or Jews for their successes. Farber and Sherry's argument is that the radical multiculturalists are potential anti-Semites and racists. This seems a fairly absurd charge, but notice the structure of the argument: Is this theory good for the Jews? Strangely, what is good for Jews, or for any other minority race or ethnic group, may well be a barometer of tolerance in a given epoch or

69. FARBER & SHERRY, supra note 5, at 53.
70. Id. at 61.
71. Pat K. Chew, Asian Americans: The "Reticent" Minority and Their Paradoxes, 36 WM. & MARY L. REV. 1, 24-31 (1994) (even succeeding according to traditional measures cannot insulate Asian Americans from racism); Neil Gotanda, Asian American Rights And The "Miss Saigon Syndrome", in ASIAN AMERICANS AND THE SUPREME COURT 1087-91 (Hyung-Chang Kim ed., 1992) ("Since model minority Asian Americans have succeeded, the message of minority-blaming points to African Americans as themselves responsible for their situation.").
era. Here Farber and Sherry understand the interplay of context and history and race. Ironically, this perceptive nugget occurs in the midst of a larger project which is a full-scale assault on relativism. It is curious that two Jewish scholars understand what it means to be a member of a minority ethnicity when it is their ethnicity under attack—or perceived attack. But, then, that is the whole point of perspectivism.

B. NARRATIVE METHODOLOGY AND REASON

Traditionalists fear that use of narrative methodology in legal scholarship will lead to nonrigorous analysis and hopelessly subjective anecdote-swapping. "Rather than relying solely on legal or interdisciplinary authorities, empirical data, or rigorous analysis, legal scholars have begun to offer stories, often about their own real or imagined experiences . . . . Often the story recounts how the author was mistreated because of race, gender, or sexual orientation." Stories told by radical multiculturalists stress "often atypical experiences of law professors"; the stories themselves "don't have straightforward conclusions—they can be read in many different ways"; furthermore, stories "almost inevitably turn ad hominem—because the storyteller is inextricably part of the story."

Ultimately, traditionalists are concerned that widespread acceptance of narrative methodology will undermine rationality and distort public discourse. Yet it is not critical theorists who divorce narrative and reason, but traditionalists. Farber and Sherry champion "reason rather than" the "rhetoric" of storytelling, and approvingly cite law professor Larry Alexander who says that critical race scholarship "fails the test for rational discourse." Jeffrey Rosen warns, "Stories do not appeal to reason; they usurp it. Reasoned arguments depend on things such as truth, evidence, logic, objectivity and the rest of the anachronistic apparatus of the critical mind. Stories, by contrast, appeal to the heart." Other traditionalists also set up storytelling and rational argument as polar opposites. However, few traditionalists go further in counterpoising reason and narrative than Richard Posner who states that if minority group members persist in using narrative methods, they will be perceived as less intelligent than whites: "By repudiating reasoned argumentation, the storytellers reinforce stereotypes about the intellectual capacities of nonwhites."

What of the value of storytelling as methodology: Is narrative methodology

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73. FARBER & SHERRY, supra note 5, at 39.
74. Id. at 73-74.
75. See id. at 39-40.
76. Id. at 48.
77. Rosen, supra note 2, at 40.
78. See Litowitz, supra note 44, at 521 ("Another danger of legal storytelling is that it plays upon emotion, instead of reason, and therefore it can convince people to adopt a position without giving them a doctrinal basis for it.").
79. Posner, supra note 3, at 42.
“unreasonable”? The first charge is that the stories are “unrepresentative” or “atypical” and therefore of limited value. Stories are offered by critical theorists as bits of evidence about oppression or as anecdotal evidence that questions systems of merit. Certainly stories are capable of multiple interpretations—in rationality and scientific discovery, no simple or complex “fact” by itself yields a conclusion. The argument against their acceptance presupposes that a bit of evidence directed at questioning the universality of mainstream attitudes is illegitimate if it does not fit the mainstream. A major evidential reason exists for highlighting personal stories in social areas such as law: their historically repressed status. Stories of women and people of color were not treated as evidence of importance; they were not in the database, and thus were not selected as part of the social reality that has been constructed. They are not a part of the mainstream. They are not part of what is “typical,” the criterion by which their stories are dismissed.

It is a broader proposition, really—this argument that stories ought to matter—applicable to whites and nonwhites, and a fairly simple and solid contribution to academic discourse: law should reflect our—all of our—lived experiences. Gaps exist between lived experiences and legal rules, particularly for those people who have historically been omitted from decisional power or occupational channels. Questioning narrative methodology as “unreasonable”—by which is meant “atypical”—elides the logical and evidential basis of the questions that critical theorists are asking. Most critics of race theory, though, never address the basic claim that viewpoint suppression has affected the emotions and attitudes of both those in positions of power and those in subordinate positions.


82. See Murray, supra note 68, at 1078.


84. A notable exception is Randall L. Kennedy, who directly confronts the issue of standpoint epistemology in Racial Critiques of Legal Academia, 102 HARV. L. REV. 1745 (1989) (arguing that scholars of color have not been excluded from academic discourse and that they do not possess a racially distinct perspective).

85. See Kimberle Williams Crenshaw, Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331, 1376 (1988) (“the very existence of a clearly subordinated ‘other’ group is contrasted with the norm in a way that reinforces identification with the dominant group”); Richard Delgado & Jean Stefancic, Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?, 77 CORNELL L. REV. 1258, 1284-88 (1992) (explaining that negative depictions of subordinated groups are internalized by members of that group and believed by dominant group members); Barbara F. Reskin, Bringing the Men Back In: Sex Differentiation and the Devaluation of Women’s Work, in THE SOCIAL CONSTRUCTION OF GENDER 141, 149 (Judith Lorber & Susan A. Farrell eds., 1991) (“Dominants respond to subordinates’ challenges by citing the group differences that supposedly warrant differential treatment . . . . Serious
The second charge—that stories can be read in multiple ways and thus lack "straightforward conclusions"—raises fundamental questions of epistemology: whether single truths exist; and whether there is one right way of viewing things. Claims, any claims, can be read in many different ways. Stories do recognize that truth is ambiguous, and that knowledge is often partial and incomplete. In this sense, perhaps stories offer "greater epistemological accuracy than conventional doctrinal analysis, even if it is simply the authenticity of uncertainty." The purpose to which facts and stories are being put should always be attended.

Traditionalists are virulent critics of storytelling. Some charge that critical race theorists and feminists cannot tell the difference between reality and fiction; they make things up. As Jeffrey Rosen says, "they have celebrated stories, such as conspiracy theories, that are widely accepted in the black community, even though they are factually untrue." In the Washington Times, Richard Grenier writes "These 'stories,' blithely ignoring facts, serve to challenge white racial dominance by making blacks feel good. Typical 'stories' are conspiracies according to which whites are determined to exterminate America's blacks either by the massive sale of crack or by energetically promoting the spread of AIDS in the black community.

What are the stories told by critical theorists? Some of the stories are experiential: what does the sting of racism feel like when one is nonwhite and engaged in the ordinary activities of life, such as shopping, apartment hunting, or applying for a job. Another category of critical race stories is a set of fictional accounts, expressly labeled as fiction, such as Richard Delgado's characters, Rodrigo and the Professor, or Derrick Bell's civil rights lawyer, Geneva Crenshaw. These are make believe stories, like some of the great works of literature, metaphorically illustrating points about morality and society. It is odd that the traditionalists, with their single-minded focus on the Western tradition of linear rationality, make little effort to distinguish between stories told as true and stories told as fiction.

Even to the extent that they are "atypical," experiential tales may produce

86. This is one of the basic teachings of legal realism. See Roscoe Pound, The Call for a Realist Jurisprudence, 44 HARV. L. REV. 697, 698-700 (1931).
87. Hayman & Levit, supra note 31, at 421.
88. Rosen, supra note 2, at 27.
90. See, e.g., Patricia J. Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, 22 HARV. C.R.-C.L. L. REV. 401, 404 (1987).
92. See, e.g., GEORGE ORWELL, ANIMAL FARM (1946); LEO TOLSTOY, WAR AND PEACE (1942); JOHANN WOLFGANG VON GOETHE, FAUST (1970).
singular counterexamples that can undermine generalities. William Eskridge offers the example of a single gay soldier who is considered effective by his comrades as someone who undermines the notion that all homosexuals would be disruptive in the armed forces.93

The critique of narrative as the primary epistemological method of critical theorists rests on a couple of sweeping misassumptions, with the mistakes running in two directions. First, not all or even most critical theory uses narrative exclusively or even primarily—yet the traditionalist critics reduce much of critical race, feminist, and gay legal theory to storytelling. For example, Beyond All Reason devotes more than a third of its relatively short text (143 pages) to a critique of narrative methodology used by some critical theorists.94 This, of course, is itself a rhetorical move that diminishes the numerous other theoretical, doctrinal, and methodological contributions of critical theorists.

A large majority of critical theorists have promoted interdisciplinary explorations of social questions. They have explored American social conventions and legal rules that perpetuate racial, class, gender, disability, and sexual injustices, including the examination of subtle, often unconscious, subordinating behaviors.95 These inquiries into the ways in which women, gays, the disabled, the poor, and people of color are marginalized and silenced are not just experiential stories, but encompass doctrinal analysis,96 empirical studies,97 and statistical

93. See Eskridge, supra note 47, at 614-15. See also Alex M. Johnson, Jr., Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship, 79 IOWA L. REV. 803, 817 (1994) ("part of the strength of Narrative results from its atypical nature").


95. See MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 121-28 (1990); Hayman, supra note 57, at 1213-14; Krieger, supra note 58, at 1199-1207; Lawrence, supra note 58, at 336-44.


evidence about the treatment of race, sex, sexual orientation, and different abilities in employment, education, criminal proceedings, and government contracting. They include complex historical projects, socio-political analysis of contemporary events, ideological inquiries into the ability of liberalism to remedy “group-based harms,” uses of social theory, and normative and positive jurisprudential analyses of various facets of identity.

Critical writings of the past decade offer solid contributions to doctrinal understanding. Critical race theorists say that race matters; that race, among other facets of identity, affects how people perceive situations, and how judges rule. Some feminists make the same claim about gender and perceptions. Gay and lesbian legal theorists demonstrate that many of our current


104. See generally HACKER, supra note 98; Carole Uhlaner, Perceived Discrimination and Prejudice and the Coalition Prospects of Blacks, Latinos, and Asian Americans, in RACIAL AND ETHNIC POLITICS IN CALIFORNIA 339 (Byran O. Jackson & Michael B. Preston eds., 1991).

105. In tort law, see Leslie Bender, Is Tort Law Male? Foreseeability Analysis and Property Managers’ Liability for Third Party Rapes of Residents, 69 CHI.-KENT L. REV. 313 (1993); Martha Chamallas, Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument, 63 FORDHAM L. REV. 73 (1994); in civil procedure, see Richard Delgado et al., Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985 WIS. L. REV. 1359; in property law, see Harris, supra note 56; in criminal law, see Deborah W. Denno, Gender, Crime, and the Criminal Law Defenses, 85 J. CRIM. L. & CRIMINOLOGY 80 (1994).

laws and social policies have conflated sex and gender, leaving sexual minorities unprotected by antidiscrimination law. Critical race theorists also illuminate the frailties of current antidiscrimination law, which reaches only maliciously intentional discrimination. The much more prevalent sorts of discrimination against women and racial minorities—emanating from the subconscious, resulting from the ordinary way of doing things, coming from the image of the job having been created by its last occupant—remain untouched under present law.

These critical theorists question the universality of normative assumptions underlying prevailing legal doctrine and call for the inclusion of previously excluded perspectives to nudge law toward substantive equality. Urging law to reflect lived experiences hardly seems either radical or wrong. Although narrative is a useful methodology to encourage people to suspend their beliefs and listen to different perspectives, critical race theory, feminism, and gay legal theory is far more than storytelling.

Second, there are storytellers other than critical theorists—and they are by far the more numerous—who are less methodologically explicit about what they are doing. Overlooked by traditional scholars is the fact that white people tell stories too. But they don’t seem like stories. They seem like analysis and truth. When conservatives use stories and anecdotes to discredit nonwhites, those stories manage to attain the status of reasoned arguments. It is somehow wrong, George Will suggests, to “summon . . . memories of lynching.” But it is somehow imperative to pretend that we are a color blind society.

Consider the story told by Judge Richard Posner in an article in which he complains that “[c]ritical race theorists are terrible lumpers,” and condemns the idea that race is socially constructed. Judge Posner targets the works of law professor Richard Delgado, who, according to Posner, “claims to be a member of . . . a group that he calls ‘people of color.’” But this group, Posner complains, “seems to be more a state of mind than a race.” And “race,” of course, is more than the professor’s “state of mind.” Judge Posner offers evidence of what he calls “Delgado’s whiteness”: “I have met Professor Delgado. He is as pale as I am, has sharply etched features in a long face,

107. See Valdes, supra note 83.
113. Posner, supra note 3, at 41.
114. Id.
115. Id.
speaks unaccented English, and, for all that appears upon casual acquaintance, could be a direct descendant of Ferdinand and Isabella. Using his own visual categorization of Professor Delgado as "white," Judge Posner firmly establishes the point he is so interested in refuting: that we socially construct races. He succeeds in proving that race is indeed "a state of mind," in this case, the Judge's.

IV. REASON, CIVILTY, AND THE INVITATION TO DISCOURSE IN JURISPRUDENTIAL CRITIQUE

A. INCIVILITY IN ACADEMIC DISCOURSE

Intolerance in academic discourse is increasing. Although the tactics of diminishment appear in many forms—trading insults and political barbs, use of harsh terms and emotive labeling, political bombtossing, meannesspirited readings, pathologizing authors' motives or raising questions as to their competence—they seem most pronounced in traditionalists' lashing of critical theories.

This decline in the civility of dialogue is, in part, a reflection of the smear tactics, lack of courtesy, and condonation of aggressive behavior in the larger political and social arenas. It may be emblematic of the gladiatorial nature of adversary litigation—"the increasingly uncivil conduct of civil litigation"—

116. Id.
117. See Robert L. Hayman, Jr. & Nancy Levit, Un-Natural Things: Constructions of Race, Gender, and Disability, in CRITICAL RACE THEORY: HISTORIES, CROSSROADS, DIRECTIONS (Jerome McCristal Culp et al. eds., forthcoming 1999).
118. See, e.g., Coughlin, supra note 41, at 1288, 1292, 1315 (questioning the originality of Patricia Williams' story of suing a sausage manufacturer—on the ground that another author, much earlier, also wrote about sausage—and asking: "Should we infer that the experience she describes may not have occurred at all?"); stating that Jerome Culp "unselfconsciously duplicates ... the rags-to-riches story popularized by Horatio Alger, Jr."; and commenting that Richard Delgado is "surprisingly unreflective over the meaning that is produced by his distinctly plotted and patterned autobiographical script, which heroically unfolds his determination to publish work that inner-circle authors will perceive to be, as he puts it, 'audacious.' "). For critiques, see Richard Delgado, Coughlin's Complaint: How to Disparage Outsider Writing, One Year Later, 82 VA. L. REV. 95, 96 (1996) ("Whenever a generous or ungenerous interpretation is equally possible, she unfailingly chooses the latter, often rearranging the evidence to suit her dire conclusion .... Coughlin presents a picture of disingenuous scholars who lie, play to the crowd, pretend to be radicals, and make money at the expense of scholarly ideals such as the Truth."); Clark Freshman, Were Patricia Williams and Ronald Dworkin Separated at Birth?, 95 COLUM. L. REV. 1568, 1590-91 (1995) ("Posner diagnoses MacKinnon as 'obsessed with pornography' " and treats Patricia Williams as "incompetent," saying " 'Williams cannot grasp the point of whites.' "). See also Jerome McCristal Culp, Jr., Telling a Black Legal Story: Privilege, Authenticity, "Blunders," and Transformation in Outsider Narratives, 82 VA. L. REV. 69 (1996); Hayman & Levit, supra note 31, at 400 n.83, 429 n.158.
119. And perhaps "road rage," spitting in umpires' faces, bumper stickers reading "My Kid Beat Up Your Honor Student," and the possibility of international assassination of political leaders is somewhat more troubling than bad manners in print. See Matt Schudel, Nasty As We Wanna Be, FLA. SUN-SENTINEL, Feb. 22, 1998, at 8. But it is, in some part, through academic dialogue that filters into the mainstream media that millions of Americans form their conceptions of, among other things, racism, sexism, merit, and reason. And ours is an enterprise built on inquiry and discourse that we threaten to render meaningless with the widespread acceptance of intolerance.
that has somehow seeped into academia.\textsuperscript{120} Maybe we are even teaching these tactics in the law school curriculum and culture.\textsuperscript{121} Or perhaps the "incipivility" is simply adversarial posturing that is used to spark debate or excite audiences. But the incivility crosses into other areas of the academy and does not seem targeted toward productive ends.\textsuperscript{122}

This phenomenon in jurisprudential discourse, though, is more than incivility or rudeness, but is, in Keith Aoki's term, "attack scholarship" which is deployed to shut down discussion or debate, particularly of race and gender issues.\textsuperscript{123} It is intolerance linked to ideological entrenchment and refusal to engage competing ideas. At the extreme, it involves the systematic degradation of identity scholarship as unworthy of being part of the academic landscape.\textsuperscript{124}

Some traditionalists engage in emotive condemnations of critical theories. They slip into \textit{ad hominem} arguments and disparage individual critical writers,\textsuperscript{125} rather than attempting to understand critical theories or engage in dialogue across the boundaries of jurisprudential paradigms. This problem is broader than simply making the argument that the social constructivist perspective is unreasonable. It is a collection of theorists, on a spectrum from conservatives like Richard Posner to the self-proclaimedly liberal Farber and Sherry, accusing particularly critical race theorists, but more broadly, any social constructivist, of \textit{unreason}.

The accusation that anyone adopting a constructivist view is guilty of unreason is a weighty one, but it is precisely what Farber and Sherry mean when they argue that radical multiculturalists are "beyond all reason." The accusation of unreason is not just that "the radicals" make illogical or unsupportable claims; it is a charge that "radical multiculturalists" are bad scholars: they lack common sense,\textsuperscript{126} attack "truth, merit, and the rule of law,"\textsuperscript{127} "exhibit a nonchalance about verifiable facts" and a "casualness about truth,"\textsuperscript{128} treat history

\begin{itemize}
\item \textsuperscript{121} See Roger E. Schechter, \textit{Changing Law Schools to Make Less Nasty Lawyers}, 10 GEO. J. LEGAL ETHICS 367 (1996) (suggesting that law school curricula are partially responsible for the poor esteem in which lawyers are often held because of an overemphasis on the adversarial model).
\item \textsuperscript{122} See, e.g., Benjamin DeMott, \textit{Seduced by Civility: Political Manners and the Crisis of Democratic Values}, NATION, Dec. 9, 1996, at 11 ("The Chronicle of Higher Education looks saucer-eyed at growing incivility in academe—professors calling each other assholes and cunts at department meetings and elsewhere, administrators struggling to establish rules of 'collegiality.' ")
\item \textsuperscript{123} Keith Aoki, \textit{The Scholarship of Reconstruction and the Politics of Backlash}, 81 IOWA L. REV. 1467, 1471 (1996).
\item \textsuperscript{124} See, e.g., Austin, supra note 94, at 1159 ("storytelling is grievance writing, so biased and empty of understanding that it is not worth reading"). \textit{See also} Arthur Austin, \textit{The Top Ten Politically Correct Law Reviews}, 1994 UTAH L. REV. 1319.
\item \textsuperscript{125} \textit{See supra} note 118.
\item \textsuperscript{126} \textit{See} FARBER & SHERRY, supra note 5, at 3, 119.
\item \textsuperscript{127} \textit{Id.} at 5.
\item \textsuperscript{128} \textit{Id.} at 100.
\end{itemize}
with "negligence," 129 are "careless" in their "treatment of factual issues," 130 and they lie—"For the radical multiculturalists, truth must sometimes take second place to political effectiveness." 131 On top of that, their theories are mildly crazy. Radical multiculturalism, Farber and Sherry diagnose, is "a paranoid mode of thought that sees behind every social institution nothing but the tracks of white supremacy and male oppression." 132

Laced throughout the writings of the traditionalists, labels alone serve as defenses of mainstream beliefs—those beliefs are associated with "reason," "objectivity," and "typicality," good things, all. Traditional theorists thus sell their vision of the existing meritocracy with emotively laden terms. 133 Terms like "objectivity" and "reason" are used emotively in application to mainstream theories because they are conclusion-loaded. Posner and Farber and Sherry never analyze why traditional conceptions of law are reasonable, nor why they are objective, other than that most traditionalists believe in them—that is, the beliefs are typical ones. This results in hypostatization of their definitional qualities: traditionalists treat reason and objectivity each as relatively simple, homogeneous, unchanging, contextless, and self-sufficient. The traditionalists similarly use a battery of emotively charged terms to refer to and denigrate nonstandard beliefs. 134

The result is an environment of intolerance for critical legal theories and theorists. To accuse Farber and Sherry of intolerance may be too harsh. They may simply be uncharitable in their readings and enveloped in their own scholarly perspective. To their credit, they do try to keep their argument at the epistemological or operational level, by spinning out the implications of "radical multiculturalist" theory. Others, such as Richard Posner and George Will, dip to the ontological and personal level, making the argument that certain critical theorists may lack the faculties to conduct worthy scholarship, or at least will be so perceived. Race theorists, for example, are accused of both, in the words of Will, "group thinking," 135 and, in the ideas of Posner, an absence of thinking: "By exaggerating the plight of the groups for which they are the self-appointed spokesmen, the critical race theorists come across as whiners and wolf-criers. By forswearing analysis in favor of storytelling, they come across as labile and intellectually limited." 136

129. Id. at 101.
130. Id.
131. Id. at 103.
132. Id. at 142.
134. See supra text accompanying notes 2-4.
135. Will, supra note 1, at B8.
136. Posner, supra note 3, at 40. See also Kenneth Lasson, Feminism Awry: Excesses in the Pursuit of Rights and Trifles, 42 J. LEGAL EDUC. 1, 3-4 (1992) (radical feminists' "words are often virtually incomprehensible, their writings filled with shrill jargon and polysyllabic gibberish—their voices as outraged as their messages outrageous"); supra text accompanying note 79.
This is essentially adult-level name-calling. Professional emotivism—not the submission of evidence or the defense of reason—it disparages people on an almost animalistic level, with the argument that critical legal theorists are not competent to engage in jurisprudential scholarship.

B. CIVILITY AND DIALOGUE: A BETTER REASON

Traditionalists and critical theorists talk past each other, define their opponents in caricature, rarely search for points of agreement or commonalities, and indulge in hypostatization, hyperbole, and emotive language.\textsuperscript{137} Once incivility begins, it is difficult for a culture—even (perhaps especially) an academic collective—to repair it and to return to a more productive standard of interchange. And maybe the warring in print is just plain too much fun. But on the assumption that incivility in academic discourse can undermine intellectual understanding—and the further assumption that both critical theorists and traditionalists are, as both claim, truly interested in fostering public dialogue—can traditionalists and critical theorists find ways to communicate?

One difficulty, of course, is communicating across paradigms. Theorists work from different assumptions, hold different values dear (even at the most fundamental levels, such as individualism or communitarianism) and speak with different bits of jargon. Searching for common ground across movements in jurisprudence may at the theoretical level require looking for common purposes or projects, such as promoting the academic mission or encouraging the use of interdisciplinary or empirical materials in legal scholarship.\textsuperscript{138} At the practical level, it may demand attention to the structures and process of dialogue. It may necessitate a willingness to tailor communication to the listeners’ perspective;\textsuperscript{139} it also may necessitate a willingness to listen.\textsuperscript{140} Richard Delgado suggests that traditionalists may have a particular obligation to make conversational space for previously silenced groups:

The ... suggestion, that the white giants who were then dominating racial discourse back off a bit and allow new scholars of color who were springing

\textsuperscript{137} These accusations are not relegated to assaults by the political right on the political left, though the more systematic campaign of silencing comes from the right. Perhaps some critical theorists have been intemperate in responding to some of their critics, but the fault is not equally shared. One difference between critical theorists and their critics is that the former group appears to invite dialogue, while the latter seems determined to foreclose it.

\textsuperscript{138} See Linz Audain, Critical Legal Studies, Feminism, Law and Economics, and the Veil of Intellectual Tolerance: A Tentative Case for Cross-Jurisprudential Dialogue, 20 Hofstra L. Rev. 1017, 1022, 1056, 1087 (1992) (arguing that “the main joint jurisprudential enterprise is maintaining and increasing the creativity of the legal academy,” and encouraging “analysis of communication among jurisprudential scholars” as well as breaking out of the “closed nature of the belief systems” of the major jurisprudential schools).

\textsuperscript{139} Farber and Sherry themselves make this point. See Farber & Sherry, supra note 80, at 826-27 (1993):

Effective communication requires bridging the gap between the viewpoints of speaker and listener, rather than simply presenting the speaker’s views without regard to the standpoint of the listener. But in our extensive reading of the storytelling literature, we have found few efforts to connect the events in the stories with the experiences of white or male readers.

\textsuperscript{140} For almost a decade, feminist, gay, and critical race scholars have called for inclusion in dialogue. They have developed narrative methodologies in an attempt to persuade. The response to this storytelling movement is “we can’t hear you, not the way you are talking.”
up to show their stuff, is a kind of rule of conversational etiquette. It says, in effect, that when you are having a conversation, look around you and see who has been speaking. If too many people of one sort are not talking, shut up for a while or try to draw them into the conversation.\textsuperscript{141}

The notion that readers or, more broadly, participants in the intellectual community (editors, publishers, students selecting among manuscripts) have any obligations is one that has received little attention. Numerous scholars have discussed the potential impact of texts on readers (the objective of narratives to generate an empathic response in readers) and the role of readers in the creation of meaning (the reader-response school of literary criticism).\textsuperscript{142} Few have addressed the responsibilities and moral choices of readers.\textsuperscript{143}

The essence of discourse is active engagement with ideas: comprehension of, response to, and optimally, understanding coming from opposing views. If dialogue is to be anything more than an affirmation of one's preconceptions, it comes with responsibilities. This is certainly not a substantive obligation to agree with the moral messages of stories, but a process obligation to listen charitably, and with an open mind. Civility as a virtue should appeal to those who prize Enlightenment values of tolerance and respect for human rights as well as critical theorists' communitarian values of promoting humane treatment.\textsuperscript{144}

These goals may be wildly aspirational, but if jurisprudential discourse is going to move forward, it must be undertaken with a spirit of mutual receptivity. An implicit agreement to accord differing views civil treatment is at least a maxim of fair process,\textsuperscript{145} and perhaps even the beginning of a more universal

\textsuperscript{141} Richard Delgado, Rodrigo's Book of Manners: How To Conduct a Conversation on Race—Standing, Imperial Scholarship, and Beyond, 86 GEO. L.J. 1051, 1059 (1998).


\textsuperscript{143} Notable exceptions are Patricia A. Cain, Feminist Legal Theories, 77 IOWA L. REV. 19, 33 (1991) ("if the misunderstanding [of communication] is a gendered misunderstanding, then the reader's obligation to listen empathetically is as crucial as is the author's obligation to communicate across gender lines"), and Nancy L. Cook, Outside the Tradition: Literature as Legal Scholarship, 63 U. CIN. L. REV. 95, 160 (1995) ("The intellect does have the power to see the association that yields empathy and then to see the differences, but this requires effort on the part of the reader.").

\textsuperscript{144} See Robert J. Araujo, S.J., Humanitarian Jurisprudence: The Quest for Civility, 40 ST. LOUIS U. L.J. 715, 750 (1996): Civil discourse is a first step toward individuals getting to know one another better. Dialogue facilitates conversation about what each person considers most important in human existence. While disagreements among people about what is important will probably surface, their discussions will still foster positive societal development. First, their conversation helps people see what they have in common. Second, it enables agreements and compromise that can resolve many disagreements. Third, it sustains the hope for the future in which they can come together to discuss their mutual interests even though they may not always agree with one another. Finally, the notion of civil discourse cultivates tolerance between individuals who may hold strongly divergent views.

\textsuperscript{145} Richard Delgado suggests that conversations about race should be conducted according to prudential rules, perhaps modeled on legal rules of civil procedure and evidence, which might offer a template for academic manners. Delgado, supra note 141, at 1059-60.
jurisprudence that can cross the boundaries of distinct schools of jurisprudential thought.\textsuperscript{146}

Certainly, good faith engagement of work with which one disagrees would seem to require the avoidance of \textit{ad hominem} debate. An extension of this prohibition is to distinguish carefully among theorists in an area, rather than lumping all of them into a constructed camp and proclaiming an ideological target. For example, Farber and Sherry accuse radical multiculturalists of being a movement. But it is a category with no content: there are no adherents; no one signed up; no one attends "radical multiculturalist" conferences, self-labels as an RM, or writes articles espousing radical multiculturalist principles. It is a moniker that is being affixed by opponents; much like the "political correctness movement," it is an invention of its antagonists.\textsuperscript{147} Farber and Sherry have created an artificial category, classified certain individuals as belonging to it,\textsuperscript{148} and then accused the group of unreason.\textsuperscript{149}

Other traditionalists also succumb to the lumping trap. In \textit{The Bloods and the Crits}, a collection of book reviews in the \textit{New Republic}, Jeffrey Rosen lumps critical race theorists with the O.J. Simpson defense team and the author of the 1989 pamphlet \textit{The Blackman's Guide to Understanding the Blackwoman} (which, Rosen says, "urges black men to 'slap' black women 'across the mouth' when

\begin{footnotes}
\footnote{146. See Araujo, supra note 144, at 717 ("Humanitarian jurisprudence considers the law as an institution which seeks understanding of the views and concerns of all people. This jurisprudence attempts to realize its goal by arguing that a just society is founded on the realization that people have much in common, especially their mutual claims to the same human rights.").}


\footnote{148. Jay Mootz notes that who is omitted from the radical multiculturalist camp is as revelatory as who is included:}

Farber and Sherry barely mention the work of Pierre Schlag, one of the most outspoken philosophical radicals in the academy during the past decade, presumably because he is a white male who does not advocate for particular radical political causes. Schlag's work has strong affinities with the radical multiculturalists: he adopts a theory of social construction with uncompromising zeal and rejects the Enlightenment ideals of truth and objective merit . . . Farber and Sherry do not discuss Schlag and other philosophical radicals who do not fit into the prescribed story of angry "minorities" running amok on the basis of questionable, second-hand philosophy.


\footnote{149. Farber and Sherry do offer a disclaimer toward the end of their introductory chapter: "our critique is not meant as a broadside against all left-of-center legal theories. Feminist and critical theories come in many varieties. Our critique addresses some important positions taken by some key members of those groups, but certainly not by everybody in those groups." Farber & Sherry, supra note 5, at 112. But after that single cautionary line, what follows is a group assault. No line of demarcation is ever offered to divide "the radicals" from other "multiculturalists," and they often seem to aim at the larger group of critical theorists. In the last three pages of the book, after much of the castigation has occurred, Farber and Sherry narrow their critique of critical theories, saying "Our attack is aimed at the deconstructive strand, and even there only at the most radical forms of deconstruction." Id. at 48. But the damage has been done by then. Critical theories have been condemned as unreasonable.}
Richard Grenier makes the same mistake when he writes: "At a swift reading of the new Crits' scholarly texts it would appear that a black man can do no wrong, and that a white man can do no right—at least in his dealings with blacks."

These rhetorical strategies are little more than polemical attacks and definitions by caricature, with derision substituting for analysis: harsh, uncompromising, and often hyperbolic. These fallacies—emotivism, *ad hominem* arguments, and offering labels in lieu of reasons—diminish fundamental principles that have characterized historical rationality. What is blocked is not only the exploration of meaning, but also the road to inquiry. Not only are they an intellectually weak method of critique, these extremist interpretations lead to fundamental misunderstanding of the philosophical issues in a movement. Race issues for the critics thus become unalterably etched in, please excuse the expression, black and white. Thoughtful points about the gendering of various situations or the conflation of sex and gender are dismissed by a refusal to actively engage the issues.

Some traditionalists notice that critical theorists become angry when the stories they tell are misinterpreted. Unfortunately, they deduce from this that the messenger ought to be shot: they reject storytelling as a methodology because it may devolve into personal defenses and attacks. Of course to dismiss a methodology merely because it may lead to anger does not address its reasoning. The narrative form does not lead ineluctably to *ad hominem* arguments; those are one type of possible responsive argument that depend upon choices made by both the reader and the author. Perhaps a better approach would be to attempt to understand and critique the message. What is needed in discourse between traditionalists and critical theorists is a commitment to inquiry.

**CONCLUSION: INQUIRY AND INCLUSION**

Ultimately, one of the questions we should be asking is, where will critical theories, including narrative methodology, lead—toward inquiry, as proponents claim, or away from it, as traditionalists fear? The answer to this question depends as much on the readers of stories as it does on their authors. Authors certainly should offer stories to encourage inquiry, test assumptions and conclu-
sions, evoke new questions, and invite readers to look at situations from a fresh perspective. It is here that some critics offer useful suggestions to improve narratives, suggestions that comport with principles of inquiry and rationality. Farber and Sherry rightly call for stories to be bolstered with and tied to empirical evidence. They urge that stories be offered with morals—“explicit reasoning connecting them to a clear conclusion.”

Yet the harsher critics ultimately conclude that atypical experiential accounts and plainly fictitious stories, whatever their merits for consciousness building, aesthetic stimulation, or political maneuvering, are simply out of place in legal academic dialogue. This is a myopic understanding of narrative. Narrative, in logic and scientific method, stands for facts or evidence. Narrative is an essential epistemological category which gives meanings, connections, and interpretations to data. Indeed, storytelling may offer one of the best methods of doctrinal critique: “It is offered as encouragement to question, to shift perceptual framework, and to visit issues from different cultural, ethnic, economic, racial, and individual perspectives.” One ought not to be against stories, but against poor evidence: poorly told or weakly used stories.

Sadly most traditionalists lean toward wholesale rejection of narrative methodology because it “does not leave enough room for dialogue.” Dialogue, though—as the word etymologically implies—is a two-way street. Using narrative to move toward inquiry is not only an obligation owed by a storyteller, it is an obligation due by a reader. This obligation on readers includes distinguishing metaphorical stories from stories of actual experience, and asking different

155. See Hayman & Levit, supra note 31.
156. See, e.g., Mary I. Coombs, Outsider Scholarship: The Law Review Stories, 63 U. COLO. L. REV. 683, 712, 715 (1992) (those judging outsider scholarship should consider its “suitability for its chosen audience” as well as its illuminative ability, clarity, and originality); Edward L. Rubin, On Beyond Truth: A Theory for Evaluating Legal Scholarship, 80 CAL. L. REV. 889, 915, 919, 928, 935 (1992) (narratives should be evaluated phenomenologically, according to criteria of coherence, persuasiveness, significance, and applicability or relational ability).
157. This suggestion, though, is couched in a tone of mockery or derision, indicating Farber and Sherry’s reservations that narrative techniques are worth improving. Rhetorically asking how one can respond to first person stories, the authors say, “‘So what?’ is essentially a request for analysis, asking the author to link the story to some broader, more readily debatable conclusion, which might then replace the story itself as the basis for further conversation.” Farber & Sherry, supra note 5, at 89. Farber and Sherry seemed somewhat more favorable toward the prospects for narrative jurisprudence in their earlier articles. See Farber & Sherry, supra note 80, at 852-53 (“If a story is presented without any methodological discussion or effort to connect it to a thesis, both the author and the reader are more likely to allow it to slide by without rigorous questioning.... Stories are best suited, in our view, for enriching legal scholarship with concreteness, but they need to be supplemented with reason and analysis.”).
158. Farber & Sherry, supra note 5, at 86.
159. See supra text accompanying notes 77, 124.
162. Hayman & Levit, supra note 31, at 424.
163. Farber & Sherry, supra note 5, at 90.
purpose and credibility questions with respect to made-up stories, once-upon-a-time stories, parables, and accounts offered as factual renditions of events. And whether the stories are interpreted so as to move toward inquiry depends perhaps on whether the reader is receptive and perceptive.

The obligation should also be to read openly and charitably. Concern for other writers means, at a minimum, looking for commonalities and points of agreement, and taking the most charitable view of each argument rather than the extreme. If presented with a choice between a plausible reading of a theory and a hyperbolic, misleading interpretation of a theory, why pick the latter to refute? One should always consider the heart of the opposition's arguments and to try to be faithful to the representations of another's theory. Of course, this plea for civility may be misinterpreted as a plea for suspending academic rigor. It is precisely the opposite: a request for constructive engagement with the ideas of gay legal, feminist, and critical race scholars,164 and adherence to an epistemology of scientific, rather than common sense, reason in jurisprudential critique.

One final concern is whether traditionalists will be willing to engage in critiques that lead toward, rather than away from, dialogue. One device employed by traditionalist critics is to characterize critical theorists as a powerful group, a "movement."165 In reality, gay theorists, race scholars, and feminists are among the most marginalized voices in the legal academy.166 The critics compound the problem of muted voices by proclaiming them unworthy of attention. They silence not by heavy-handed censorship, but instead by censure—by professing the works of critical scholars "unreasonable."

Beyond All Reason begins with a quote by Salman Rushdie, "'I should be happier about this, the quietist option . . . if I did not believe that it matters, it always matters, to name rubbish as rubbish, that to do otherwise is to legitimize it.'"167 If what critical theorists are saying is "beyond all reason," as the title implies, or "rubbish," as the introductory quote states, it becomes acceptable, perhaps imperative, to ignore them. It is a way to halt even the most modest progress of outgroups into the academy and of justifying indifference toward people who are hardly ever heard.

165. FARBER & SHERRY, supra note 5, at 5, 3.
167. FARBER & SHERRY, supra note 5, at 3.