AFFIRMATIVE ACTION AND LEGAL KNOWLEDGE: PLANTING SEEDS IN PLOWED-UP GROUND

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I. INTRODUCTION

As twentieth century scholars we are pursued by the relativity of knowledge. Anthropologists, historians of science, feminist theorists, and critical legal scholars are among those attempting to understand the degree to which knowledge is contingent or autonomous, real or imagined, accidental or purposeful.[1] Those outside the traditional center of academia intuit that their personal knowledge — what they hold true and dear, what is real to them — often comes from their life experience as outsiders.[2] Women report the experience of a different reality, a different morality.[3] People of color find an affinity of knowledge in their separate

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[1] *See* Minow, *The Supreme Court, 1986 Term — Forward: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

[2] *See, e.g.*, THE AUTHORITY OF EXPERIENCE: ESSAYS IN FEMINIST CRITICISM (A. Diamond & L. Edwards eds. 1977).

"Outsiders" is used throughout the remainder of this article to encompass various outgroups, including women, people of color, poor people, gays and lesbians, indigenous Americans, and other oppressed people who have suffered historical under-representation and silencing in the law schools. "Outsiders" is an awkward term, used here experimentally to avoid the use of "minority." The outsiders collectively are a numerical majority in this country. The inclusive term is not intended to deny the need for separate consideration of the circumstances of each group. It is a semantic convenience used here to discuss the need for epistemological inclusion of the views of many dominated groups.

[3] *See, e.g.*, C. GILLIGAN, IN A DIFFERENT VOICE (1982). Gilligan's description of a separate female experience and other feminists' moral views are discussed and critiqued in Dubois, Dunlap, Gilligan, MacKinnon & Menkel-Meadow, *Feminist Discourse, Moral Values, and the Law — A Conversation*, 34 BUFFALO L. REV. 11 (1985) [hereinafter *Feminist Discourse*]. *See also* E. ABEL, WRITING AND SEXUAL DIFFERENCE (1982) (for a discussion of the unique attributes of female perception and writing).

caucuses that they do not find in predominantly white settings.[4] Knowledge at the academic center, however, stands monumental and unchanged by the separate knowledges groups of outsiders are nurturing at the academic margins.

Affirmative action, a concept we have accepted in respect to bringing new colors and shapes of human bodies into law schools, should also apply to our primary function as scholars: the exploration of human knowledge. The new individuals we are bringing to the law schools also bring new ideas about law. Instead of bending their minds to conform to the knowledge of the formerly-segregated law school, perhaps we should bend our shared legal knowledge to accommodate new visions.

II. OLD GARDENS: THE LANDSCAPE OF SEGREGATED LEGAL KNOWLEDGE

This proposal suggests specific action to end apartheid in legal knowledge. Apartheid is evident in the books shelved, in the journals read, and in the sources considered in the process of legal scholarship.[5] Recurring citations in prestigious legal writing,

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[4] An interesting example of this is the collection of papers presented at the Tenth National Critical Legal Studies Conference at Los Angeles, California, Jan. 7, 1987. The authors, who worked separately from their perspectives as legal intellectuals and people of color, came to remarkably similar conclusions. *See* Bracamonte, *Minority Critiques of the Critical Legal Studies Movement — Forward*, 22 HARV. C.R.-C.L. L. REV. 297 (1987); Dalton, *The Clouded Prism*, *id.* at 435; Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, *id.* at 301; Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, *id.* at 323; Williams, *Alchemical Notes: Reconstructing Ideals From Reconstructed Rights*, *id.* at 401; *cf.* Torres & Brewster, *Judges and Juries: Separate Moments in the Same Phenomenon*, 4 LAW & INEQUALITY: J. THEORY & PRAC. 171 (1986); Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WISC. L. REV. 219.

[5] The author's statement represents her impression based on observations of scholarly behavior; she invites empirical refutation. The example of the typical first-year law school curriculum indicates, for example, that the casebooks, hornbooks, and even the commercial study aids are overwhelmingly authored by white men. White men are over-represented both as authors and editors in prestigious legal journals, and the books considered imperative for the scholar's bookshelf are similarly segregated. For a collection of feminists' views on segregated knowledge in the various disciplines, see *Reconstructing the Academy*, 12 SIGNS 203–409 (1987) (issue of the journal "dedicated to reclaiming our alma mater" and offering a collection of readings "about ourselves as educators and as students of women's experiences," *id.* at 205); *see also* FOR ALMA MATER: THEORY AND PRACTICE IN FEMINIST SCHOLARSHIP (P. Treichler, C. Kramarae & B. Stafford eds. 1985).

particularly in theoretical writing, are largely segregated, as Richard Delgado noted in his article, *The Imperial Scholar*.[6] This segregation results in a legal knowledge uninformed by the rich and provocative knowledge of outsiders.

One can discern the landscape of segregated legal knowledge by reading the law reviews of elite law schools. Certain citations appear with such frequency that they have become *de rigueur* for anyone wishing to engage in discourse within that particular academic realm.[7] While women authors are, commendably, increasingly represented in the articles and citations, an informal review indicates that they are cited with far less regularity than men. People of color fare even less well than women in citation counts, following the familiar pattern of affirmative action in admissions and employment: white women are integrated first, and in limited numbers, followed by men-of-color, then women-of-color, each at dramatically decreasing rates.[8]

Citation counts are a standard measure of academic prestige.[9] Scholars proceed in research and information-gathering by following a trail of footnotes.[10] In addition to following footnotes, people cite what they have read and discussed with their academic friends. When their reading and their circle of friends are limited, their citations become limited. The citations then breed further self-reference. This process ignores a basic fact of human psychology: human beings learn and grow through interaction with difference, not by reproducing what they already know.[11] A system of legal education that ignores outsiders' perspectives artificially restricts and stultifies the scholarly imagination.[12]

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[6] Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

[7] A particular example of this is THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1970).

[8] *See* Chused, *Faculty Parenthood: Law School Treatment of Pregnancy and Child Care*, 35 J. LEGAL EDUC. 568, 572 (1985) (statistics of the number of women in law teaching); Lawrence, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 20 U.S.F. L. REV. 429 (1986) (discussing the absence of minority law teachers).

[9] *See, e.g.*, A. Fiedler & C.D. Hart, *Stratospheric Aerosals: The Transfer of Scientific Information*, 8 LIBR. & INFO. SCI. RES. 243 (1986) (study of the use of citations following a single paper).

[10] *Id.*

[11] J.B. MILLER, TOWARD A NEW PSYCHOLOGY OF WOMEN (1976). *See also* Axtell, *Forked Tongues: Moral Judgments in Indian History*, 25 PERSPECTIVES: AM. HIST. ASSOC. NEWSL., Feb. 1987, at 10 (reproducing existing knowledge can make us sloppy scholars, "unwitting dupes and victims of our sources," *id.* at 10).

[12] Segregated scholarship also conveys the implicit message of the inferiority of the

When outsiders' perspectives are ignored in legal scholarship, not only do we lose important ideas and insights, but we also fail in our most traditional role as educators. We fail to prepare future practitioners for effective advocacy and policy formation in a world populated by women and men of differing points of view. We also fail in traditional affirmative action goals.[13] Recruitment and retention of women and people of color in faculty positions, for example, are exceedingly difficult when such candidates perceive the law schools as hostile worlds of tilted knowledge, and where their scholarship fails to claim the attention of dominant legal academicians.[14]

III. PLOWING UP THE GROUND:[15] ALTERING THE LANDSCAPE OF LIMITED LEGAL KNOWLEDGE

A theory of affirmative action scholarship is worthless without a method of implementation. This section sets forth concrete steps toward the desegregation of legal knowledge.

Established scholars can start the process of eradicating apartheid in legal knowledge by making a deliberate effort to buy, order, read, cite, discuss, and teach outsiders' scholarship. When buying twenty books in a newly-discovered bookstore, for example, the affirmative action scholar should ascertain that some of them are written by white women, women of color, and men of color.[16] If none are available, a formal inquiry is appropriate. The scholar can put pressure on the bookselling and publishing

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excluded scholarship. Like segregation in housing, schooling, and private clubs, segregation in citations denies the worth of the excluded groups. *See* H. KITANO, RACE RELATIONS 95–96 (1980) (the message of segregation is inferiority).

[13] *See* McMillen, *Universities are Lagging in Hiring Women and Blacks For Faculty Jobs, 2 Studies Find*, CHRONICLE HIGHER EDUC., July 8, 1987, at 11.

[14] *Cf.* Austin, *Resistance Tactics for Tokens*, 3 HARV. BLACKLETTER L.J. 52 (1986) (discussing the alienation of outsiders in law school faculties).

[15] To quote Frederick Douglass: "Those who profess to favor freedom and yet deprecate agitation . . . want crops without plowing up the ground, they want rain without thunder and lightening. They want the ocean without the roar of its many voices." W. MARTIN, THE MIND OF FREDERICK DOUGLASS 175 (1984).

[16] Bell Hooks reminds us that white women and women of color are different in some ways, similar in others. B. HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM (1981).

industries to supply outsiders' scholarship. Quotas will help the particularly recalcitrant buyer.[17]

Similarly, the affirmative action scholar will ensure that some of the materials in a stack of books and articles set aside for weekend reading are authored by outsiders. When writing an article or book, the newly-conscious scholar might consider ways in which outsider scholarship could enhance the piece. Once one begins a formal reading program in outsider scholarship, the citation goal is easily met. As scholars, we are inspired by what we read, and the affirmative action reader will delight in the new insights gleaned from writers previously unknown. Citing outsider scholarship is a political act. Tenure and promotion review committees typically ask whether a candidate's work is cited. Readers look to citations to determine whether an article speaks to them. When Martha Minow, a Harvard Law School professor, cites Audre Lorde, for example, she is saying to women, to people of color, and to lesbians "I am talking to you. I am learning from you."[18] This act brings outsiders into the world of "Harvardian" discourse and encourages them to continue writing. It challenges other readers to expand their sources and prevents the ghettoization of outsider writing.

Scholars can also engage in affirmative action when writing checks for dues and subscriptions by searching out fora that attract outsiders' work,[19] and by learning to read documentary sources other than law review articles. Some of the best theoretical statements are found in position papers, briefs, speeches, op-ed pieces, and other non-academic publications.[20] Outsiders' scholarship is often front-line scholarship.[21] The luxury of law

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[17] Quotas are suggested here in the literal sense. Examples include: 1. *Numerical Goals*: I will buy five books by women of color this year. 2. *Alternating Selection*: For every book I buy authored by a man, I will buy one authored by a woman. 3. *Moratoriums*: I will not buy any mainstream books this summer until I make corrections in my deficient knowledge of outsider scholarship. For a discussion of the moral and theoretical basis of affirmative action, see Edley, *Affirmative Action and the Rights Rhetoric Trap*, in THE MORAL FOUNDATIONS OF CIVIL RIGHTS 56 (R. Fullinwider & C. Mills eds. 1986).

[18] Minow, *supra* note 1, at 63, 64, 79.

[19] SIGNS is a high-academic source of feminist scholarship. THE BLACK LAW JOURNAL and THE HARVARD BLACKLETTER JOURNAL frequently publish works by black legal scholars.

[20] *See, e.g.*, H. APTHEKER, A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES (1965).

[21] Leading Afro-American historians, for example, have often worked outside the academy. *See* Harris, *The Flowering of Afro-American History*, 92 AM. HIST. REV. 1150

review writing is not always available to scholars whose legal and theoretical skills are called first to battle against racism and sexism. If originality, exhaustive research, theory-building, conceptualization, doctrinal facility, and historical perspective are the measures of quality legal scholarship, then briefs in test-case litigation qualify as scholarship.[22] To the extent that briefs frame cases and cases become raw material for casebooks and law review articles, many writers are inadvertently failing to attribute the proper origin of innovations in legal concepts and changes in the law.

In addition to enlarging the scope of what one reads, cites and teaches to include the works of outsiders, scholars and others in the legal profession can promote affirmative action goals as organizers of meetings, panel discussions, and symposia. Inviting an outsider to present a paper, particularly if publication is likely to follow, is an empowering gesture that will result in a more productive experience for all participants.[23] Those privileged with frequent invitations to participate in such events might develop the habit of asking whether members of under-represented groups will also receive invitations, and might also advocate strategies for ensuring outsider attendance. Those attending academic meetings can call attention to absences that reveal ideology by questioning the intellectual legitimacy of a panel discussion devoid of a female voice, or of a conference unattended by people of color.

Editors, librarians, book reviewers, and publishers can also participate in affirmative action scholarship, and consumers of their services can request that they do so. Law review editors, for example, should take special care to invite outsider scholars

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(1987). This tradition of active and involved historical inquiry may explain why high-scoring Black high school students scored highest of *all* students on a history test administered to measure the extent of students knowledge. *See* D. RAVITCH & C. FINN, WHAT DO OUR 17-YEAR-OLDS KNOW: A REPORT ON THE FIRST NATIONAL ASSESSMENT OF HISTORY AND LITERATURE 136 (1987).

[22] Valuable examples of non-law review scholarship include Plaintiff's Petition for Writ of Error Corum Nobis and Memorandum of Points and Authorities, Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984) (No. CR-27635W) (written by the predominantly Asian-American *Korematsu* Legal Team).

The Amici Curiae Brief of the Feminist Anti-Censorship Taskforce, *et. al.*, American Booksellers Ass'n Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (No. 84-3147), is an excellent treatment by feminists of the first amendment/pornography dilemma.

[23] In this regard the author would like to thank the Harvard Women's Law Association and the Australian Law and Society Association for organizing conferences on gender issues at which preliminary versions of this essay were presented.

to contribute, and book reviewers should analyze, critique, and bring to the fore deserving outsider works.

Law students, as well, can exercise affirmative action scholarship. Students are perhaps unaware of the power they hold as the fee-paying consumers of legal education. Students can inquire of professors and administrators whether outsider scholarship was considered in the compilation of required readings.[24] They can conduct surveys, perhaps as an independent study project, exploring the degree of segregated knowledge in the law schools. Empirical study of the assigned readings in the first-year curriculum, for example, might reveal a degree of segregation previously unnoticed by the faculty. Students can organize fora to bring outsider voices to law schools, and they can take responsibility for their own education, seeking out and studying the materials law schools fail to hand to them.[25] The habit of complicity, of accepting without challenge what one is provided by established power, is dangerous and anti-democratic. Law schools are relatively safe places to risk conflict and to develop the habit of self-education.[26]

Finally, affirmative action in legal scholarship requires new skills of listening. The voices bringing new knowledge are sometimes faint and self-effacing, other times brash and discordant.[27] To the extent our past complicity in academic segregation has contributed to these different tones, we should strive to understand their origin and listen carefully for the truth they may hide.

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[24] Women and people-of-color often feel alienated in law school classrooms as they struggle to achieve academic success while simultaneously questioning the legitimacy of ethnocentric and androcentric legal institutions. Duncan Kennedy addresses this dualism in LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (1983). It is amazing that anyone with this dual agenda manages to obtain a law degree. Finding in their assigned readings an article by a feminist or a member of their own group, even if the purpose of inclusion is to invite classroom critique, can be a life preserver in a sea of irrelevancy for many students.

[25] For example, in 1982, the Harvard Law School Third World Coalition organized a course on racism and law, bringing scholars of color from around the country to present lectures. Other conferences organized by student groups to bring outsider scholars to the fore include: The Harvard Women's Law Association Conference, Equality in Fact: Using Legal Education to Combat Racism and Sexism in the Law, May, 1987; The Yale Law School Third World Women Collective Conference, April, 1988; and the annual Asian-American Law Students Convention.

[26] *See* Worden, *A Student Polemic*, 16 N.M.L. REV. 573 (1986).

[27] Professor Harry Kitano suggests that minority group writers, having suffered under racist conditions, "are likely to write with great emotion and little patience." H. KITANO, *supra* note 12, at 8.

Implicit in this proposal is the belief that intellectual inquiry is a valid adjunct to movements for positive social change. I do not suggest that scholars are the vanguard of such change. They are not. The creation and dissemination of collective knowledge is, however, an important element of social transformation. Scholars must continue to do what they do best in a way that will promote an end to all forms of oppression. Only a privileged minority of world citizens receive a university education. Exercising that privilege without thought to inclusion of outsiders supports the continuation of an exclusionary system, and deprives all scholars of the full breadth of intellectual stimulation and rigor we require.

IV. NEW GARDENS: THE LANDSCAPE OF INTEGRATED LEGAL KNOWLEDGE

It is difficult to imagine a landscape of integrated legal knowledge, for we have never brought together all the hands we need to create that landscape. Feminist theory tells us that the outsider's voice is likely to change the way we understand the world. We do not yet know whether the difference women bring is simply a temporal reaction to patriarchy or whether it is, as some hope, a revolutionary difference that will re-make law to bring about a more humane world.[28] We will not know what we can learn until we use affirmative action in scholarship to welcome newcomers to the legal profession.

The new voices will emphasize difference. Confronting difference will give new vigor to theoretical debate. The outsiders' different knowledge of discrimination, for example, is concrete and personal.[29] To the extent legal discourse is distillable into conflicts over distribution of resources, the voice of the poor will force us to discuss such conflicts with full awareness of the reality of American poverty.

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[28] Catherine MacKinnon argues that true women's morality is unknowable given the reality of patriarchical dominance. In her words, women are not free to articulate their own particularities while "this foot [is] on our necks," *Feminist Discourse, supra* note 3, at 28.

[29] This point was made repeatedly in the comments on feminist jurisprudence published in the Association of American Law Schools Section on Jurisprudence Newsletter, Nov. 1987.

Standard jurisprudential discourse, with its tendency to abstraction, will be forced to confront the harsh edge of realism. True affirmative action in law schools requires that the perspective of outsiders is considered as a matter of course in all discussions of doctrine and policy, and is expressed freely without fear of being labeled irrelevant or unrealistic. An affirmative action law school would respect those views by including them in readings, citations, symposia, library acquisitions, conferences, and classroom discussion. When we do this, we will live and work a different kind of academic life, one more invigorating and surprising than that we live now.

V. WEEDS: OBJECTIONS TO AFFIRMATIVE ACTION IN LEGAL SCHOLARSHIP

In the spirit of the new legal scholarship that allows for self-doubt,[30] this section considers troublesome objections to the concept of affirmative action scholarship.

First, an attempt to seek out and use outsider scholarship can appear patronizing and can reveal to others an embarrassing lack of knowledge. Do we grant unwelcome privilege to outsiders by seeking out their work, exercising an infatuation with difference that serves only to reinforce existing concepts of otherness? Do we maintain a hierarchical relationship of patron and token outsider by choosing whom to include?

The danger of missing out altogether on an important body of knowledge seems, on balance, a greater risk. The writers of the Harlem renaissance struggled with the conflicting need for and desire to reject white patronage. For example, as offensive as white preference for "dialect" poetry was, the Harlem writers continued to seek publication in white-dominated presses.[31] The white patronage they exacted helped develop and preserve an American art and literature integral to our cultural history. My

[30] *See* Gordon, *Critical Legal Studies Symposium: Critical Legal Histories*, 36 STAN. L. REV. 57 (1984) (discussing the self-conscious critique of critique as a standard part of the sonata-like form of Critical Legal Studies).

[31] The patronage problem of Harlem renaissance writers is discussed, *inter alia*, in G. HULL, GIVE US EACH DAY: THE DIARY OF ALICE DUNBAR-NELSON (1984); A. RAMPERSAD, THE LIFE OF LANGSTON HUGHES (1986).

conclusion from this historical incident is that the risk of offensive patronage and of inevitable cross-cultural misunderstanding was worth the benefit to both Black culture and mainstream American culture that is the legacy of the Harlem renaissance.

Thinking people can avoid the grossest offenses by creating fora for discussion of the patronage dilemma and by learning a new academic etiquette. We might stop saying "American" when we mean "white" or "women" when we mean "white women." We might learn the basic facts of the experience of outsider groups. We might learn why a *sansei* cannot speak Japanese, what Black scholars are saying about capitalizing "Black," and how many women in a class of 100 are probable victims of sex abuse. These are the things we learn from exposure to difference. We learn the facts and the code of behavior that relieve us from constant reassessment of our ability to commune successfully with one another. Until we acquire these new skills — skills we have been deprived of by our own segregated backgrounds — we will wound and stumble and long for retreat into the familiar singularity of segregated life.

In addition to the discomfort arising from our lack of social skill at integrated life, there is the dual danger of over-rating or under-rating outsider work. Insiders may feel they are not free to criticize outsider scholarship. I have noticed in myself, for example, an immediate reaction of rage when someone tells me they did not like the *Civil Rights Chronicles*.[32] Where does this rage come from? Does it mean that I presume anyone who does not have a near-religious experience upon reading Derrick Bell is a racist? This would be an unfair assumption, and an over-protective attitude toward Professor Bell, whose stature as a scholar can and will survive public criticism. While "not bad, considering" and "bad, such a pity" comments can drip with racism and sexism, fair public and private criticism is valuable to all scholars. In the legal profession, recognition is gained as often by critique as by praise. Witness the citation frequency and concomitant must-read status accorded Rawls and Dworkin in Critical Legal Studies literature, or of Duncan Kennedy in the writing of the Right. Fair criticism is thus consistent with affir-

[32] Bell, *The Supreme Court, 1984 Term — Forward: The Civil Rights Chronicles*, 99 HARV. L. REV. 1 (1985).

mative action goals. Intellectual criticism directed against vulnerable, isolated, untenured, and disempowered scholars, however, carries different political implications than criticism of outsider scholars surrounded by a critical mass of other empowered outsiders. Fair criticism requires the reader to understand a particular genre before criticizing, and to strive for freedom from race/class/gender/culture bias.[33] It requires as well an active commitment to numerical affirmative-action hiring.

Exposure will chip away at the walls between us, and academic insiders and outsiders will benefit from scholarly exchange across those crumbling walls. The more outsider scholarship critics read, the more informed their criticism will be. Scholarship arises in a context. Just as the full impact of James Joyce or Igor Stravinsky becomes clear only after understanding the state of the art they responded to, so the full sweep of *The Civil Rights Chronicles* becomes evident only within the context of Afro-American history, Afro-American rhetorical style, and Bell's previous work.

Concern about overburdening or imposing upon outsider scholars might also arise in acting upon this proposal for affirmative action scholarship. Given low numbers of outsider scholars, is it fair to ask them repeatedly to participate in symposia, to critique drafts, or to review books? Perhaps it is best to leave them alone to write their tenure pieces. This concern carries two false assumptions. First is the assumption that there are only a handful of outsider scholars to share the burdens of presenting alternative perspectives. While there are fewer than one would hope, there are increasing numbers of white women and people of color in law teaching.[34] Active inclusion of these scholars will help end the myth, particularly prevalent at elite law schools, that outsider law professors are as rare as California condors.

The second false assumption is that active participation in the scholarly community will overburden outsider scholars and pre-

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[33] For an example of an informed critical response to Black nationalist poetry, see J. Jordon, *Cultural Nationalism in the 1960's: Politics and Poetry*, in RACE, POLITICS, AND CULTURE: CRITICAL ESSAYS ON THE RADICALISM OF THE 1960's (A. Reed ed. 1986).

[34] The Association of American Law Schools is a good source for locating outsider legal scholars. *See* "Minority Law Teachers," in ASSOCIATION OF AMERICAN LAW SCHOOLS, DIRECTORY OF LAW TEACHERS, 1986 - 87, at 1053 (listing of minorities in law teaching); ASSOCIATION OF AMERICAN LAW SCHOOLS, ASSOCIATION HANDBOOK, SEPTEMBER 1987, at 74–76 (listing of section chairpersons of the Minority Groups and Women in Legal Education sections of the Association of American Law Schools).

vent them from doing their own important work. The opposite may well be true. Scholars attempting to produce articles alone in the law library sometimes fail because of the very isolation that is intended to promote writing. Writing is communicating, and it comes with natural ease and enthusiasm when the will to tell is strong. The will to tell, the will to teach, is roused when the scholar is actively, even angrily, engaged in discourse with other scholars. Thus, the rounds of symposia, retreats, and public speaking — and the concomitant feeling that others care about one's point of view — are significant precursors to good scholarship.

Another barrier to affirmative action in scholarship, sometimes called the collegiality problem, is the conflict, pain, and embarrassment that accompanies the introduction of difference. While we can strive to soften the edges of this conflict, we cannot avoid it, for the very goal of affirmative action is to change the way things are. Outsiders will expose and become targets for racism, sexism, and other "isms" more easily buried when we pretend that law school revolves around narrowly-defined discourse. Outsiders will feel the characteristic frustration that arises when one is asked to educate others about what the others should already know. Conversely, white men will experience the terror of otherness when new voices arrive at law schools. No longer the referent of everyone else's difference,[35] they may feel vulnerable and marginalized as outsiders grow in power; they may perceive themselves as objects of outsiders' bitter fantasies of revenge. Audre Lorde once said in response to a white woman's guilt and confusion in the face of black anger: "I do not exist to feel her pain for her."[36] While I strive to understand and respect her statement, I do think we all must accept some responsibility for the pain we generate when we shake ourselves out of the casual racism and sexism that has pervaded our institutional homes.

We must also consider the dangers of complacency, assimilation, and homogenization. Once we have incorporated all voices we may still remain keepers of law schools full of smart people talking to each other, divorced from the real world of struggle. Academe may prove a mellow monster amiably capable of draw-

[35] Minow, *supra* note 1.
[36] A. LORDE, SISTER OUTSIDER: ESSAYS & SPEECHES 125 (1984).

ing angry outsiders into its maw, where they will rest quietly, no longer a threat to existing power. I do not think this will happen. Assimilation is not possible in a world that is, unfortunately, still poisoned by resilient racism, sexism, class bias, and homophobia. Outsiders are all too frequently reminded of their difference. They are likely to remain aware and active *qua* outsiders until Frederick Douglass' dreamed of millenium — the time of true equality that is the reward for constant struggle.[37]

The dangers of intellectual appropriation, imperialism, and colonization also deserve attention. If mainstream scholars take the admonition to read and cite outsiders in their own work seriously, will they thereby enhance their own academic prestige by playing new music to an old audience? Scholarship, to an extent, is appropriation with attribution. The danger of intrusion and preemption of outsider prerogatives necessitates an examination of the possibility of exploitation. Is it exploitative, for example, for an Asian-American to rely heavily on Black sources or for a white scholar to build an academic reputation writing about indigenous peoples? My answer thus far is that telling the story is important, and the voice-once-removed is sometimes the only one available to tell that story in the universities. When using the experience of another, careful attribution, acknowledgment, and disclaimer are appropriate, as well as an active commitment to bringing the outsiders themselves into the academic circle and to sharing any benefits accruing from publication.

Finally, any proposal for affirmative action scholarship will draw resistance from those who rightfully treasure academic freedom and who fear tyranny of any kind, including the tyranny of outsider pain. Thus it is necessary to clarify this proposal. The project proposed here is not one of establishing hierarchies of pain, or superiorities of difference. Rather it is one of recognizing difference and thereby advancing our goals as scholars and political beings. Outsiders might want to discuss among themselves whether there is such a thing as reverse elitism, and learn to recognize when their frustration at insiders' inability to empathize is itself a conditioned response of the colonized, made irrespective of the merits of the insiders' efforts. As to insiders who feel

[37] Douglass' conception of the millenium is developed in Waldo Martin's outstanding intellectual biography of Frederick Douglass, W. MARTIN, *supra* note 15.

coerced, no one is required to follow this proposal. The skeptical may wish to try it, with artificial enthusiasm, to see whether it works for them. Like the city child planting a first garden, the skeptic may find something wonderful and obvious that was unknown before.

VI. CASE STUDY: ONE TEACHER'S EXPERIENCE

This essay closes by offering a few examples of how these ideas have worked for the author.

On a recent visit to Australia, I reminded myself of affirmative action scholarship and sought out writing by aboriginal people. The commercial and university bookstores had thin collections of materials pertaining to aboriginal people, and had almost no works authored by aboriginal people themselves. Complaints about this finally led me to Black Books, a small store operated at an aboriginal college. Even at Black Books all the books on aboriginal legal claims and land use, my research interests, were written by enlightened whites. The clerk, sensing my frustration, offered assistance, pointing out a section overflowing with poems and fiction by Black Australian writers. These works contained what I was looking for: insight into the jurisprudence of aboriginal people — their ideas about land, about law, about government, about justice. Later, I realized, the best sources I have found for an indigenous voice are poems. Poets can self-proclaim their status as writers. Academic writers cannot. Semantically we differentiate between writers (unpublished) and authors (published), but a poet is a poet, regardless of commercial or state-defined status. Aboriginal writers, coming from a rich oral tradition and finding themselves excluded from academic writing, have become powerful poets and fiction-writers.[38]

This and other efforts to find and read outsider work led naturally to using this work in the classroom. In my American Legal History class, I have used excerpts from a book discovered

[38] *See, e.g.*, J. DAVIS, THE FIRST-BORN AND OTHER POEMS (1983); C. JOHNSON, THE SONG CIRCLE OF JACKY AND SELECTED POEMS (1986); K. WALKER, MY PEOPLE (1970); A. WELLER, GOING HOME (1986).

through a self-imposed bookstore quota rule.[39] The book is *Selma, Lord, Selma*,[40] an oral history of two Black women who were children during the voter registration struggle in Selma, Alabama. I use this excerpt in class first to describe the civil rights movement to students who have no personal recollection of it, and secondly to provoke a discussion of the power of rights rhetoric versus the limits of liberal legalism. Students in each of three classes shed real tears over this story of two children who decided on their own, without parental approval, to join the life-threatening confrontation at Edmund Pettus Bridge in order to win the right to vote for Blacks. This personalized account forces students to confront the power of legal ideals in a concrete way, and provides a useful counterpoint to articles challenging the efficacy of law reform. I know of no comparable piece for making this point. It is no accident that it took the words of two Black women to evoke that response.

The only other time I have seen students cry in class was when I read an Alice Walker essay on death and dying in contemporary America[41] to illustrate a point in a torts class. The topic for the class was the underlying rationale for compensating wrongful death. The class was asked whether the rationale relates to an emerging human rights standard of dignified death. The Walker essay describes the death of an elderly Black woman who has lived a full life of work, friendship, gardens, and grandchildren. Her friends and family gather around her as she dies quietly in her home. Walker's female understanding of what she calls an "excellent death" is a good foil for the standard analysis of wrongful death as compensation for economic loss to the survivors. Her reverence for death from old age provides a Black perspective as well: death from old age comes less often to the Black community, where police violence, substandard health care, crime, industrial accidents, and the ravages of poverty take disproportionate numbers of young lives — young lives devalued by

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[39] *See supra* note 17.

[40] S. WEBB & R.W. NELSON, SELMA, LORD, SELMA: GIRLHOOD MEMORIES OF THE CIVIL RIGHTS DAYS (1980).

[41] Walker, *On Excellence: America Should Have Closed Down on the First Day a Black Woman Observed that Supermarket Collard Greens Tasted like Water*, MS., Jan. 1985, at 53. The essay is short enough to read aloud in class, although the effect is so profound that it may be better to let students read it on their own time.

the standard lost-future-earnings measure of damages. The broadened perspective of torts issues that this article provided was a useful supplement to the casebook.

In addition to classroom material, affirmative action scholarship has helped me to think about law, justice, knowledge, and history in ways that have excited me and fueled the desire to write. It has led me to new environments where I was welcomed with open arms, and to others where I was told angrily "go study your own acts of oppression, leave us alone." That anger never fails to wound; it is so familiar, and yet, I am told, not mine to know or understand. That anger first brings terror: it may be true, after all, that each of us is ultimately and coldly alone in this life. Subsequently, however, it brings resolve to learn more and to work harder to defeat the terror. The voices of outsiders, including the angry voices, speak with an urgency that pushes my pen and makes me a scholar, indebted to my sisters and brothers for what they have taught me.

In summary, for one law teacher, affirmative action in the pursuit of knowledge has quickened the chase, has worked in the classroom, and has brought forth this essay/proposal. We are intellectual workers.[42] Our shared words can end apartheid on our bookshelves and can help to banish it from our lives.

VII. CONCLUSION

A gardening handbook warns us to remove the seed heads of phlox every spring and plant anew the hybrid seed.[43] Left alone to reseed, the phlox will soon revert to the old muddy-purple, disappointing the gardener who first planted a rainbow of lemon, white, garnet, lavender, and apricot. We must tend our garden

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[42] Anne Fagan Ginger, scholar, activist, and author of, *inter alia*, RELEVANT LAWYERS: CONVERSATIONS OUT OF COURT ON THEIR CLIENTS, THEIR PRACTICE, THEIR POLITICS, THEIR LIFESTYLE (1972), uses the term "intellectual workers" in urging law students to use their legal training in their own brand of activism.

[43] J. CROCKETT, CROCKETT'S VICTORY GARDEN (1977).

lovingly, lest we revert to the boring world of one color, one idea. Would that only aesthetics were at stake. Law, unfortunately, mediates much more in our America. We are a people striving for peace and economic security in a world that possesses neither. We cannot afford to exclude the strengths of any of us in the difficult days ahead.