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# Deconstructing the Distinction Between Bias and Merit

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*In this article Professor Roithmayr attempts to develop in the context of law school admissions a theoretical argument from deconstruction to support the radical critique of merit. The radical critique, espoused primarily by Critical Race Theorists and radical feminists, argues that merit standards disproportionately exclude white women and people of color because merit standards were developed by dominant social groups, in ways that have disproportionately benefited their descendants. Using a critical history of law school admission standards, as well as a deconstructive reading of a defense of merit offered by Professors Daniel Farber and Suzanna Sherry, Professor Roithmayr deconstructs the distinction between merit standards and social bias, to argue that merit standards necessarily embody race-conscious social preferences existing at the time the standards were developed. Reviewing the history of law school admissions standards, she demonstrates that choices about what constitutes socially valuable ability in the legal profession and legal education historically were made in the context of the profession's explicitly race-conscious effort to exclude immigrants and people of color. Professor Roithmayr then proposes to use deconstructive and critical historical insights about merit and bias to modify Title VI doctrine to reflect the fact that merit standards historically have depended on and deferred to race-conscious social bias.*

The mind funnels of Harvard and Yale are called standards.  
Standards are concrete monuments to socially accepted

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subjective preference. Standards are like paths picked through fields of equanimity, worn into hard wide roads over time, used always because of collective habit, expectation and convenience. The pleasures and perils of picking one's own path through the field are soon forgotten; the logic or illogic of the course of the road is soon rationalized by the mere fact of the road.

—Patricia A. Williams<sup>1</sup>

The meritocratic ideal is that positions in society should be based on the abilities and achievements of the individual rather than on characteristics such as family background, race, religion, or wealth. This ideal requires that merit be objective in the sense of being definable without reference to those personal characteristics.

—Daniel A. Farber and Suzanna Sherry<sup>2</sup>

The results from Proposition 209 are finally in and the numbers are quite dramatic. Administrators on law school campuses in the University of California system have released the demographic profiles of the first class of students admitted and enrolled under the edicts of Proposition 209, which precludes the use of race in educational admissions decisions. Not surprisingly, the number of Latino/a and African-American students enrolled in U.C. law schools had dropped sharply.<sup>3</sup>

1. PATRICIA A. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 99 (1991).

2. DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997) [hereinafter FARBER & SHERRY, *BEYOND ALL REASON*]; see also Daniel Farber and Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CALIF. L. REV. 853, 858 (1995) [hereinafter Farber & Sherry, *Radical Critique of Merit*].

3. The following figures reflect a comparison between admissions and enrollment figures for 1996 (under admissions policies that could consider race as a factor) versus 1997 (under new admissions policies that prohibited considering race as a factor). At the University of California-Davis School of Law, admissions for Latinos/as dropped from 8.28% (69) to 6.21% (50); for African Americans, admissions dropped from 3.24% (27) to 2.49% (20). In a class of 172 enrolled, 6 (3.48%) were Latinos/as and 5 (2.9%) were African American. Letter from Sharon Pinkney, Director of Admissions at the University of California-Davis, to Joe Jaramillo, MALDEF, September 5, 1997 (on file with author).

At the University of California-Los Angeles School of Law, admissions for Latinos/as dropped from 10.7% (108) to 7.34% (74); for African-Americans, admissions dropped sharply from 10.3% (104) to 2.08% (21). Enrollments for Latinos/as dropped from 14.65% (45) to 10.23% (39); for African Americans, enrollment dropped from 6.2% (19) to 2.62% (10). Chart, UCLA School of Law Statistics 1980-97, September 4, 1997 (on file with the author).

At the University of California-Berkeley School of Law (Boalt Hall), admissions for Latinos/as were cut almost in half from 9.6% (78) to 4.9% (39); for African-Americans, admissions dropped sharply from 9.2% (75) to 1.8% (14). Seven Latinos/as currently enrolled this year (2.88% of new

But even the most prescient of commentators could not have predicted that the University of California-Berkeley School of Law (Boalt Hall) would not enroll a single African-American student admitted for the 1997-1998 year.<sup>4</sup>

Reaction to the numbers has been mixed. Supporters of affirmative action point out the obvious, that the new admissions policy has disproportionately excluded people of color from University of California and Texas law schools, and fear that the new admissions programs will resegregate these institutions.<sup>5</sup> Opponents of affirmative action argue that the new policy is appropriately meritocratic and race-neutral, and that the policy's disproportionate impact on applicants of color can be explained by poor schooling or cultural differences.<sup>6</sup> Those explanations notwithstanding, the U.S. Department of Education's Office of Civil Rights recently has agreed to investigate whether the SP-1 admissions process, as the new process is called, violates Title VI, which prohibits discrimination on the basis of race or ethnicity in higher education.<sup>7</sup>

In many ways, what is at stake in the California affirmative action debate is not just quibbling over the fate of the so-called "talented tenth." Rather, the controversy focuses on a concept at the heart of contemporary race politics in the idea that merit and bias are opposites, and that merit is a race-neutral concept, while bias is race-conscious. As

enrollees) (seven deferred from the previous year). Letter from Edward Tom, Director of Admissions, Boalt Hall to Joe Jaramillo, MALDEF, August 25, 1997 (on file with the author).

At the University of California-Hastings School of Law, admissions for Latinos/as dropped from 9.5% (169) to 6.3% (81). For African Americans, admissions dropped from 5.2% (92) to 3.0% (38). Enrollments for Latinos/as dropped from 6.7% (43) to 6.0% (19), and for African Americans from 5.3% (26) to 2.8% (9). Letter from Angele Khachadour, Office of the General Counsel, UC-Hastings Law School to Joe Jaramillo, MALDEF, September 3, 1997 (on file with author).

4. See Letter from Edward Tom, *supra* note 3. Only one African-American student, Eric Brooks, who had been admitted the previous year, but had deferred enrollment for a year, was enrolled for the 1997-98 academic year. See *id.*

5. *Freshman Fallout*, Houston Chronicle, August 24, 1997 at 1 (Robert Berdahl, speculating that Texas public schools enrolled fewer minorities because of fears of resegregation).

6. According to University of Texas law professor Lino Graglia, "Black and Hispanic people do not do as well on standardized tests and come from cultures in which 'failure is not looked upon with disgrace . . .'" *UT Group Praises Hopwood Ruling*, AUSTIN-AMERICAN STATESMAN, September 11, 1997 at B1. Law school enrollments in Texas dropped significantly after Attorney General Dan Morales interpreted the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), to bar affirmative action and retention programs in law schools. In particular, enrollments at Texas public law schools dropped by the following percentage points for the groups listed: Black-23%; Latino-19%; Asian-24%; American-Indians-53%. *Law, Medical Schools Hunting For Minorities*, AUSTIN AMERICAN STATESMAN, October 17, 1997 at C1.

7. *UC Law Schools Face Discrimination Investigation*, LOS ANGELES TIMES, July 15, 1997 at A3. Title VI, 42 U.S.C. SECTION 2000d (1994) (Title VI of the Civil Rights Act of 1964) [hereinafter "Title VI"], prohibits discrimination on the basis of race in federally funded education programs.

is reflected in the opening citation, the conventional understanding of merit assumes that merit standards measure an individual's potential ability to produce something of social value—good lawyering, or high performance in law school, for example—by assessing certain traits, qualities, or skills that reflect potential ability. Law schools admit students on the basis of their grades and LSAT scores—on their “merits”—because admissions committees think that a high score on the LSAT and a high GPA reflect an applicant's potential ability to achieve and produce social value in legal education and the legal profession.

In contrast, bias is understood as the direct opposite of merit. Biased selection standards—those based on race, ethnicity, family connections, social status—are condemned because society does not think that these factors rationally correlate to the ability to produce value in legal education or the legal profession. To the extent that statistical analysis might demonstrate some correlation between race and success in law schools, scholars search for some external and theoretically race-neutral factor—e.g., poor schooling—to explain the correlation. But they begin with the presumption that the standards by which they measure merit are race-neutral, and that merit itself—the ability to produce something of social value—is race-neutral as well. Within that framework of analysis, policy-makers seek to eliminate racism by rooting out bias and ensuring that opportunities are distributed on the race-neutral basis of pure merit standards.

And then comes the radical critique of merit, which literally stands the distinction between merit and bias on its head. The radical critique, articulated primarily by critical race theorists and some radical feminist scholars, argues that merit standards disproportionately exclude people of color and women because the standards historically have been developed by members of dominant groups in ways that end up favoring them. Scholars like Patricia Williams have argued that merit standards are simply socially acceptable subjective preferences, developed by members of social groups who were in power at the relevant time and place in history, and whose descendants continue to disproportionately benefit from decisions made under those standards.<sup>8</sup> We have forgotten or suppressed the standards' subjective history, according to Williams, and now represent the standards to be ahistorical, objective measures of ability. Having separated the standards from their history, we do not contemplate the notion that what constitutes ability itself is subjective

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8. WILLIAMS, *supra* note 1, at 99. See also *infra* note 9.

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and constructed under particular historical circumstances by particular social groups.

Although several scholars have sketched the outlines of the radical critique of merit,<sup>9</sup> those outlines have been more general in nature. This article attempts to develop more fully a deconstructive theoretical argument in support of the radical critique of merit, using a critical history of law school admissions to illustrate that merit standards are necessarily the effect of subjective, social and contingent race-conscious preferences for particular kinds of abilities.

The Article takes as its point of critical departure the objectivist conception of merit defended by Professors Daniel Farber and Suzanna Sherry in their latest work. In their book *Beyond All Reason: The Radical Assault on Truth in American Law*, Farber and Sherry continue their long-standing defense of the conventional notion that merit standards, when properly applied, provide some measure of excellence that is objective and independent of ideology or culture.

Farber and Sherry do not defend merit on theoretical grounds. Rather, they start with the empirical claim that Jews and some Asian groups have had disproportionate success under current meritocratic systems.<sup>10</sup> Armed with this assumption, they level two political objections to the radical critique. First, they argue that radical critics cannot reconcile the success of Jews and Asian Americans with the argument that merit standards were constructed to exclude people of color.<sup>11</sup> Second, they contend that the radical critique unfairly characterizes the successes of Jews and Asian Americans as undeserved, and seeks to deprive members of those groups of their hard-won successes.<sup>12</sup> The better argument, say the authors, is that Jews and some Asian-American groups have succeeded because they possess an objective quality called "merit" that is

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9. See Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO L.J. 1711 (1995) [hereinafter Delgado, *Rodrigo's Tenth Chronicle*]; Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357, 1364 (1992); Robert L. Hayman, Jr. & Nancy Levit, *The Tales of White Folk: Doctrine, Narrative and the Reconstruction of Racial Reality*, 84 CALIF. L. REV. 377, 403 (1996); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705 (1990) [hereinafter *A Culturally Pluralist Case*]; Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 803-807 (1990); Williams, *supra* note 1, at 104-110.

10. See FARBER & SHERRY, *BEYOND ALL REASON*, *supra* note 2 at 57-58.

11. See *id.* at 10 ("If there is no such thing as objective merit, what explains the success of Jews and Asian Americans, both of whom, like Blacks, have been victims of discrimination by white Gentile America?")

12. See *id.* at 10-11 ("The radical theories inescapably imply that Jews and Asians [sic] enjoy an unfair share of wealth and status. . . . In short, we believe that radical multiculturalism implies that Jews and Asian Americans are unjustly favored in the social distribution of goods.")

independent of race or ethnicity.<sup>13</sup> To explain why other people of color have failed to achieve comparable success, Farber and Sherry argue that the most likely explanation (given that it disturbs status quo assumptions the least) is that dominant groups have applied objectively valid merit standards to those groups in a discriminatory manner.<sup>14</sup>

Although the authors studiously avoid metaphysical discussions about the existence of "objective merit," their work nevertheless relies on a conventional theoretical distinction between merit and bias. According to the authors' logic, society should prefer merit standards because they efficiently select for the ability to create social value, and therefore are logically associated with justice, rationality, objectivity and color-blindness. In contrast, society should disfavor "biased" criteria such as race, wealth or family connections, because those criteria derive from status, and are associated with subjectivity, irrationality and race-consciousness.<sup>15</sup>

To be sure, Farber and Sherry's distinction between merit and bias comports with conventional mainstream understandings of why merit standards should be preferred over standards that are biased. But the conventional distinction between merit and bias ignores the way in which ideas about what constitutes value in a particular institutional setting, and what constitutes an appropriate way to measure for the potential to create that value, are necessarily contingent, subjective, and historically specific ideas.

This Article deconstructs the authors' conceptual opposition between merit and bias to make three related arguments. First, merit standards necessarily defer to and depend on the very ideas that define social bias and distinguish it from merit. For merit standards to measure the ability to create social value, as they are said to do, the standards must necessarily defer to social preferences about what constitutes social value, and how that value is produced. These preferences are necessarily subjective and race-conscious; they are developed in a historically contingent social context and are authored by members of groups who have

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13. *See id.* at 57, 59 ("There is no doubt that Jews and Asians [sic], considered as groups, have achieved extraordinary success in our society, on average outperforming white gentiles on many measures of success." "If objective merit is wholly irrelevant, it is difficult to account for Jewish or Asian [sic] success.")

14. *See id.* at 55, 56 ("Denouncing the concept of merit altogether is much more satisfying than simply charging that objective standards of merit are applied in a discriminatory fashion, as unfortunately they sometimes are." "[The argument that current discrimination is the cause of differential success rates between blacks and whites] also suggests that what blacks—and by extension other disadvantaged groups—need to do is to continue battling discrimination.").

15. *See id.* at 54.

enough social power—which historically has been based in part on their race and ethnicity—to define what counts as social value. Thus, merit standards necessarily reinscribe the very qualities that Farber and Sherry associate with bias—subjectivity, nonrationality, race-consciousness and social status. In some meaningful sense, then, merit standards can be redescribed as a form of bias that has come to be socially accepted.

This Article uses the example of law school admissions to illustrate that choices about social value in the legal profession and education—and the merit standards designed to promote that social value—historically have been tied to the social status of professional leaders and, in this case, to the profession’s desire to bar entry to immigrants and people of color. In particular, choices 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.

Second, the Article suggests that, because determining what constitutes “social value” in any particular context is necessarily an historically-specific, contingent phenomenon, Farber and Sherry might better explain the disproportionate success of Jews and some Asian-American groups by conducting a critical historical inquiry. Given the historical differences between groups, it would be more useful to determine the conditions under which these groups achieved their success, rather than reasoning abstractly and ahistorically about why each group has or has not succeeded.

Finally, the Article proposes that the deconstructivist interpretation of merit be put to practical use. Using deconstructivist insights in conjunction with the critical history of law school admissions criteria, litigators might be able to argue that current merit standards in the SP-1 law school admissions process in the University of California system violate Title VI (which precludes discrimination in educational institutions that receive federal money), because these standards historically were developed in the context of racial exclusion, and because the standards as they are currently operated serve to disproportionately exclude Latinos/as and African Americans. At the very least, this argument based on history and statistics should shift the burden of proof to proponents of merit standards, who should have to prove that the standards are “pure”—that is, they were not adopted or developed in a context where people of color were routinely excluded, or they do not disproportionately affect people of color.

Part I of this Article attempts to provide a primer on the method of deconstructive practice, in order to translate and make accessible concepts that are relevant to this project. This section briefly traces the theoretical evolution of deconstructive practice from structuralism and post-structuralism. It demonstrates, using an example of deconstructive re-description, that concepts like merit or reason are rhetorical categories that are historically created in the context of particular social institutions, and are not objectively grounded in “true” or “real” accounts of the way things really are.

Part II applies this deconstructive method to the passage in Farber and Sherry’s text in which the authors attempt to justify the conventional preference for merit by contrasting it to bias. In particular, the deconstructive reading of the authors’ defense of merit demonstrates that “merit” standards necessarily and inevitably defer to arbitrary, race-conscious, subjective and historically contingent preferences—i.e., to socially acceptable biases—about what constitutes social value. The Article illustrates this argument by showing how law school admissions standards deferred to and relied upon subjective, historically and socially contingent choices, made by leaders of the profession—whose status was based in large part on race—in the context of a concerted effort by the profession to keep immigrants and Blacks out of practice and legal education. To the extent that law school admissions standards were developed in the context of racial exclusion, and perhaps for the explicit purpose of racial exclusion, it should come as no surprise that these standards continue to exclude disproportionately on the basis of race and ethnicity.

This critical history of law school admissions demonstrates the limits of the objectivist defense of merit, which purports to rely on reason and not politics for its justification. By demonstrating the indeterminacy of the distinction between merit and bias, deconstruction clears the way for an explicitly political discussion about how we want to distribute opportunity in educational institutions and the workplace.

Part III explores several additional implications of the deconstructive reading for Farber and Sherry’s defense of merit. First, the section suggests that, rather than drawing “logical” conclusions about Jewish and Asian-American success, Farber and Sherry might find it more useful to conduct a critical historical inquiry into the matter. For example, an historical inquiry might reveal, as the authors themselves have suggested, that some Asian-American groups and Jews have overcome some forms of historical discrimination by using their own cultural capital to beat the dominant discourse at its own “merit” game. Perhaps these

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groups have taken advantage of their own independently developed cultural emphasis on formal education in certain professions to excel at the kind of merit valued by conventional standards. In any event, ahistorical comparisons and abstract analyses are problematic, given that merit is necessarily a historically and culturally contingent assessment.

More pragmatically, the section proposes that litigators deliberately and strategically make use of deconstructive insights into merit and bias to argue under Title VI that SP-1 admissions standards are both historically and currently discriminatory. This section proposes a new hybrid category of claim under anti-discrimination law, an “intentional impact” category, which combines elements of intentional discrimination with elements of disproportionate impact doctrine. Under “intentional impact” claims, plaintiffs could mount a prima facie case upon showing that a merit selection process can be traced in some way to historical discrimination (even if that discrimination is not institution-specific), in conjunction with a showing that the procedure currently disproportionately excludes applicants of color. Defenders of a selection process like SP-1 would then have to prove either that the standards were not developed in the context of early efforts by legal institutions to exclude applicants of color from the bar or that they have no disproportionate impact on protected groups.

Finally, Part IV disputes the author’s charge that the radical critique is nihilistic. This section argues that, to the contrary, deconstruction deploys rigorously analytical reasoning to expose the limits of that rationality, and to clear the way for a necessarily political discussion on how society should distribute its resources. Indeed, the radical critique is nihilist only when one already accepts the need for and the possibility of transcendent and uncontroversial criteria to choose between competing accounts of merit.

## I

### A PRIMER ON DECONSTRUCTIVE PRACTICE

#### A. *The Deconstructive Turn*

Deconstructive practice proceeds from the premise that language does not neutrally and objectively represent objects that are “out there” in reality. Instead, deconstructivists point out that our knowledge of reality is inextricably bound up with, and shaped by, language or other

practices that we use to represent reality.<sup>16</sup> According to Jacques Derrida,<sup>17</sup> most conventional Western intellectual traditions rely on a “metaphysics of presence”—the idea that objects in the real world and ideas inside someone’s head are actually present in some sort of existentially meaningful way that can be described as real and “true.”<sup>18</sup> These “logocentric” traditions assume that objects and consciousness are “present” and exist independently of the language we use to describe them.<sup>19</sup>

Under this logocentric view of language, words derive their meaning from a one-to-one correspondence with naturally existing objects or ideas. Words merely reflect these objects or ideas “as they really are,” and our understanding of the objects and ideas is prior to, and is not affected or shaped by, process of representation itself.<sup>20</sup> For example, the word “tree” is a sign that substitutes for the “real thing”—the physical arboreal entity—and the word reflects the thing perfectly,

16. To trace the history of deconstructive practice is to pretend that deconstruction fits into determinate categories by way of some coherent, logical worked-out theory, a notion that is of course antithetical to the entire project of post-structuralism. In particular, “[t]o present ‘deconstruction’ as if it were a method, a system or a settled body of ideas, would be to falsify its nature and lay oneself open to charges of reductive misunderstanding.” CHRISTOPHER NORRIS, *DECONSTRUCTION: THEORY AND PRACTICE* 1 (1991). However reductive and oversimplified, these accounts nevertheless may be of some use to the reader.

17. Widely acknowledged as the father of deconstruction, Jacques Derrida’s writings do not fit neatly within any of the traditional categories of academic disciplines. His professional training was in philosophy at the Ecole Normale Supérieure in Paris. His ideas have influenced many other fields outside philosophy, including literary theory, linguistics, sociology, psychoanalysis and feminist studies. See RICHARD KEARNEY & MARIA RAINWATER, *THE CONTINENTAL PHILOSOPHY READER* 289, 438 (1996); NORRIS, *supra* note 16, at 18.

The section relies not only on Derrida’s work but also on secondary analysis of Derrida, namely the work of Gayatri Spivak, Jonathan Culler and Christopher Norris. See *Translator’s Preface* to JONATHAN CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* (1982). See generally JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Spivak trans., 1976); NORRIS, *supra* note 16.

18. See CULLER, *supra* note 17, at 92-94. In Derrida’s words, the logocentric “metaphysics of presence” might be described as “the determination through history of the meaning of being in general as presence . . . [e.g.,] presence of the object to sight . . . presence as substance/essence/existence . . . temporal presence as the point of the now or the instant . . . self presence of the cogito, consciousness, subjectivity, co-presence of the self and the other . . .” *Id.* at 92-93 (citing DERRIDA, *supra* note 17, at 23).

19. Under the logocentric view, “[l]anguage was not understood to create meaning, but rather to operate as a tool to uncover and manipulate a concealed, but already known or knowable, order. The content of this order was neither altered by, nor contingent upon, the mediation of the encounter with language itself.” Thomas C. Heller, *Structuralism and Critique*, 36 *STAN. L. REV.* 127, 139 (1984).

20. See *id.* at 134-35. “[B]oth world and will (consciousness) have been independent of, and prior to, language.” *Id.* at 138.

without any interference or shaping of our knowledge about the tree from the language system we use to represent it.

In contrast, structuralism argues that “our knowledge of the world is inextricably shaped and conditioned by the language that serves to represent it.”<sup>21</sup> Under the structuralist view of language, words or other representational “signs” do not get their meaning from a correspondence to real objects in the world or in human consciousness. Rather, the meaning of a term comes from its structural relationships of difference or similarity to other terms or codes in a representational system.<sup>22</sup> For example, the word “tree” acquires its meaning from its difference from words like “sky,” “sun” or “ground,”<sup>23</sup> and from its similarity or organizational relationship<sup>24</sup> to words like “bush,” “twig” and “arbor.” Moreover, “tree” only makes sense as part of a scientific naming system that organizes plants into separate categories based on whether they have woody stems, and whether they grow to a certain height, and so on.

These structural relationships of difference and sameness not only create the categories that we use to express what we perceive, but also shape the process of perception itself. According to Saussure,<sup>25</sup> “[m]eanings are bound up . . . in a system of relationship and difference that effectively determines our habits of thoughts and perception.”<sup>26</sup> It is not possible to say whether the chaotic phenomena that constitute the world “out there” is “naturally” divided up into the discrete perceptual categories into which we have organized them. We simply cannot know our physical world without already having shaped our perceptions to correspond with the categories of knowledge and

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21. NORRIS, *supra* note 16, at 4. Structuralism first appeared in linguistics, and then moved through anthropology and literary criticism, but was quickly overtaken in the U.S. by post-structuralism in literary criticism. See Peter Schanck, *Understanding Postmodern Thought and Its Implications For Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2520 (1992).

22. “Meaning, in this view, arises solely from formal relations between signs and not directly from any substance in the signs themselves. . . . [Meaning] must originate in the discovery of similarity and difference within a system of discrete linguistic units.” Heller, *supra* note 19, at 141-42.

23. “[The] most precise characteristic is [it is] what the others are not.” FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 117 (W. Baskin trans., 1959). See also Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1165 (1984) (“The meaning of ‘tree’ is generated through the socially created system for dividing things in the world. Tree is contrasted with bush, sky, supper, etc.”).

24. Saussure defines “associative relations” as structural associations that are “part of the inner storehouse that makes up [linguistic] relations.” *Id.* at 123.

25. Structuralism was largely the work of Ferdinand de Saussure, a Swiss linguist who sought to scientifically catalog the structural relationships within language. For a brief introduction to Saussure and his work, see KEARNEY & RAINWATER, *supra* note 17, at 289.

26. NORRIS, *supra* note 16, at 4. See also Peller, *supra* note 23, at 1165.

perception created by language. We see a tree as separate from the earth and sky and ground, because the way in which "tree" fits into our language has created that separation, marking as more relevant the borders between those objects, and less relevant other borders contained within and outside those objects. Thus, our knowledge of reality is inevitably bound up with linguistic conventions that enable us to organize and classify—"[w]hat creates interest in, gives significance to, and permits knowledge of such a set of events is the reduction of any particular event to its order within the system of differentiations."<sup>27</sup> According to the structuralists, then, language does not reflect reality. Instead, reality reflects language, because our knowledge of reality is created by the way in which language carves reality up and organizes it.

In applying structuralism to literary theory, structuralists engage in a precise and tedious dissection of a text, to discover its inherent structural features, and then to explain how meaning arises from those structural features.<sup>28</sup> Not surprisingly, structuralists find the same kinds of structural relationships in all manner of texts, regardless of the author, culture or historical period. Indeed, structuralists see structural relationships as universal, perhaps programmed innately into human consciousness and reflecting the nature of human intelligence.<sup>29</sup> Some structuralists imagine structures as disembodied entities, arguing that they "think themselves through" the author and reader.<sup>30</sup> Disembodied entities notwithstanding, structuralism attempts to bring scientific rigor to linguistics and literary criticism by describing language as a set of relationships that linguists can study scientifically via "semiology," the study of linguistic signs and what they signify.<sup>31</sup>

Post-structuralism turns the structuralist critique upon itself, in some sense using the master's tools to dismantle the master's house. According to post-structuralists, structures and linguistic organization cannot serve as an anchor for meaning, because structural relationships and linguistic categories are themselves already the products of

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27. Heller, *supra* note 19, at 142.

28. See CULLER, *supra* note 17, at 32 ("The attempt to describe structures and codes responsible for the production of meaning focuses attention on the reading process and its conditions of possibility.").

29. Saussure contended that the general mechanism of language, which involved differentiating operations, reflected the process of the mind. See JONATHAN CULLER, SAUSSURE 59 (1976); see also NORRIS, *supra* note 16, at 2-3.

30. See generally NORRIS, *supra* note 16, at 2.

31. See *id.* For a useful description of structuralism, see Heller, *supra* note 19, at 131-53. See also Vivian Grosswald Curran, *Deconstruction, Structuralism, Antisemitism and the Law*, 36 B.C. L. REV. 1, 10-13 (1994).

structural relationships—pre-existing categories and operational rules—in a particular language game or representation practice.<sup>32</sup>

For post-structuralists, the structural relationships in a particular text are indeterminate for two reasons. First, the structural relationships in a text are not universal or innately programmed, but are very much the product of the context or particular language game in which the text is situated.<sup>33</sup> But, lest one think that context provides the anchor for meaning, the number of alternative contexts or language games, and hence interpretations, is infinite.<sup>34</sup> It is impossible to ground meaning in any particular representational practice or context, because one can always imagine another context that would give rise to different meanings, or additional information about the given context or practice that could change the resulting meaning.<sup>35</sup>

Indeed, social convention can even create new meaning by fiat, arbitrarily grafting the meaning of a text onto a new context. For example, social convention could randomly specify that “bububu” means “if it does not rain I shall go out for a walk.”<sup>36</sup> Thus, “total context is unmasterable, both in principle and in practice. Meaning is context-bound, but context has no boundaries and is limitless.”<sup>37</sup> Accordingly, meaning has no pre-defined categories or limitations, and a text can produce multiple interpretations, rather than just a single correct one.<sup>38</sup>

Second, because we must use language to describe structural relationships, language games and contexts, they are also themselves the product of structural relationships in a particular language game or context. We describe structural relationships, contexts and language games interpretively, identifying some elements of the structure, context

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32. “In these ‘structuralist’ approaches, it is supposed that meaning can be determined by specifying these underlying codes, which are seen as the significant context of the text. But representational structures can never be conclusively determined; their relational meaning depends on the representational practices in which they are found. Any description of the representational structure within which meaning is generated is merely a re-presentation of the structure according to the language of the interpreter, the way that the interpreter distinguishes relevance from irrelevance.” Peller, *supra* note 23, at 1173.

33. See J.M. Balkin, *Nested Oppositions*, 99 *YALE L.J.* 1669, 1674-75 (1990) (discussing the dependence of structural relationships on context).

34. See CULLER, *supra* note 17, at 123-24.

35. See *id.*

36. Culler notes that context is unmasterable because it is always open to further description, and because it is possible to graft a new context and new meaning onto an old formulation. *Id.* at 124. Culler uses the cited example because Wittgenstein had argued that one could not say “bububu” and mean “if it does not rain I shall go out for a walk.” *Id.*

37. *Id.* at 123.

38. See *id.*

or game as relevant, and others as irrelevant.<sup>39</sup> Accordingly, structure is itself the product of the structural relationships in the language we use to describe a structure. This never-ending recursive chain of structural relationships puts beyond reach any solid ground for meaning.<sup>40</sup> “[H]owever far back we try to push, even when we try imagining the ‘birth’ of language and describe an ordinary event that might have produced the first structure, we discover that we must assume prior organization, prior differentiation.”<sup>41</sup> Thus, neither structure, context nor representational practice can provide a stable source for meaning.

Deconstructive practice, which is a form of post-structuralist method, takes aim at a particular kind of structural relationship—the ordered<sup>42</sup> binary opposition—to show that meaning is unstable and subject to multiple interpretations and re-descriptions.<sup>43</sup> According to Derrida, traditional Western discourse creates meaning by organizing knowledge into structural binary oppositions, in which a pair of terms are framed as opposites of each other, and one term enjoys a privileged hierarchical status over the other.<sup>44</sup> For example, conventional discourse constructs reason and passion as opposites, where reason enjoys the preferred position while passion is relatively disfavored.

39. Context is “the derivative effect of the representational practice in which some elements of social life are said to constitute the context or structure to the exclusion of other aspects.” Peller, *supra* note 23, at 1224. Peller argues that the shift from authorial intent in the text to focus instead on the context is the strand of legal realist practice that mainstream legal discourse has incorporated (via realism and the law and economics movement), as opposed to the deconstructive strand. *See id.* at 1225.

40. Beyond recursive structures, theories of difference presume the existence of something from which to differ. “Even theories like Saussure’s, with its powerful critique of logocentrism in its concept of a purely differential system, do not escape the logocentric premises they undermine . . . [A] theory based on difference does not escape logocentrism but finds itself appealing to presence . . . because in order to identify differences responsible for meanings one needs to treat some meanings as if they were given, as if they were somewhere ‘present’ as a point of departure.” CULLER, *supra* note 17, at 109-10.

41. *Id.* at 96.

42. The binary opposition is described as hierarchically ordered because social convention ranks one of the terms as primary or preferred, and the other as a negation, a supplement, or a derivative secondary term. For example, social convention ranks reason over passion. *See* JACQUES DERRIDA, *DISSEMINATION* viii (Barbara Johnson trans., 1981); *see also* Schanck, *supra* note 21, at 2525.

43. “Deconstruction is avowedly ‘post-structuralist’ in its refusal to accept the idea of structure as in any sense given or objectively ‘there’ in the text.” NORRIS, *supra* note 16, at 3.

44. Western thought “has always been structured in terms of dichotomies or polarities . . . The second term in each pair is considered the negative, corrupt, undesirable version of the first, a fall away from it . . . [The two terms] are not simply opposed in their meanings, but are arranged in a hierarchical order which gives the first term priority.” DERRIDA, *supra* note 42, at viii.

In what appears to be a structuralist move, Derrida argues that in a binary opposition, each term derives its conventionally understood meaning by way of its difference from its opposite term.<sup>45</sup> In our example, reason often is defined by referring to that which it is not—passion, emotion or desire. Moreover, even relationships of similarity can be reduced to structural difference, because terms that are similar ultimately also gain their meaning from that which they are not.

Where Derrida “breaks new ground,” however, is in demonstrating that relationships of difference “inevitably shade” into relationships of deference and dependence.<sup>46</sup> Derrida contends that each term acquires its fundamental meaning by simultaneously differing from, and depending on and deferring to, the qualities possessed by its opposite.<sup>47</sup>

In the case of reason/passion, suppose that a certain text distinguished reason from passion on the grounds that reason produces order and passion produces disorder or violence. A deconstructivist reading reverses or flips the terms within the hierarchy, to show that for reason to maintain order, it necessarily must defer to, and/or rely upon, the violent and coercive force associated with passion. Indeed, as is detailed in the next section at some length, reason can be redescribed as the passion to repress passion. If reason necessarily possesses passion’s characteristic use of coercive violence to maintain order, then the text’s argument that we should prefer reason over passion has run aground on its own terms.<sup>48</sup>

Similarly, passion can be redescribed as the logical reason to prefer reason over passion—if we value order over violence, then rationally we should prefer reason. Accordingly, if reason can be seen to depend on passion, and passion is understood as depending on reason, then the terms defer to one another even as they oppose each other. Their relation of simultaneous difference and dependence is rhetorical and illogical rather than “real” and “rational.”

Under this deconstructionist view, neither of the two terms in an opposition can serve as the source of meaning, because each term

45. “The sign marks a place of difference. . . . the sign is the place where ‘the completely other is announced as such—without any simplicity, any identity, any resemblance or continuity—in that which is not it.’” DERRIDA, OF GRAMMATOLOGY, *supra* note 17, at xvi-vii. See also Balkin, *supra* note 33, at 1674.

46. See generally DERRIDA, *supra* note 17, at 61.

47. “Such is the strange being of the sign: half of it always ‘not there’ and the other half always ‘not that.’ The structure of the sign is determined by the trace or track of that other which is forever absent.” DERRIDA, *supra* note 17, at xvii.

48. See *id.* at 88 (“Working within the opposition, the deconstruction upsets the hierarchy by producing an exchange of properties.”)

depends on and defers to the qualities of its opposite in order to gain meaning. At the same time, however, each term must at least momentarily have meaning in order for there to be any relationship of either contrast or dependence.<sup>49</sup> This alternating back and forth between a term's fullness of meaning and its lack of positive and complete meaning, which Derrida calls "differance," is at odds with the laws of logic.<sup>50</sup>

In summary, deconstruction undoes the binary opposition from within in order to reveal its internal contradictions and rhetorical formulation. Deconstruction shows that for the superior term (e.g., reason) to function as it is said to, that term necessarily must depend on and defer to the qualities of the inferior term (e.g., passion).<sup>51</sup> By way of this reversal, deconstruction shows that reason is just a particular form or effect of passion—the passion to repress passion.

However, deconstruction does not perform this operation merely to reverse the terms and show that all reason is a form of passion. Indeed, the reversed hierarchy can also be deconstructed to show that all passion is a form of reason. Rather, deconstruction aims to displace the ordered binary opposition by demonstrating that it is a rhetorical artifact that depends on particular categories already contained in language and not on any account of what is "true" or "real" in the world outside of language.

### B. *Deconstructive Practice in Action: Reason and the Mob*

In "Reason and the Mob," Gary Peller provides a wonderful example of a deconstructive reading that illustrates the "differance"—the simultaneous difference and deferral—between reason and passion.<sup>52</sup> Peller deconstructs a text authored by Nathan Scott in the *Virginia Quarterly Review*, in which Scott relies on the binary opposition between reason and passion to argue that rationalism should prevail over post-structuralism.<sup>53</sup>

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49. "The value of the transcendental arche [origin] must make its necessity felt before letting itself be erased. The concept of the arche-trace must comply with both that necessity and that erasure. It is in fact contradictory and not acceptable within the logic of identity." DERRIDA, *supra* note 17, at 61.

50. *See id.* Derrida calls this relationship of mutual differing and deferral "differance." *See generally* DERRIDA, *supra* note 17.

51. *See* CULLER, *supra* note 29, at x.

52. *See* Gary Peller, *Reason and the Mob: Politics of Representation*, 2 *TIKKUN* 28 (1989).

53. *See* Nathan Scott, *The New Trahison Des Clercs: Reflections on the Present Crisis in Humanistic Studies*, 62 *VA. Q. REV.* 402 (1986).

Peller first sets forth the parts of the text in which Scott argues that rationalism should be preferred to post-structuralism because the latter is nihilistic, anti-rationalist, and ultimately violent. Scott writes:

Today, of course, the enterprising anti-humanism of the post-Structuralist movement is in full tide, and it presents us with the great example in contemporary intellectual life of the new *trahison des clerics*. This phrase forms the title of a once famous book by the French critic Julien Benda which was first published in 1927, and in English the phrase is best rendered as the "betrayal of the intellectuals". . . . [Benda] was moved to advance the rather extravagant charge that the typical intellectuals of the modern period, identifying themselves with class rancor and nationalist sentiment, have abdicated their true calling in the interests of political passion: instead of quelling the mob and beckoning it toward true community, they have joined the mob, concurring in its lust for quick results and adopting its devotion to the pragmatic and the expedient. . . . And it is his fiercely reproachful term that appears now to be the appropriate epithet for the intellectual insurgency that is currently sowing a profound disorder in the . . . humanities.<sup>54</sup>

Using terms and arguments from Scott's text, Peller then identifies the binary oppositions that give Scott's argument its meaning:

Scott's rhetoric . . . contains a group of associations with the intellectuals and with the mob that can assist us in determining its meaning. The distinction between the mob and the intellectuals and the justification for the superiority of the intellectuals are suggested by the fact that the mob is characterized by social desire—it is associated with "class rancor," "nationalist sentiment," "political passion," "lust," "disorder," and "insurgency."

The intellectual, on the other hand, stands in contrast to these features: the intellectual is supposed to represent order and dispassion rather than "rancor" and "sentiment," neutrality as opposed to politics, the "disciplined" search for "knowledge and truth" rather than the lustful satisfaction of passion and desire, the ideal and the long term as opposed to the "pragmatic and the expedient."

In short, Scott's argument seems animated by a structure of meaning where reason and passion are distinguished from each other. Reason is associated with the intellect, knowledge, truth,

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54. Peller, *supra* note 52, at 30.

neutrality, and objectivity; passion is associated with disorder, politics, sentiment, class rancor and unthinking nationalism.<sup>55</sup>

Next, Peller locates the structural associations—the association of reason with order and of passion with disorder—in the Western Enlightenment discourse on civilization and social progress:

Scott's appeal is to a general language of social progress and development—the intellectual is favored over the mob because the mob is, in a sense, less human, closer to nature, primitive. . . . [T]he failure to regulate the emotional with the rational would in a sense be giving in to our animal urges, opening up the possibility of regression and the end of civilization.<sup>56</sup>

Using these textual associations, Peller summarizes Scott's central argument: we should prefer rationalism to post-structuralism because we should prefer civilized order to primitive violence.<sup>57</sup> Explaining why Scott's argument is persuasive, Peller refers to concrete images from shared cultural history that appear to justify a social preference for reason over passion. Peller includes the image of the Southern lynch mob, in which passion threatens the order imposed by reason:

Probably the most powerful single image in the American experience is the image of the Southern lynch mob. . . . [I]n the common understanding, the mob, ruled by irrational racism against Blacks, bypassed the orderly, rational, and judicial means of dispensing justice in favor of the 'pragmatic and the expedient,' simply acting on the basis of their passionate emotions.<sup>58</sup>

Peller then proceeds to deconstruct the conceptual opposition between reason and desire. First, he reverses Scott's structural associations to show that in order for reason to function as it is said to—to maintain order and to displace passion—it must necessarily depend on and defer to the strategies of coercive violence normally associated with passion.

[I]t strikes us as initially dissonant that the intellectuals are asked to 'quell' the mob. The very ability of the intellect to 'quell' suggests that in some way the intellectuals are like the mob, possessing coercive power. Yet it was the potential for the mob to coerce that justified its regulation by the intellectuals.

The power of the intellect to 'quell' introduces the possibility that reason is actually a means of discipline, a coercive

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55. *Id.* at 31.

56. *Id.* at 31, 92.

57. *See id.* at 92.

58. *Id.* at 31.

technology for the social regulation of passion and emotion. At both the individual and social levels, reason plays the role of standing in the place of desire and deferring it to another time or place. . . . But once we see reason as the regulator of passion, as a technology, we also realize that reason is constructed out of social power. . . . Reason itself yields no determinate basis that would allow us to choose between the alternatives. . . . [R]eason can only ‘quell’ desire on an individual level by the means of desire itself, by becoming the desire to defer desire, and reason can only control desire on a social scale by becoming social desire—the mob. . . . Like the mob, reason promises a coerced social order based on a particular social desire.<sup>59</sup>

Completing the reversal, Peller demonstrates that, rather than describing passion as the absence of reason (which privileges reason as the superior term), reason can be redescribed as an effect of desire. In particular, reason can be understood as the emotional, subjective and arbitrary desire to defer desire with regard to certain decisions, and to “give in” to desire in other, more “appropriate” circumstances.

Next, Peller contends that the conventional distinction between reason and passion appears coherent and legitimate only by suppressing those subverse instances in which reason overtly depends on and defers to strategies of passion or vice-versa. For example, Peller recovers from history the repressed image of religious persecution of the infidel and the heretic, when reason was used coercively to suppress the possibility of religious rebellion. Peller argues that the image of religious persecution must be suppressed in order to achieve reason’s position as a socially acceptable form of desire:

Thus reason is only desire that has become institutionalized as good sense, that has achieved social conventionality, that is no longer recognizable as [passion] because it no longer bears the signs of its emotion, the rage that marked the historic efforts to repress the passion of the other, the infidel and the heretic. . . . [H]aving achieved its goal, reason can appear free of the violence that is its history.<sup>60</sup>

Moreover, Peller argues, the privilege we accord to reason is dictated by the larger Enlightenment story of “social progress through enlightened reason.” According to Peller, that story is a product of the categories already contained in a particular ideological and political language game about social progress:

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59. *Id.* at 92.

60. *Id.*

[T]hese distinctions are not simply natural and necessary ways to divide up the world, but rather form the language for a particular discourse of authority and power. . . . [T]hese very ways of thinking and talking about social life already embody a particular discourse of power that seeks to legitimize social hierarchy by claiming to have escaped politics, superstition, and the mere conventionality of language. . . . [the] supposedly rational or scientific interpretations of the world.<sup>61</sup>

In summary, Peller's deconstructive reading highlights most of the important ideas from the preceding introduction to deconstruction. First, Peller's reading provides an excellent example of deconstructive reversal and displacement, in which the two terms in a binary opposition exchange properties and trade places on the hierarchical ladder to illustrate that they are functions of a language game.<sup>62</sup> Peller demonstrates that, for reason to quell the violence of passion as it is said to, reason must possess the violence and coercive social power associated with passion. Deferring to and depending on the properties of passion, reason loses its metaphysical privilege and is demoted to the inferior position in the binary relation, and becomes just a socially acceptable form of passion. The argument for preferring reason over passion now collapses under the weight of its own analysis, and the opposition dissolves.

Second, Peller demonstrates the post-structuralist idea that the binary opposition between reason and passion is itself merely a rhetorical formulation, produced by the categories and associations already contained in an ideological discourse or representational practice.<sup>63</sup> His reading reveals the opposition's rhetorical nature by uncovering a logically impossible relationship between terms, in which reason depends on and defers to passion, even as it simultaneously opposes passion.

Finally, Peller locates the rhetorical opposition and its associations in a particular discourse. He points out that the binary opposition between reason and passion, and the association between reason and order, as well as passion and disorder, are the product of the Western

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61. *Id.* at 94.

62. "First, we were able to show that Scott's text yielded no stable, authoritative meaning; to the contrary, Scott's argument could be read in one way as advocating the elevation of reason over passion; yet we were also able to use the text's own terms of analysis to reverse this meaning. . . ." *Id.* at 93.

63. Deconstruction "is not simply a strategic reversal of categories which otherwise remain distinct and unaffected. It seeks to undo both a given order of priorities and the very system of conceptual opposition that makes that order possible." NORRIS, *supra* note 16, at 31. By inverting the hierarchy, deconstruction "uncovers and undoes the rhetorical operations" that privilege the first term over the supplement. CULLER, *supra* note 17, at 88.

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Enlightenment story of social progress, which associates reason with progress and passion with the destruction of civilization.<sup>64</sup>

## II

### DECONSTRUCTING THE DISTINCTION BETWEEN MERIT AND BIAS

#### A. *The Binary Opposition: Merit vs. Bias*

In their most recent work, *Beyond Reason: The Radical Assault on Truth in American Law*, Daniel Farber and Suzanna Sherry continue their challenge to the “radical constructivist” argument that merit standards are socially constructed in ways that arbitrarily favor the abilities of the dominant majority.<sup>65</sup> The book, which collects many of Farber and Sherry’s previous essays, argues that disproportionate success rates for Jews and Asian Americans undermine the radical claim that merit is arbitrary and designed to reinforce white male power.<sup>66</sup> In addition, according to the authors, the radical constructivist position may be used for anti-Semitic or anti-Asian<sup>67</sup> ends, because the critique indicts the accomplishments of some Asian groups and Jews as unfairly obtained:

Radical constructivists contend that standards of merit are socially constructed to maintain the power of dominant groups. In other words, ‘merit’ has no meaning, except as a way for those in power to perpetuate the existing hierarchy. In explaining why some minorities have been less successful than whites, these writers repudiate genuine merit as even a partial explanation of the current distribution of social goods. They are then left in a quandary, unable to explain the success of other minority groups that have actually surpassed the dominant majority. . . . [N]o [other] explanation for competitive success can be anything but negative. These groups have obtained disproportionate shares of important social goods; if they have not earned

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64. By reversing the relationship between reason and passion, and thereby showing how reason might be seen as simply the effect of passion rather than its regulator, this critical interpretation showed how the rational, determinate sense of the argument actually depended on an initial, arational association between reason and particular cultural and political visions of social life. *Id.* at 94.

65. The authors distinguish the radical constructivist, who views “fundamental concepts” like merit to be “socially constructed aspects of systems of power,” from the moderate social constructivist, who merely acknowledges that categories like race and sexual orientation are socially constructed. Farber & Sherry, *Radical Critique of Merit*, *supra* note 2, at 855. The authors offer William Eskridge as an example of the former, and Richard Delgado, among others, to exemplify the latter. *Id.*

66. See FARBER & SHERRY, *BEYOND ALL REASON*, *supra* note 2, at 57-59; Farber & Sherry, *Radical Critique of Merit*, *supra* note 2, at 856.

67. The term “Asian” is used here to refer to Asians who are not long-term residents of the U.S., those who are, and Asian Americans.

their shares fairly on the merits, then they must have done so unjustly. Thus, the radical constructivist view of merit logically carries negative implications regarding groups that have surpassed the dominant majority . . . .<sup>68</sup>

In setting out their argument, Farber and Sherry deploy the conventional binary opposition which positions merit and bias as opposites. This opposition is most obvious in a long passage (part of which appears in the opening citation) in which the authors defend merit on the grounds that, at least theoretically, it is race-neutral.

The meritocratic ideal is that positions in society should be based on the abilities and achievements of the individual rather than on characteristics such as family background, race, religion, or wealth. This ideal requires that merit must be objective in the sense of being definable without reference to those personal characteristics. John Rawls has described the underlying concept of justice as one of careers "open to talents," a concept first adopted by egalitarians who rejected previous aristocratic understandings of human worth.

Under this conventional view, the ultimate conception of merit is color-blind and gender-blind. Its advocates believe that people are treated unjustly and discriminated against "when their merit is assessed according to their status rather than according to the value of their traits or products." Thus, for instance, under this conception of merit, racial discrimination "is irrational and unjust because it denies the individual what is due him or her under the society's agreed standards of merit."<sup>69</sup>

Randall Kennedy, to whom Farber and Sherry cite in the passage above, similarly defends his preference for merit in its pure theoretical form.

As I use the word, 'merit' is an honorific term that identifies a quality of accomplishment that has been achieved; it does not refer to inherited characteristics such as race or gender. As a matter of theory, this conception of merit is rather

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68. Farber & Sherry, *Radical Critique of Merit*, *supra* note 2, at 856-57. See also FARBER & SHERRY, *BEYOND ALL REASON*, *supra* note 2, at 11 ("If merit is nothing but a mask for white male privilege, then it becomes difficult to defend the fact that Jews and Asians are quite disproportionately successful. If their success cannot be justified as fairly earned, it can only be attributed to a heightened degree of entanglement with white male privilege. In short, we believe that radical multiculturalism implies that Jews and Asian Americans are unjustly favored in the social distribution of goods.").

69. Farber & Sherry, *Radical Critique of Merit*, *supra* note 2, at 858-59 (citing Randall L. Kennedy).

conventional. . . I do not want race-conscious decisionmaking to be assimilated into our conception of meritocracy.<sup>70</sup>

A close look at Farber and Sherry's (and Kennedy's) argument reveals that they have set up their objectivist defense of merit through a set of ordered binary oppositions in the text. Merit, they argue, is "based on ability and achievement of the individual" as measured through "the value of traits or products."<sup>71</sup> In contrast, bias involves an assessment "according to status" or "inherited characteristics."<sup>72</sup> According to the text, merit is "objective" when it is "definable without reference to [the] personal characteristics" or the "inherited characteristics" of "family background, race, religion or wealth."<sup>73</sup> Bias, in comparison, is presumably "subjective" because it is defined according to those characteristics.<sup>74</sup>

In addition, merit is "just" because everyone "has an equal opportunity to compete for desirable occupations."<sup>75</sup> Bias, on the other hand, is "unjust" because it "denies the individual what is due him or her under the society's agreed standards of merit." Where bias is an "irrational" "deviation" from the ideal of "colorblind" meritocracy, merit presumably is both rational and "colorblind."<sup>76</sup> In sum, merit promotes economic efficiency, ability and achievement, and therefore can be associated logically with justice, equal opportunity, objectivity, rationality, and color blindness.<sup>77</sup> Bias, on the other hand, is based on

70. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1806-07 (1989).

71. Farber & Sherry, *Radical Critique of Merit*, *supra* note 2, at 858-59.

72. *Id.*

73. *Id.*

74. Duncan Kennedy calls this genre of argument, which presumes that there is something out there in the real world called merit, "colorblind meritocratic fundamentalism." Duncan Kennedy, *A Cultural Pluralist Case*, *supra* note 9, at 707.

75. "This ideal holds at once that all people must have equal rights and opportunities to develop their peculiar talents and virtues, and that there should be equal rewards for equal performances. . . . [M]erit tests, at least in theory, provide a basis for procedural justice in distribution." *Id.* at 836, 838.

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[F]acts of parentage and ancestry should not count as formal bars to access. . . . There has, however, developed a widespread, even consensual conception of moral *irrelevance* that is central to accepted interpretations of equality and of merit. . . . Because race is considered a factor irrelevant to virtually any morally permissible human purpose, merit distribution has been considered—and remains in the popular mind—a diametric alternative to selection on the basis of race.

*Id.* at 836, 837.

77. Distributing on the basis of merit serves as the perfect technocratic tool to efficiently "allocate resources to persons likely to use them productively. . . . And, by employing those capable of greatest productivity, private industry increases the wealth available for distribution within the

status or inherited traits, and is therefore associated with the opposing characteristics— injustice, lack of equal opportunity, subjectivity, irrationality, and race-consciousness.

Using these binary oppositions, Farber and Sherry contend that merit is objective and rational because, at least in its ideal form, it focuses neutrally on individual traits, abilities and achievements that contain social value. Later in the text, the authors use this colorblind vision of merit to support their argument that, in light of the relatively greater success rate under conventional merit standards for Jews and Asians, merit cannot be a race-conscious weapon designed to keep white males in power.<sup>78</sup>

Farber and Sherry's descriptions of merit and bias appears to be consistent with our intuition that, in order to fight racism, we need to focus on "objective criteria" as a way of displacing bias. Under a true meritocracy, people will not be excluded because they are Mexican-American or Black or Jewish, but because they do not score as highly on objective tests of ability or some other indicia of social value.<sup>79</sup> As Professor Sherry recounts, one promise of the Enlightenment was to replace subjective bias with objective merit, to the benefit of those outsiders whom bias had kept out:

The lasting accomplishment of the Enlightenment . . . method was a repudiation of the "the millennium of superstition, otherworldliness, mysticism, and dogma known as the Middle, or Dark Ages." . . . Instead, the human capacity to reason, in all its splendor, would control the future. As Justice Felix Frankfurter commented in a related context, "[w]hat mattered was excellence in your profession to which your father or your face was equally irrelevant."<sup>80</sup>

In summary, Farber and Sherry's conventional treatment of merit and bias finds much support in social practice. Indeed, our idea of social progress has depended on the notion that merit rationally and objectively is based on ability, promotes economic efficiency and excellence, and is associated with justice and equal opportunity.

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society. . . . The social interest in educating doctors, for example, is best served by educating those who will be the best doctors." Richard H. Fallon, Jr., *To Each According To His Ability, From None According To His Race: The Concept of Merit In the Law of Antidiscrimination*, 60 B.U. L. REV. 815, 823, 838 (1980).

78. See Farber & Sherry, *Radical Critique of Merit*, *supra* note 2, at 868-71.

79. See STEPHEN JAY GOULD, *THE Mismeasure of Man* 231 (1981). See also Delgado, *supra* note 9, at 1711 (fictional friend of Rodrigo Crenshaw argues that objective standards are African American's best "guarantor against racism").

80. Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L. J. 453, 456-57 (1996).

*B. Deconstructive Reversal: How Merit Defers to Bias*

As soon as the meaning of Farber and Sherry's distinction appears to stabilize, however, it begins to self-de(con)struct. Reversing the authors' structural associations, we discover that for merit to do the job of rewarding ability and creating social value (and thereby displace bias), it must depend on and defer to subjective, arbitrary, status-oriented, culturally-specific definitions of "social value." Put differently, in order for merit to function as the opposite of bias, it must defer to and depend on social bias towards particular traits and abilities.

In their text, Farber and Sherry make the connection between merit and social value explicit, when they justify social preference for merit on the grounds that it distributes opportunities and resources on the basis of "the value of [applicant's] traits or products" rather than "status."<sup>81</sup> According to Farber and Sherry's own text, "merit" is made possible by, and must necessarily defer to, the social value of certain traits or products.

But 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. Far from being the opposite of "bias," the concept of merit is necessarily inscribed with subjective, status-based social bias, which merit sought to exclude in the first place. Indeed, we can re-describe merit as the effect of bias rather than its privileged opposite, because social bias supplies the "social value" that merit purportedly promotes. Thus, merit can be viewed from this alternative perspective as socially acceptable bias for certain kinds of qualities.

Moreover, the opposition itself cannot tell us when a preference is an illegitimate "bias" or valid "merit." Those distinctions ultimately are determined by politics, culture and ideology. For example, we formulate our ideas about what constitutes social value in the legal profession based in large part on our political, ideological and moral commitments about what constitutes a legal dispute and how a legal

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81. See also Fallon, *supra* note 77, at 815 n.1 (citing to the following definitions of merit from other scholars: qualities that count as merit that are useful to society (Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955, 961-63 (1974)); 'endowments' and 'achievements' that are "praised, coveted or admired" (Shapiro, *Who Merits Merit? Problems in Distributive Justice and Utility Posed by the New Biology*, 48 S. CAL. L. REV. 318, 321-22 (1974)); *id.* at 823 ("Merit cannot be judged apart from human interests and desires. . . [and] 'will bring the most talented individuals to positions of power and responsibility, and that the competitors will produce social goods in the process of demonstrating that they merit power and responsibility.'") (citing to Karst & Horowitz, *supra*).

system should resolve a dispute, or whether government should even play a role in resolving disputes. To be sure, the social value we seek to promote is not based on deductive reasoning about the human personality or natural laws governing human relationships. Nor have our ideas about legal education evolved in some Darwinian fashion to produce the most superior form of legal education to date. Rather, our ideas about social value are a function of contingent history, of time and chance. That is, various historical and social forces have converged at certain points in time to produce our peculiar legal institutions and practices, which are useful for awhile and then inevitably are in need of revision, as time passes and different historical and social forces converge.

The history of law school admissions standards illustrates the argument that merit standards necessarily defer to or depend on socially subjective and historically contingent biases about social value in the profession. A review of history reveals that our notions of value in legal education and the legal profession were developed in the early part of this century by leaders of the profession, who had acquired their leadership status based in large part on their race. Those leaders, and the institutions in which they were ensconced, developed certain ideas about what constituted "social value" and "ability" in practice and in legal education.<sup>82</sup> Given the fact that the legal profession had affirmatively excluded people of color at the time, those choices about social value reflected, if not embodied, the race-consciousness of early twentieth century legal culture. At the very least, those choices took place in the context of a culture in which racial exclusion was routine and relatively uncontroversial.

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82. Critical history is a tool often deployed by Critical Race theorists and deconstructivists alike. Critical Race Theory views social institutions and practices as products of historical circumstance, in which relationships of power, and in particular, racial power, determine the content of those practices and institutions. Critical historical inquiry maps the ways in which structures like merit or property are not natural or race-neutral ways of framing the world, but are a historical collection of strategies and discourses born of and deployed in particular political, cultural, and institutional conflicts. Using critical historical methods, radical scholars interpret the development of standards of merit and bias as a contingent response to a particular set of historical circumstances, in which social and racial power ultimately determined who would be excluded from institutions that distribute power and wealth. See *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xvi (Kimberlé Crenshaw et al. eds., 1995). See also *Introduction to WORDS THAT WOUND* 6 (C. Lawrence et al. eds., 1993) (critical historical inquiry "challenges ahistoricism and insists on a contextual/historical analysis of the law," to view legal institutions in the actual context of history and relationships of race and power).

### 1. *The Formulation of Merit Standards in Law School Admissions*

Much has been written about the issue of merit and bias in law school admission standards. For as long as law schools have administered aptitude tests, Latino/a and African-American applicants disproportionately have achieved lower scores than white applicants.<sup>83</sup> Many scholars have argued that such results are due to improper procedures or a cultural bias in the test itself.<sup>84</sup> For example, Professor Leslie Espinoza has pointed out that past LSATs have contained questions about culturally specific phenomena, like polo matches and regattas, with which applicants of color are not likely to be familiar.<sup>85</sup> Other scholars contend that Blacks and Latinos/as have disproportionately lower LSAT scores and undergraduate GPAs because they lack comparable educational opportunities and suffer from other forms of disadvantage.<sup>86</sup>

Both arguments assume, however, that there is something “out there” called “merit”—the knack for legal reasoning, smarts, or diligence—that at least in theory is race-neutral. Both arguments also

83. See SUSAN BROWN AND EDUARDO MARENCO, JR., MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND (MALDEF) LAW SCHOOL ADMISSIONS STUDY [hereinafter MALDEF STUDY] 16-17 (1980).

84. See Derrick A. Bell, Jr., *In Defense of Minority Admissions Programs*, 119 U. PA. L. REV. 364, 367 (1970) (arguing that the LSAT is insufficiently predictive); Delgado, *Rodrigo's Tenth Chronicle*, *supra* note 9, at 1740-42 (arguing that the SAT and the LSAT have test items about toboggans, lacrosse, polo and regattas, concepts with which applicants of color are not likely to be familiar); Leslie G. Espinoza, *The Bias of LSAT Narratives*, 1 AM. U. J. GENDER & L. 121, 129 (1993) (arguing that LSAT narratives contain offensive racial stereotypes and concepts with which minority applicants would be less familiar); Portia Y. T. Hamlar, *Minority Tokenism in American Law Schools*, 26 HOW. L.J. 443, 468-513 (1983) (extensive review of various challenges to law schools' use of the LSAT and GPA); James C. Hathaway, *The Mythical Meritocracy of Law School Admissions*, 34 J. LEGAL EDUC. 86, 94 (1984) (arguing that the LSAT only explains 14 or 15 percent of law school performance, and presents a particularly inaccurate picture of the likely success of men, younger students, and members of racial minorities); David A. Weber, *Racial Bias and the LSAT: A New Approach to the Defense of Preferential Admissions*, 24 BUFF. L. REV. 439 (1974) (arguing that the LSAT's questions contained biased items). See also MALDEF STUDY, *supra* note 83, at 16-17 (arguing that grades and LSAT scores are overused).

85. Espinoza, *supra* note 84, at 129.

86. See Jamie B. Raskin, *Affirmative Action and Racial Reaction*, 38 HOW. L.J. 521, 554 (1995) (contending that merit criteria do not take into account a multitude of disadvantages suffered by applicants of color). See also Delgado, *Rodrigo's Tenth Chronicle*, *supra* note 9, at 1718 (arguing that disparity between haves and have-nots, with regard to education, constitutes a pre-existing disadvantage that neutral mechanisms do not take into account); *id.* at 1738 (wealthy whites have advantages in education and income that may explain higher achievement); *id.* at 1725 (noting that merit does not take into account the ability to overcome past disadvantage and past hurdles surmounted). Current proposals to revise affirmative action programs to reflect class often evince a desire to focus on proportional disadvantage. See Albert Y. Muratsuchi, *Race, Class, and UCLA School of Law Admissions, 1967-1994*, 16 CHICANO-LATINO L. REV. 90 (1995).

assume that people of color have been unfairly prevented from acquiring "merit" because of discrimination. Finally, both sides appear willing to concede that properly validated tests can theoretically measure an applicant's "true" ability to succeed in law school in a race-neutral way.

But opponents of admissions standards need not concede the standards' theoretical color-blindness quite so quickly. When one situates law school admission standards in their historical context, it appears that merit criteria deferred to and depended on the race-conscious social bias of the time to define what constituted "social value" in the legal profession. As is detailed extensively in the following discussion, admissions standards reflected the subjective preferences of white male lawyer elites. These leaders had acquired social power or "status" within the legal culture of the early twentieth century, in large part because of their race, given that people of color were affirmatively excluded from the profession at the time. Moreover, the leadership's subjective preferences about "social value" substantially reflected if not embodied the profession's desire to exclude Black and immigrant applicants from the practice of law.

The development of law-school admission standards can be traced to a number of related events occurring in the late nineteenth and early twentieth centuries. First, the number of European immigrants and African-Americans entering into the legal profession and law schools increased dramatically. At the same time, large, elite corporate law firms gained prominence on the Eastern seaboard, and created symbiotic relationships with prestigious Eastern law schools, at least in part to create a "safe haven" from the influx of immigrants. In addition, in an effort to prevent both immigrants and African Americans from gaining admission to practice law, the American Bar Association ("ABA") was formed. The ABA was part of a larger movement to eliminate part-time, night-time, and proprietary law schools, which served the rising numbers of immigrants and African Americans who sought to become lawyers. Reinforcing the hierarchy between prestigious law schools and schools that served immigrants and African Americans, Christopher Columbus Langdell and others introduced the case method into elite law schools, which helped to orient legal education toward abstract legal reasoning and away from practical experience. As discussed below, these events all were directly or indirectly related to the more general explosion of racist and nativist sentiment in the legal culture and in American society during the period.

Prior to 1870, seasoned lawyers trained aspiring practitioners in an apprenticeship program governed by the Inns of Court. Serving as the

central institution governing legal practice at the time, the Inns permitted lawyers to select their apprentices, determine the nature and duration of their apprenticeships, and prescribe attainments necessary for bar membership.<sup>87</sup> Lawyers obtained very little formal training in legal theory, and those who did “read the law”—mostly old English treatises—did so under the guidance of a mentor.<sup>88</sup> Some aspiring lawyers attended proprietary law schools, where practicing attorneys taught a few basic forensic skills and hornbook rules from treatises like Blackstone’s Commentaries.<sup>89</sup> Both apprenticeship programs and proprietary schools emphasized practical technique.

From 1870 to 1920, record numbers of immigrants from Eastern and Southern Europe flooded into the United States, and many began to seek entry into the legal profession.<sup>90</sup> Many first and second generation immigrants saw the practice of law as a gateway to economic opportunity.<sup>91</sup> Free public education at lower levels meant that immigrants could save their money toward tuition for part-time and night-time classes at proprietary schools. In response to new demand, proprietary law schools sprang up almost overnight in large numbers, predominantly in cities with heavy immigrant populations.<sup>92</sup>

Typically, the immigrant student had far less formal education than his native-born counterpart, and the immigrant’s parents were less likely to be professionals.<sup>93</sup> The immigrant practitioner was also much more likely to practice in criminal law, real estate, and non-commercial civil law.<sup>94</sup> Jerold Auerbach describes how the professional elite began to create “selective” institutions, based in large part on the profile of the immigrant practitioner, in order to protect their elite status.

As mass immigration and urbanization inundated the dominant Anglo-Saxon culture, the fortunate few moved to the safety of selected social institutions—Eastern schools, for example, and careers in business and finance—which could protect, or extend,

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87. See, e.g., Charles C. McKirdy, *The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts*, 28 J. LEGAL ED. 124 (1976).

88. See *id.* at 198.

89. See *id.*

90. See Gerard W. Gawalt, *The Impact of Industrialization of the Legal Profession 1870-1900*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 97, 103 (Gerard W. Gawalt ed., 1984) [hereinafter *HIGH PRIESTS*].

91. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 81 (1983).

92. See *id.* at 74.

93. See *id.*

94. See Gawalt, *supra* note 90, at 103.

their power and status. . . . Big business served as “a new preserve of the older Americans, where their status and influence could continue and flourish.”<sup>95</sup>

These big business clients, whose numbers increased exponentially as America underwent industrialization, in turn, created a demand for large corporate law firms along the Eastern seaboard.<sup>96</sup> Given the demographic makeup of big business at the time, firms catered to those clients by limiting entry into the firm to Easterners of “old-American stock,” whose fathers were, like the firm’s clients, wealthy professionals or businessmen.<sup>97</sup> Quite predictably, symbiotic relationships formed between these corporate firms and the elite law schools. Big firms began to court only the top graduates from the “best” schools, and law schools discovered that grades and law review membership were a way to help separate the “appropriate” applicant from others who would not fit into big firm culture. Law schools were enthusiastic participants in the process, because they were able to reinforce their elite status by serving as a pipeline to funnel associates into the most prestigious firms.<sup>98</sup>

In addition to closing ranks between big firms and prestigious law schools, prominent members of the profession also responded to the influx of immigrants by calling for “reform” on many fronts. Leaders of the profession created reform-minded bar organizations that limited their membership to the most affluent lawyers, all of whom were of

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95. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 24-28 (1976) (citation omitted).

96. *See id.* at 27.

97. *See id.* at 21-25. For example, Cravath, Swaine and Moore attorneys were recruited more heavily from prestigious law schools because “[t]he best men, too, are most likely to be found in the law schools which have established reputations. . . .” Robert T. Swaine, *The Cravath Firm and Its Predecessors*, in JOHN T. NOONAN, JR. AND RICHARD W. PAINTER, *THE LAWYER: PERSONAL AND PROFESSIONAL RESPONSIBILITY* 318 (1997) [hereinafter NOONAN AND PAINTER]. Attorneys were also selected for partnership based on intangibles that included “personality, judgment and character.” *Id.* Not surprisingly, Cravath’s partnership criteria produced a partnership that was almost exclusively white, male, old-American stock of Northern European ancestry, Protestant, and upper class. *See* Complaint, *Lucido v. Cravath, Swaine & Moore*, in NOONAN AND PAINTER, *id.* at 328 (“Cravath for years did not have any Jewish partner at the firm. On information and belief, the first Jewish partner was promoted to partnership in 1958. . . . Cravath has had only one female partner. . . . Cravath has never had a black partner nor a Spanish-surnamed partner.”)

98. *See* Gawalt, *supra* note 90, at 107 (“‘It was obviously much simpler’ for law firms ‘to discriminate among recruits in terms of the law school they had attended than the type of law office in which they had apprenticed. In addition, the law school provided a convenient measure of competence in their ratings of students by academic achievement.’”) (citing JEROME CARLIN, *LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO* 20-21 (1962)).

old-American stock.<sup>99</sup> After much discussion about the downward direction of the profession, in 1878 a group of elite lawyers created the American Bar Association for the purpose of restricting entry into the profession, and they vowed to “admit no men who would not be worthy members.”<sup>100</sup> As discussed later in this section, the ABA was instrumental in pushing for reforms relating to the “moral character” and academic aptitude of applicants to the bar, both of which could be traced to anti-immigrant and racist sentiment.

Strains of nativism and racism were also evident legal education. In 1917, the ABA and the Association of American Law Schools (“AALS”) commissioned non-lawyer Alfred Z. Reed to study the state of legal education and to make recommendations for reform.<sup>101</sup> Both organizations had been inspired by the success of the Flexner report, a similar study of medical schools that had called for the medical profession to close many part-time or newly created programs.<sup>102</sup> In 1921, Reed issued his first report, which described the legal profession as stratified along class, racial and ethnic lines.<sup>103</sup> Reed agreed with earlier writers who viewed proprietary schools as supplying the needs of members of the social strata “whose sons [were not] thinking of university education,” but who looked to the law school for training in a craft.<sup>104</sup> However, unlike many commentators of the time, Reed proposed creating different tracks for both bar and law schools to coincide with the two strata.<sup>105</sup> He predicted that if the intellectually less fashionable schools were driven out of business, large segments of the practice areas that were most useful for immigrant and racial groups would go unserved.<sup>106</sup>

Reed’s report was published only a month after the ABA’s Committee on Legal Education had issued their own report on the same

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99. See John A. Matzko, *‘The Best Men of the Bar:’ The Founding of the American Bar Association*, in *HIGH PRIESTS*, *supra* note 90, at 78.

100. *Id.* at 88-89. ABA leaders also craved the opportunity to vacation each year in Saratoga Springs, New York. Saratoga Springs was chosen as the site for ABA leadership meetings “because more wealthy lawyers were likely to vacation at this prestigious spa than at any other in the country.” *Id.* at 87. Lawyers referred to an early group of ABA leaders as the “Saratoga clique,” whose self-appointed mission was to direct the association from “the hotel porch after lunch.” *Id.*

101. See Robert Stevens, *Two Cheers For 1870: The American Law School*, in *LAW IN AMERICAN HISTORY* 403, 450 (D. Fleming & B. Bailyn eds., 1971).

102. See *id.* at 449-50.

103. STEVENS, *supra* note 91, at 113.

104. *Id.* (citing JOSEF REDLICH, *COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS*, 70 (1914)).

105. STEVENS, *supra* note 91 at 114; Stevens, *supra* note 101, at 452.

106. STEVENS, *supra* note 91 at 114.

matter.<sup>107</sup> Displeased with the ABA's lack of support for legal education, the AALS had pressured the ABA into creating the Committee, to be chaired by former ABA president Elihu Root.<sup>108</sup> Predictably, the Root report pressed for a unitary bar, arguing that the different parts of the profession required the same intellectual training,<sup>109</sup> and that such training could only be provided by law schools, preferably within a university setting.<sup>110</sup> By 1927 the AALS and the ABA had issued lists of approved schools, and had done away with any requirements for office-training or other apprenticeship.<sup>111</sup> The ABA had also increased law school admission requirements to include two years of college training.<sup>112</sup>

Ignoring pressure from the ABA, Reed issued a second report in 1928, denouncing the homogenization of law schools, which he traced in part to the growing use of the case-law method.<sup>113</sup> In keeping with his earlier report, Reed proposed creating two types of schools to match the stratification in the profession.<sup>114</sup> In 1930, the ABA rejected his recommendations and passed a resolution against commercially operated schools.<sup>115</sup> The ABA also created the National Conference of Bar Examiners to centralize the standards for bar examinations; whereupon the conference promptly proposed that bar-exam questions be modeled after questions being tested at the "better" university-affiliated law schools.<sup>116</sup> In 1935, capitalizing on the explosion of racist and nativist sentiment in the bar, the ABA moved to limit the number of lawyers in the bar, citing overcrowding and problems with "moral character."<sup>117</sup>

As was reflected in Reed's second report, the call for more restrictive standards coincided with the move by law schools to formalize legal education. In the late nineteenth century, Christopher Columbus Langdell and James Barr Ames introduced the case-law method of legal instruction, first at Harvard and then at a growing number of elite law schools aspiring to become even more exclusive.<sup>118</sup> Case-law method

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107. *See id.* at 115.

108. *See id.*

109. *Id.* at 116.

110. *Id.* at 115.

111. *See id.*

112. *See id.*

113. *See id.* at 120.

114. *See id.* at 121.

115. *Id.* at 176.

116. *See id.* at 177.

117. *Id.* at 178.

118. *See generally* Albert J. Harno, *Legal Education in the United States*, in NOLAN, READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION 217 (1980).

devotees believed that law could and should be taught as a science like math or chemistry. Case-law instruction required the student to distill general principles from philosophical reflection and historical analysis of a particular area of the law, and to apply those principles consistent with the legal system's more general objective principles.<sup>119</sup> Initially, only a minority of professors endorsed the case-law method, and after students at Harvard questioned its usefulness, its future appeared uncertain. However, case-law method survived and prospered, in large part because its proponents included many men of prominent status, among them the leadership of the newly formed bar associations.<sup>120</sup>

The case-law method fulfilled the requirements of modern education: it was scientific, practical, and best of all, Darwinian in approach—it winnowed out large numbers of students, allowing only the “fittest” and the most able (who also happened to be the most affluent and Anglo-Saxon) to survive.<sup>121</sup> The case law method was a point of professional pride for many elite schools, because it differentiated them from second-tier schools. The case-law method also afforded the law professor increased power and influence in the classroom, enabling him to move from a mere treatise-reading clerk to the author, lead actor, and director of a classroom drama.<sup>122</sup>

In addition to winnowing out large numbers of students, the case-law method “selected against” practitioner professors, and “selected for” professional law teachers by making “demands that neither busy practitioners nor retired gentlemen could meet.”<sup>123</sup> Supporters of the case-law method pressed for increased affiliation of law schools with universities, and for the entry of full-time law professors into the academy.<sup>124</sup> In 1873, Harvard appointed its first non-practicing law professor, James Barr Ames.<sup>125</sup> By the turn of the century, defenders of the case method had begun to prevail in their “holy war of supremacy” and the remaining practitioner-teachers quickly disappeared.<sup>126</sup>

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119. See Robert W. Gordon, *The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers, 1870-1910* in HIGH PRIESTS, *supra* note 90, at 51, 52; Harno, *supra* note 118, at 217. According to Langdell, the data for such a scientific inquiry resided not in sociological observation but in books, and in particular, in appellate opinions. STEVENS, *supra* note 91, at 53.

120. See Gordon, *supra* note 119, at 52.

121. See STEVENS, *supra* note 91, at 55.

122. See *id.* at 63, 102.

123. AUERBACH, *supra* note 95, at 75.

124. See *id.* See also Harno, *supra* note 118, at 217.

125. See AUERBACH, *supra* note 95, at 74.

126. *Id.* at 75. Responding to those who criticized the modern law school for replacing the human element with logic, Dean Roscoe Pound observed that modern law had made demands “which the old type is quite unable as well as unwilling to meet. His mind is not trained for class-room logical

## 2. *Race and Social Value in Legal Education*

In *Unequal Justice*, Jerold Auerbach traces the foregoing events—the ascendance of the elite corporate law firm, the spread of the case-law method, and the ensuing call for “standards”—to virulent anti-immigrant sentiment, Anti-Semitism and racism in the legal profession in the early part of this century.<sup>127</sup> Auerbach contends that middle-class, native-born white lawyers called for “standards,” both “moral character” and academic, in order to safeguard their professional respectability and status from what they saw as the threat of dilution by the flood of immigrants and African Americans into the profession.<sup>128</sup>

As chronicled by Auerbach, many reformers made little attempt to disguise the racist, anti-immigrant and anti-Semitic prejudices motivating their call for standards relating to “moral character.” One member of the Root Committee, who explicitly equated the values of the legal profession with American cultural values, defended new bar admission requirements as “an instrument of Americanization” needed to protect the profession against “[t]he ‘influx of foreigners’ in the cities [who] comprised an uneducated mass of men who have no conception of our constitutional government.”<sup>129</sup> Surely, he concluded, “the American Bar Association did not wish to ‘lower standards simply to let in uneducated foreigners.’”<sup>130</sup>

Auerbach notes that even the most visible and respected professional leaders were not subtle about drawing a connection between professional concerns about “moral character” and ensuing restrictions based on ethnicity and immigrant status. Former ABA president Elihu Root declared, “I do not want anybody to come to the bar which I honor and revere . . . who has not any conception of the moral qualities that underlie our free American institutions; and they are coming, today, by the tens of thousands.”<sup>131</sup>

Auerbach describes the anti-Semitic undertone of the “moral character” debate:

Even before the war Theron Strong [an influential New York lawyer and author who wrote about the legal profession] complained sourly about “the influx of foreigners.” Strong

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acrobatics. Naturally he claims to compensate by the ‘human’ element that consists better with indolence. The wail of the unfit is very apt to be made in the name of Demos.” *Id.* at 84-85.

127. See generally AUERBACH, *supra* note 95.

128. Gordon, *supra* note 119, at 53.

129. AUERBACH, *supra* note 95, at 114 (citation omitted).

130. *Id.*

131. *Id.* at 115.

was especially troubled by the rising proportion of Jewish lawyers, which was “extraordinary, and almost overwhelming—so much so as to make it appear that their numbers were likely to predominate, while the introduction of their characteristics and methods has made a deep impression upon the bar.”<sup>132</sup>

Auerbach also cites remarks, made by the dean of the University of Wisconsin Law School in 1915, as evidence that concerns about ethics were racially motivated. The dean’s statements were quite openly racist and nativist:

If you examine the class rolls of the night schools in our great cities, you will encounter a very large proportion of foreign names. Emigrants and sons of emigrants remembering the respectable standing of the advocate in their own home, covet the title as a badge of distinction. The result is a host of shrewd young men, imperfectly educated, crammed so they can pass the bar examinations . . . viewing the Code of Ethics with uncomprehending eyes. It is this class of lawyers that cause Grievance Committees of Bar Associations the most trouble.<sup>133</sup>

Concerns about immigrant status and ethnicity were not limited to the immigrants’ “moral character.” Professional leaders also expressed dismay and doubt concerning the academic abilities of their immigrant counterparts. Future Chief Justice Harlan Fiske Stone “referred to ‘the influx to the bar of greater numbers of the unfit,’ who ‘exhibit racial tendencies toward study by memorization’ and display ‘a mind almost Oriental in its fidelity to the minutiae of the subject without regard to any controlling rule or reason.’”<sup>134</sup> Austen Fox, a prominent lawyer who would later antagonize Louis D. Brandeis during his Supreme Court confirmation hearings, spoke of “the many immigrant boys . . . [who] can hardly speak English intelligibly and show little understanding of or feeling for American institutions and government.”<sup>135</sup> In Fox’s eyes, they were a “group of young men who as a class acquire very rapidly but do not assimilate—quick to learn and quick to

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132. AUERBACH, *supra* note 95, at 107 (citation omitted).

In an apocalyptic memorandum, another lawyer warned of “the great flood of foreign blood . . . sweeping into the bar.” Eastern European immigrants, “with little inherited sense of fairness, justice and honor as we understand them,” were committed only to their own “selfish advancement.” How, the author inquired, “are we to preserve our Anglo-Saxon law of the land under such conditions?”

*Id.* (citation omitted).

133. STEVENS, *supra* note 91, at 109 n.67 (quoting Harry S. Richards, *Progress in Legal Education*, 15 HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS 63 (1915)).

134. AUERBACH, *supra* note 95, at 107 (citation omitted).

135. *Id.* at 121 (quoting Austen Fox).

forget."<sup>136</sup> In response to this outpouring of Anti-Semitism and nativism, in 1909, the Section of Legal Education of the ABA adopted the requirement that lawyers be American citizens, even though the foreign student was a market force to be reckoned with, having created a great demand for proprietary and night schools.<sup>137</sup>

Efforts to restrict admission to the bar targeted African Americans as well as immigrants. Paul Finkelman has documented turn-of-the-century efforts to keep Blacks from practicing law:

Starting in the 1890s, white-dominated southern governments began to disenfranchise and segregate blacks as a backlash against the Civil War and the goals of the Reconstruction. As blacks lost their newly acquired rights, black lawyers disappeared from the scene. For example, in 1900, Mississippi had twenty-four black lawyers, and South Carolina had twenty-nine. A decade later Mississippi was down to twenty-one black lawyers and South Carolina had seventeen. In 1920, both states had only fourteen black lawyers, and by 1930, Mississippi had only six black lawyers, and South Carolina had thirteen. In 1940, there were just three blacks practicing law in Mississippi, and five in South Carolina.<sup>138</sup>

The pervasiveness of racial exclusion during this time period manifested itself in an incident involving the American Bar Association during the early part of the century. In 1912, the ABA unwittingly admitted three Black lawyers. When informed of the error, the organization rapidly passed a resolution rescinding admission.<sup>139</sup> "[S]ince the settled practice of the Association ha[d] been to elect only white men as members,"<sup>140</sup> the ABA referred the matter for a vote by the entire association. In discussing the matter, the Association quite openly declared that, from their perspective, the matter posed "a question of keeping pure the Anglo-Saxon race."<sup>141</sup> Eventually, the ABA reached a compromise; it allowed the three black lawyers to keep their memberships, but it imposed a new requirement that all future applicants identify themselves by race.<sup>142</sup>

136. *Id.* at 121.

137. See STEVENS, *supra* note 91, at 100 ("The schools that catered to immigrants apparently were so low in the view of the elite that, despite their possible economic power, the associations were quick to attempt to crush them.")

138. Paul Finkelman, *Not Only the Judge's Robes Were Black: African-American Lawyers as Social Engineers*, 47 STAN L. REV. 161, 182 (1994).

139. See AUERBACH, *supra* note 95, at 65.

140. *Id.* at 65.

141. *Id.* at 65-66.

142. See *id.* at 66.

Of course, racism pervaded legal education during this time period as well. Many law schools, particularly those in the South, formally denied Blacks admission, and most others informally excluded them. As late as 1939, thirty-four of the eighty-eight accredited law schools had formal policies excluding Blacks.<sup>143</sup> In 1925, Texas passed a law restricting attendance at the University of Texas to white students, and the law remained in effect until much later in the century.<sup>144</sup> As late as 1938, the University of Missouri Law School continued to formally exclude Black applicants on the grounds that "it was 'contrary to the constitution, laws and public policy of the State to admit a negro as a student in the University of Missouri.'"<sup>145</sup>

Although the University of Texas Law School formally excluded Latinos by restricting their admission to white students only, law schools did not need to adopt formal exclusionary policies for Chicanos and other Latinos; pre-existing social and economic constraints alone were sufficient to keep them out.<sup>146</sup> Most Mexicans and Mexican Americans lacked even the requisite high-school degree to apply to proprietary schools, much less the more prestigious university-affiliated law schools.<sup>147</sup> The majority of newly arrived Mexicans in the Southwest and California took jobs in agriculture, where they suffered sub-standard living conditions, chronic underemployment and dramatically low wages.<sup>148</sup> A minority of Mexican immigrants entered the lower ranks of industrial employment in the Northwest and the Midwest as unskilled laborers, but few sought entry into the legal profession.<sup>149</sup>

While racism against Latinos did not manifest itself as explicitly during this time period in legal education, Mexican Americans and Mexican nationals experienced in other ways much of the same nativist and racist sentiment that had been directed against Blacks and immigrants in the legal profession. Although immigrants from Mexico narrowly had escaped the limits on European immigration enacted in the Immigration Restriction Acts of 1914 and 1924, during the 1920s, Congress tried again to restrict Mexican immigration by eliminating

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143. See *id.* at 183 (citing AUGUST MEIER, *BLACK HISTORY AND THE HISTORICAL PROFESSION 1915-1980* 50 (1988)).

144. See *Sweatt v. Painter*, 339 U.S. 629, 631 n.1 (1950) (citing Texas statute).

145. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 343 (1938).

146. This information was collected during a telephone interview with Professor Michael Olivas of the University of Houston Law School (August 21, 1996) [hereinafter, "Olivas Conversation"].

147. *Id.*

148. See MATT S. MEIER & FELICIANO RIBERA, *MEXICAN AMERICANS/AMERICAN MEXICANS: FROM CONQUISTADORS TO CHICANOS* 123 (2d ed. 1993).

149. See *id.* at 121-22.

Mexico's exemption.<sup>150</sup> In 1926, Representative John C. Box of Texas introduced a bill to remove the exemption. During Senate hearings on the subject in 1928, Box publicly referred to Mexican workers as "peonized, illiterate and unclean."<sup>151</sup> Support for Box's effort to remove the exemption came from many sources, including teachers' organizations and labor unions, as well as the more blatantly nativistic "patriotic societies" and overtly racist groups.<sup>152</sup>

This, then, was the state of legal and social culture when law schools first began to explore the use of competitive admissions standards. In the early twentieth century, law schools first began to require some college attendance beyond a high school degree.<sup>153</sup> By 1921, elite schools insisted on college degrees, while the less elite schools offered legal education as part of their undergraduate curriculum.<sup>154</sup>

Admissions programs also became selective for the first time in the early 1920s, in conjunction with the demands of the case-law method of instruction. Previously, most elite law schools had employed open admissions policies at least for affluent males who had a college degree and could pay their way.<sup>155</sup> However, in the 1926-27 academic year, Harvard failed 250 of its 700 first-year students, and other schools experienced similarly high rates of attrition, largely due to the introduction of the case-law method and the ensuing radical transformation of legal education.<sup>156</sup> To deal with these attrition rates, Yale began limiting its entering classes to 100 students; no student was admitted unless he had a C average, and transfer students needed a B average for admission.<sup>157</sup> After 1926, Yale applicants were required to submit a transcript of their college record and letters of recommendations, to participate in an interview and to take a classification test.<sup>158</sup> By 1928, Yale was rejecting over two-thirds of its applicants to maintain its limit of 100 new students per year.<sup>159</sup>

The elite schools sought to limit the high rate of academic failures in another way—through the use of aptitude testing.<sup>160</sup> At Columbia,

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150. *See id.* at 125-26.

151. *See id.*

152. *See id.* at 126-27.

153. *See STEVENS, supra* note 91, at 61.

154. *See id.*

155. *See id.* at 160-61.

156. *See id.*

157. *See id.*

158. *See id.*

159. *See id.*

160. *See id.*

Dean Harlan Fiske Stone initiated experimental testing for admissions in 1921, and in 1928 Columbia added aptitude testing to its newly selective admissions process.<sup>161</sup> In 1925, the year after enactment of the Immigration Restriction Act of 1924, the West Publishing Company published the first edition of its Ferson-Stoddard aptitude test, which was used through three editions by a number of law schools.<sup>162</sup> Yale's success with aptitude testing encouraged other schools to explore the use of psychometric testing.<sup>163</sup> Through aptitude testing, elite law schools solved the problem of admitting students who were not proficient in case-method analysis. "Rather than cut back on the case method, the schools cut back on the average student."<sup>164</sup>

The use of aptitude testing continued to spread throughout the 1930s and 40s. In the late 1940s, three law schools formed an early version of what is now the Law School Admissions Council ("LSAC") to develop the Law School Aptitude Test ("LSAT").<sup>165</sup> Despite the already widespread use of aptitude testing among law schools, the first version of the LSAT, developed in 1947, did not draw from previous classroom testing experiences in legal education, but was based instead upon the Pepsi-Cola Scholarship Test and tests developed for the United States Navy.<sup>166</sup>

Not surprisingly given the foregoing historical context, the Navy tests and other aptitude tests of similar character had their own foundation in racist and anti-immigrant sentiment.<sup>167</sup> In *The Mismeasure of Man*, Steven Jay Gould points out that the same racist and nativist assumptions that had fueled support for anti-immigrant legislation had created a demand for the development of ability

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161. *See id.*

162. *See* Thomas O. White, *LSAC/LSAT: A Brief History*, 34 J. LEGAL EDUC. 369, 369-70 (1984). John Henry Wigmore concluded that the test had no substantial value in predicting success in law school. *See* STEVENS, *supra* note 91, at 169 n.54 (citing Wigmore, *Juristic Psychometry—or How to Find Out Whether the Boy has the Makings of A Lawyer*, 24 U. ILL. L. REV. 454, 455 (1929)).

163. *See* STEVENS, *supra* note 91, at 169 & n.54.

164. *Id.* at 161.

165. *See* White, *supra* note 162, at 370.

166. *Id.* at 371.

167. Professor Richard Delgado has argued generally that law schools' use of LSAT scores and undergraduate grades is inextricably intertwined with the racist history of intelligence testing. Delgado questions the validity of LSAT, in part because of the racist history of intelligence testing, an argument that is taken up in more detail in the text accompanying notes 168-184 *infra*. *See also* Delgado, *Rodrigo's Tenth Chronicle*, *supra* note 9, at 1721, 1740-41.

testing.<sup>168</sup> Gould notes that ability testing was the practical (and inevitable) offspring of biological determinism, an intellectual movement then coming into its own, one that used genetic and evolutionary theory to justify existing social, racial, and cultural arrangements.<sup>169</sup>

According to Gould, the pioneers of ability testing developed their tests during the early twentieth century expressly to justify on biological grounds certain *a priori* political and social assumptions about race and ethnicity that were then in vogue. For example, Lewis M. Terman, who developed the Stanford-Binet scale in 1916, dreamed of a "rational" society that allocated professional opportunities by IQ scores.<sup>170</sup> Henry H. Goddard, who brought the Binet IQ scale to America, reified its results as concrete representations of innate intelligence. Goddard hoped to use test scores "in order to recognize limits, segregate, and curtail breeding to prevent further deterioration of an endangered American stock, threatened by immigration from without and by prolific reproduction of its feeble-minded from within."<sup>171</sup>

168. See generally GOULD, *supra* note 79; see also Delgado, *Rodrigo's Tenth Chronicle*, *supra* note 9, at 1740 (relying on Gould and others to argue that the SAT developed from a scientific tradition intent on proving racial inferiority).

169. See GOULD, *supra* note 79, at 20.

170. Terman proclaimed that validating the hereditarian arguments about race and class were a primary aim of his work. See *id.* at 189. Of the laboring class, he wrote that

[t]hey represent the level of intelligence which is very, very common among Spanish-Indian and Mexican families of the Southwest and also among negroes. Their dullness seems to be racial, or at least inherent in the family stocks from which they came. The fact that one meets this type with such extraordinary frequency among Indians, Mexicans, and negroes suggests quite forcibly that the whole question of racial differences in mental traits will have to be taken up anew . . . Children of this group should be segregated in special classes and be given instruction which is concrete and practical. . . . There is no possibility at present of convincing society that they should not be allowed to reproduce, although from a eugenic point of view they constitute a grave problem because of their unusually prolific breeding.

*Id.* at 190-91. Terman later revised his analysis to explain group differences in terms of differences in environment. See *id.* at 192.

171. *Id.* at 159. Goddard used Binet's tests to screen incoming immigrants at Ellis Island for the purpose of "detecting mental defectives," and his initial results indicated that 83% of the Jews, 80% of Hungarians, 79% of Italians and 87% of the Russians were "feeble-minded." *Id.* at 164-66. "Goddard rejoiced in the general tightening of standards for admission, [and] . . . report[ed] that deportations for mental deficiency increased 350 percent in 1913 and 570 percent in 1914 . . . 'due to the untiring efforts of the physicians who were inspired by the belief that mental tests could be used for the detection of feeble-minded aliens.'" *Id.* at 168 (citing Henry H. Goddard, *Mental Tests and the Immigrant*, J. OF DELINQ. 2, 271 (1917)). Goddard went so far as to alter photographs to support his argument that a stock of paupers in the pine barrens of New Jersey, whom he named the "kakos" line, were genetically deficient. See *id.* at 171-72. Indeed, Goddard's "Kallikak family" functioned as the primal myth of the eugenics movement for several decades. See *id.* at 168. Goddard later recanted to admit that he had set the ceiling of "morosity" too high. See *id.* at 172.

Robert M. Yerkes, who persuaded the Army to test its recruits in World War I, was perhaps the most responsible for developing aptitude testing to perpetuate the notion that immigrants and Blacks were intellectually inferior for genetic reasons. Yerkes' Army data purported to show that dark-skinned Southern and Eastern European immigrants were less intelligent than the light-skinned Northern and Western Europeans, and that the Negro was least intelligent of all.<sup>172</sup> Yerkes' data, along with data from other hereditarian ability testers, led directly to passage of the Immigration Restriction Act of 1924, and to segregation in higher education:<sup>173</sup>

Other propagandists used the army results to defend racial segregation and limited access of blacks to higher education. Cornelia James Cannon, writing in the *Atlantic Monthly* in 1922, noted that 89 percent of blacks had tested as morons and argued . . . "[that] the education of the whites and colored in separate schools may have justification other than that created by race prejudice . . ."

But the army data had its most immediate and profound impact upon the great immigration debate, then a major political issue in America, and ultimately the greatest triumph of eugenics.<sup>174</sup>

Carl Brigham, the man who eventually would become the head of the Educational Testing Service, used the Yerkes data to argue publicly

172. See *id.* at 197.

173. See *id.* Leon Kamin has concluded that American psychologists were directly responsible for influencing legislators to pass the Immigration Restriction Act of 1924. See generally LEON KAMIN, *THE SCIENCE AND POLITICS OF IQ* (1974). See also James Reed, *Robert M. Yerkes and the Mental Testing Movement*, in *PSYCHOLOGICAL TESTING AND AMERICAN SOCIETY* 77 (Michael Sokal ed., 1987).

Yerkes and Terman . . . shared with other American Galtonians the assumption that "civic worth" or "mental ability" or "Q" were inherited biological capacities distributed unevenly among classes and ethnic groups. They translated Galtonian ideology into harsh judgments that fit all too well with the nativism and xenophobia of their culture. Thus, the efforts of Yerkes and Terman to promote their discipline were greatly eased by the fact that their technology of mental measurement reconciled equality of opportunity with inequality; they provided numbers that seemed to confirm the "naturalness" of social class and racial caste.

*Id.*

174. GOULD, *supra* note 79, at 231. Gould quotes Henry Fairfield Osborn, trustee of Columbia University, whose law school was the first to explore the use of aptitude tests:

I believe those tests were worth what the war cost, even in human life, if they served to show clearly to our people the lack of intelligence in our country, and the degrees of intelligence in different races who are coming to us, in a way which no one can say is the result of prejudice. . . . so in regard to many races and subraces in Europe we learned that some which we had believed possessed of an order of intelligence perhaps superior to ours were far inferior.

*Id.* (quoting Henry Fairfield Osborn).

for restrictions on immigration and eugenic regulation of reproduction.<sup>175</sup> As noted earlier, the LSAT in its earliest formulations drew directly from Navy tests and Pepsi scholarship tests, all variations of the original IQ tests and the early Army data.<sup>176</sup>

Gould's arguments about the racist and nativist sentiments underlying ability testing rest on more than the openly racist motivations of the testers. Indeed, Gould argues that the very idea of ability testing itself rests on racist and nativist assumptions: the key structural components of ability measurement are tied inextricably to social and cultural desires to justify pre-existing distributions of wealth and power on the basis of race and ethnicity.<sup>177</sup> According to Gould, the ability testers embedded at least two *a priori* assumptions about race and ethnicity into the methodology of ability testing.<sup>178</sup>

First, the ability-testers assumed that it was possible to reduce human capability in all its many forms to a unitary and measurable attribute—intelligence—and that such an attribute could be assigned a number.<sup>179</sup> Gould argues that the scientific method of converting human ability into a unitary number represented the social desire to justify pre-existing political, racial, and cultural divisions among people.<sup>180</sup>

We recognize the importance of mentality in our lives and wish to characterize it, in part so that we can make the divisions and distinctions among people that our cultural and political systems

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175. See *id.* at 230. Brigham saw the threat to American intelligence as coming from both immigrants and Blacks. "Running parallel with the movements of these European peoples, we have the most sinister development in the history of this continent, the importation of the negro." *Id.* Brigham eventually recanted many of his conclusions, but his change of heart did not affect the widespread acceptance of his theories. *Id.* at 232-34. See also Delgado, *Rodrigo's Tenth Chronicle*, *supra* note 9, at 1743 (noting that Brigham relied on the Army test results).

176. See White, *supra* note 162, at 370-71. See also MALDEF STUDY, *supra* note 83, at 16 (discussing the historical development of the LSAT).

177. See GOULD, *supra* note 79, at 24-25.

178. See *id.*

179. See *id.*

180. See *id.* In a similar vein, Professor David Goldberg argues that Enlightenment notions of morality, intellectual capacity, and Reason reflect the Western European desire to justify appropriation of land and human resources on the grounds that savages, Negroes, and Southern and Eastern Europeans all were inferior in those categories. See DAVID GOLDBERG, *RACIST CULTURE* 15-40 (1991) (contending that the central tenets of Enlightenment moral philosophy, e.g., arguments about irrationality or immorality, were constructed by social views on race and ethnicity, as illustrated by philosophers' writings on race); *id.* at 117-19 (arguing that Enlightenment Reason is racially and culturally Western and Eurocentric, because it calls other cultures irrational for their "fail[ure] to exhibit the values, metaphysical attitudes, epistemological principles, or cognitive values of 'whitemales'").

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dictate. We therefore give the word ‘intelligence’ to this wondrously complex and multifaceted set of human capabilities.<sup>181</sup>

Second, the hereditarian testers assumed that it was possible to rank the scores obtained from measurement in some sort of serial fashion.<sup>182</sup> However, Gould describes the practice of ranking scores in ascending order not as an example of precise measurement but as a function of the Enlightenment metaphor of progress as upward movement on a linear scale.<sup>183</sup> In particular, according to Gould, the process of ranking comported with “[m]etaphors of progress and gradualism [that] have been among the most pervasive in Western thought.”<sup>184</sup> Gould traces the metaphor of progress to Darwinian assumptions about evolution, and biological determinism in particular.

Notwithstanding Gould’s work and similar arguments from other prominent scientists, intelligence and ability tests continue to be used to screen potential applicants for educational and some employment purposes. Certainly, commentators and testing organizations continue to criticize overreliance on these tests, based in part on the racist historical context surrounding their development. But having forgotten (or having repressed) the history of law school admissions standards, law schools continue to perpetuate the meritocratic myth that LSAT scores measure ability to succeed in law school in objective, universal and race-neutral ways.

The foregoing critical history of law school admissions illustrates the general deconstructivist insight that merit standards necessarily defer to and depend on subjective, socially constructed preferences about what constitutes social value, in this case in the legal profession. More relevantly, it demonstrates that legal professionals and educators constructed preferences for social value, as well as the corresponding law school admissions standards, at a time when the profession affirmatively sought to exclude people based on their race and ethnicity. Far from being colorblind, law school admissions standards were developed in a context of racial and cultural exclusion, where those professional leaders who developed those standards and values had achieved their leadership status in large part because of their race. Far more troublingly, this critical history raises the possibility that law schools admissions standards

181. GOULD, *supra* note 79, at 24.

182. *See id.* at 24-25.

183. *See id.*

184. *Id.* at 24. In an astonishing tour de force, notable for its scope, Gould also debunks the scientific methods used to develop intelligence testing, by re-analyzing the data and conclusions of the early twentieth century intelligence testers. *See id.* at 24-29.

may have been developed as part of a broader professional effort to exclude on the basis of race and ethnicity.

Practically speaking, the history of law school admission may help to explain the admissions standards' disproportionate impact on groups that were excluded from the legal profession at the relevant time. Given the origins of aptitude testing, it is less likely to be mere coincidence that contemporary academic selectivity measures continue to exclude certain people of color disproportionately. For as long as the tests have been administered, Blacks and Latinos have performed at levels significantly below those of white applicants. For example, in 1992-93, 25.7% of white applicants scored at or above 160 on the LSAT, compared to 11.5% of Latino applicants, 12.7% of American Indian applicants, and 2.9% of African-American applicants.<sup>185</sup>

Beyond providing an alternative critical historical account of law school admission, what theoretical implications might this deconstructivist account have for Farber and Sherry's defense of objective merit? Using the authors' own argument that merit should be preferred over bias, law school admissions standards must be rejected as biased or race-conscious. Farber and Sherry describe merit as valuable, objective, and rational because it is "definable without reference to th[e] personal characteristics" of race, gender, class, and religion. Conversely, they condemn bias for being unjust, irrational, and "race-conscious." According to Farber and Sherry's own analysis, then, the conception of merit in the legal profession must be rejected to the extent that it was developed in ways that were related to race and ethnicity, i.e. because merit is "race-conscious."

Indeed, all merit standards are potentially subject to this critique. As the foregoing critical history illustrates, all merit standards necessarily must defer to subjective, nonrational, culturally- and racially-specific judgments about what constitutes social value. Many, if not all, of the "numbers-based" standards might potentially be traceable to the racist history of ability testing. But beyond an analysis of its specific history, because merit depends on and defers to what is in effect a social bias, merit actually reinscribes the qualities and characteristics of bias. Indeed, merit can be redescribed as a socially acceptable bias for particular qualities and characteristics and values. Certainly, the radical

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185. See LAW SCHOOL ADMISSIONS COUNCIL, 1990-95 NATIONAL STATISTICAL REPORT F-5 (1996). In 1994, the average LSAT score of African American applicants was a 149 as compared to a 158 for Caucasian students. The average GPA of African American students was 2.91 as against 3.25 for Caucasian students. *Id.*

critique of merit builds on this assumption to condemn certain merit standards as favoring the groups that constructed them.

However, contrary to popular belief (and perhaps the views of some critical theorists), the deconstructive argument does not collapse the distinction between merit and bias, to argue that all merit is bias. One could also make the reverse deconstructive argument, that bias necessarily reinscribes the “rationality” of merit because biases can be said to be rationally related to a particular state of the world they seek to produce.

Suppose that society openly viewed the distribution of jobs and other opportunities as a socially acceptable means by which certain demographic groups could consolidate their power. It then would constitute a merit-based selection to choose an employee or student on the basis of their social status, race, class, or gender—these criteria would have “merit” in light of the social value of power consolidation. Similarly, affirmative action programs could be said to have “merit” because they put members of previously excluded groups into positions of power, a political goal that many defenders of affirmative action articulate.<sup>186</sup> Thus, bias depends on and defers to the idea of the “logic of selection” fundamental to the definition of merit, in which a particular characteristic or trait rationally predicts for a particular ability that has social value, whether that be the ability to perform well under the Socratic method or the ability to consolidate the power of dominant groups.

The possibility of deconstructing the distinction between merit and bias from either direction reveals the “differance” between the arbitrary, nonrational social choices associated with bias and the rational objectivity associated with merit. Merit differs from bias, but the way merit is constructed through judgments about social value necessarily reinscribes the characteristics of bias. Bias differs from merit, but given a particular social value—e.g., the perpetuation of white supremacy—selection based on race or ethnicity meritoriously and logically relates to achieving that social value.

Rationality or logic cannot fully explain distributions according to merit. Nor can merit standards be explained fully as the irrational exercise of social power. Deconstructive practice reveals the limits of both “rationality” and the exercise of social power in explaining social practices like merit selection or biased selection. Deconstruction “sets in train a process of thought which shuttles productively from one

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186. See Kennedy, *supra* note 9.

standpoint to the other.”<sup>187</sup> At the same time, it undermines and displaces any stable meaning for merit or bias as opposites, by redescribing bias as a form of merit, and merit as a form of bias. Thus, it reveals the choice of what we choose to call merit and what gets called bias to be a political one, subject to discussion and debate.

### III

#### ADDITIONAL THEORETICAL AND PRACTICAL IMPLICATIONS

##### A. *Critical Historical Method: An Alternative Line of Inquiry*

Whatever one thinks of deconstructive practice and difference, the original question posed by Farber and Sherry remains. Given that merit standards were designed to keep Southern and Eastern Europeans, Jews, and African Americans out of power, how does one explain the disproportionate success of Jews and some groups of Asians? Farber and Sherry primarily focus their attention on alternative answers that are Anti-Semitic, but they also allude to two other potentially acceptable (i.e., not Anti-Semitic) possibilities, neither of which they explore in depth. First, the authors concede that for Jews and some Asian groups, the standard might “simply [happen] by chance to correspond to something in their own culture.”<sup>188</sup> Alternatively, they suggest, “these groups might have mastered the dominant culture as a response to their subordinated status.”<sup>189</sup> Farber and Sherry do not fully develop either alternative, both of which explain Jewish or Asian success as cultural “adaptation.”<sup>190</sup>

Indeed, one could imagine such an argument, more fully fleshed out than the authors’ description, that Jewish or some Asian cultures have some traditions or emphases—perhaps a history of achievement in the legal profession, an embrace of Enlightenment values, an emphasis on formal education, a mastery of written texts, rules of law or religion, or other adaptations related to their diaspora—that might explain why

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187. NORRIS, *supra* note 16, at 27.

188. Farber & Sherry, *Radical Critique of Merit*, *supra* note 2, at 880.

189. *Id.*

190. Farber and Sherry find this argument to be Anti-Semitic, in one sense, because it implicates Jews in the blame for constructing racist standards (which in the case of law school admissions standards seems rather doubtful), or at least for taking advantage of them. *See* FARBER & SHERRY, *BEYOND ALL REASON*, *supra* note 2, at 72. Alternatively, the argument is Anti-Semitic because any radical proposal for reform would take away the fruits of Jewish success as unfairly earned. *See* Farber & Sherry, *Radical Critique of Merit*, *supra* note 2, at 881. The authors find the adaptation argument to necessarily suggest that Jewish and Asian cultures are parasitic and inauthentic. *Id.* *See also* FARBER & SHERRY, *BEYOND ALL REASON*, *supra* note 2, at 74.

these groups have beaten the dominant culture at its own game in particular professions or educational settings.<sup>191</sup>

The authors ultimately reject the possibility of this argument, or any derivation of it, for two reasons. First, Farber and Sherry contend that the “white Gentiles might allow Jews and Asians to *succeed*, but they would not allow them to *surpass*. A ‘gate built by a white male hegemony’ is not likely to open wider for Jews and Asians than for members of the dominant culture.”<sup>192</sup> Second, and in the alternative, Farber and Sherry respond that any radical critique of merit that emphasizes its cultural or ideological situatedness is nihilistic.<sup>193</sup>

Whether or not the charge of nihilism sticks—an argument taken up in more detail in the next section—the authors do not appear to have undertaken any sort of historical inquiry, conventional, critical, or otherwise, to answer the question about Jewish or Asian success. Farber and Sherry instead focus on hypothetical explanations that they then attack as anti-Semitic or anti-Asian.

As the critical history of law school admissions suggests, however, it might have been more productive for Farber and Sherry to explore the Jewish/Asian question by conducting a critical historical inquiry. The authors could have explored how Jews and Asians did or did not participate in the creation of admissions standards, how they initially fared during the adoption of admissions criteria, and when and how they first began to succeed under such standards (a project that this Article does not take up). Whatever the results of such an historical inquiry, the authors’ ahistorical comparisons between groups are of little help, because, as the foregoing discussion suggests, merit cannot be assessed in abstract, “objective” terms.

In any event, Farber and Sherry’s argument is premised on the assumption that members of the dominant group consciously and actively conspired to exclude all groups other than their own, by constructing intentionally unfair standards rather than neutral, fair standards. The authors’ argument does not necessarily apply to the weaker formulation of the radical critique presented in this Article, which describes all merit standards as culturally and historically situated, and does not necessarily

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191. Though beyond the scope of this article, there is some suggestion that the data with regard to Asian Americans in law schools and law school faculty positions may not conform to Farber and Sherry’s more general argument about Asian American success. See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241 (1988).

192. FARBER & SHERRY, *BEYOND ALL REASON*, *supra* note 2, at 71 (emphasis in original).

193. The nihilism argument is taken up in Part IV, *infra*.

formulate merit standards as the product of conscious conspiracy on the part of members of the dominant group.

Of course, this Article does raise the possibility of a stronger argument, i.e., that merit standards in law school admissions were part of a broader structural, perhaps explicitly conscious effort to exclude Blacks and immigrant groups on the basis of perceived racial, ethnic, and cultural differences. However, even the stronger version of the argument does not negate the possibility that Jews or Asians, as time passed, would come to surpass the dominant culture's performance at its own game, for historical or social or cultural reasons that do not necessarily hold true for other groups with different histories and cultures. Nor does that explanation presume that Jewish and Asian groups have become assimilated culturally into American culture—to the contrary, there is much to indicate that, in conjunction with their success under conventional merit standards, Jews and Asians continue to enjoy distinctive and rich cultural and historical traditions. Rather, the radical critique is meant to point out the ways in which *all* merit standards are necessarily historically and culturally specific, and to argue that all groups ought to have the opportunity to participate in the development of such standards.

*B. A Practical Application of Deconstruction:  
Shifting the Burden of Proof*

This section suggests ways in which litigators could make use of the deconstructivist insights of this article in litigating against purely numbers-based law school admissions standards. As noted earlier, deconstruction merely clears the way for necessary political discussions about what gets called merit or bias. Although this Article does not develop those political arguments, the practical task of creating litigation tools assumes a prior, political commitment to increase the numbers of Blacks and Latinos/as in law schools. Thus, this section touches on those arguments briefly.

It is possible, drawing from the critical history of law school admissions, to marshal at least two persuasive political arguments for affirmative action in law schools. First, the critical history of law school admissions standards raises the possibility that law schools developed those standards, and more particularly the LSAT, as part of a broader intentional effort to exclude Blacks and immigrants from the legal profession. To the extent that we find arguments about intentional discrimination politically persuasive, we should respond to evidence of

possible intentional discrimination in the creation of these standards by overhauling the standards or admitting people of color via affirmative action programs.

The critical history of law school admissions also supports a second political argument from fairness, this one a more process-oriented argument than the last. Duncan Kennedy argues persuasively that, to the extent certain groups were affirmatively excluded via merit standards and explicit racism from the legal profession, they did not have an opportunity to participate in the initial development of merit standards.<sup>194</sup> Therefore, affirmative action programs are justified on the grounds that they put people of color in positions of leadership where they eventually will be able to serve as intelligentsia for communities of color, and participate in decisions about continuing or revising standards of merit.<sup>195</sup>

Assuming the persuasiveness of these pro-affirmative action political arguments, how might deconstructive insights about merit and bias translate into practical litigation tools? Using standard anti-discrimination arguments (or slightly modified ones), litigators might be able to use deconstructive insights to challenge straight numbers-based admissions procedures like the SP-1 policy recently mandated in California universities. While courts are not likely to find persuasive the argument that all merit standards are a form of bias, they may find more persuasive the argument that law school admissions standards were developed in the context of, or for the purpose of, racial exclusion. These radical claims in support of affirmative action and against admissions policies like SP-1 certainly can be fit into the conventional legal vocabulary's distinctions between merit and bias.

Currently, standard anti-discrimination law recognizes that remedying past discrimination constitutes a compelling state interest of sufficient weight to justify affirmative action programs.<sup>196</sup> Standard anti-discrimination doctrine also recognizes that the contextual history of a selection procedure is important in assessing whether the procedure has been used with an intent to discriminate.<sup>197</sup> The deconstructivist history of law school admissions provides material for both of those arguments.

First, to the extent that litigation involves defending an affirmative action program in a law school, such programs can be justified on the

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194. Kennedy, *supra* note 9, at 712-13 (arguing that to compete effectively for wealth and power, minority groups must have intelligentsia who participate in the production of knowledge.)

195. *See id.*

196. *Shaw v. Hunt*, 116 S. Ct. 1894, 1902 (1996).

197. *U.S. v. Fordice*, 505 U.S. 717, 734 (1992).

grounds that they are remedying the past discriminatory activity embedded in law school admissions standards themselves, whether the discrimination consists of developing the standards for the purpose of excluding people of color, or excluding them from the profession in a way that prevented their participation in developing merit standards. Although the United States Supreme Court does not recognize remedying industry or profession-wide discrimination, that limitation has never been applied to cases which justify an affirmative action program on the grounds that the selection process itself is intrinsically and structurally discriminatory.<sup>198</sup> Using such an argument, defense attorneys in *Hopwood v. Texas*<sup>199</sup> might have coupled the foregoing general historical narrative with evidence of specific institutional history as well as evidence of disproportionate impact of the law school's admissions process, to argue that Texas's affirmative action programs were justified by the a compelling state interest in remedying past discrimination.<sup>200</sup>

Likewise, critical history could also be used as an offensive weapon in challenging the validity of pure numbers-based admissions standards like SP-1 under a Title VI intentional discrimination challenge. Standard anti-discrimination law under Title VI looks to the history surrounding a selection procedure to determine whether the procedure was used with the intent to discriminate. In *United States v. Fordice*, the United States Supreme Court condemned historically white Mississippi colleges' admissions policies relating to use of the American College Test (ACT) on the grounds that they were traceable to a de jure system of discrimination, were originally adopted for a discriminatory purpose, and continued to have discriminatory effects.<sup>201</sup> Likewise, a court could find that the history of affirmative discrimination surrounding the birth of law school admission standards constituted a de jure system of discrimination, and that the LSAT and grade point average admissions standards are traceable to that time period and were originally adopted for a discriminatory purpose.

Defenders of the SP-1 process likely will argue that evidence of historical discrimination does not prove that the standards themselves

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198. See *Croson v. City of Richmond*, 488 U.S. 469, 497-98 (1989).

199. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

200. The defense could also have made use of an affirmative action counternarrative to argue that the program served the "compelling state interest" of affording previously excluded groups the opportunity to participate in constructing merit standards, thereby ensuring that they will not be systematically excluded from professional opportunities. See *id.* at 940, 944-48 (requiring a compelling state interest to justify use of affirmative action in law school admissions because the program is race-conscious).

201. 505 U.S. 717, 734 (1992).

were, or are currently, the product of discriminatory intent, particularly if the LSAT has been modified over the years. Further, LSAT defenders are likely to argue that the facts in *Fordice* are inapposite, since Mississippi had formally been held liable by the judicial system for operating a de jure system of segregation.<sup>202</sup>

Acknowledging the potential doctrinal difficulties of such an argument, this Article proposes the creation of a new doctrinal category, "intentional impact," which would combine elements of disparate impact doctrine with elements from intentional discrimination, or disparate treatment, doctrine. Under an "intentional impact" theory, a party could combine evidence of an industry or profession's discriminatory intent in adopting or developing certain selection standards with current evidence of disproportionate impact, to create a prima facie case of intentional impact discrimination. Upon a prima facie showing of intentional impact, the burden of proof would then shift towards proponents of the merit standard at issue to prove, beyond any showing of educational or business necessity, that the standards either were not developed in the context of racial exclusion, or did not produce a disparate impact on historically excluded groups.<sup>203</sup>

Our suspicions are certainly raised when we discover that a particular merit standard, like the LSAT, was developed in a context of racial exclusion, and possibly for the explicit purpose of racial exclusion. We become more suspicious when we are confronted with evidence of the standard's current disproportionate impact on people of color. Just as the burden is shifted after an initial showing of disparate impact in Title VI and VII cases,<sup>204</sup> so too should the burden shift in intentional

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202. *Id.* at 734.

203. In *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977), the Supreme Court held that in order to mount a constitutional challenge on the basis of disparate impact, plaintiffs would have to show some evidence of intentional purpose in adopting the facially neutral government action at issue. In that case, the Court held that in determining whether a facially neutral government action was motivated by a discriminatory purpose, a trial court should consider the historical background of the decision as an evidentiary source, in conjunction with discriminatory impact. *Id.* at 267. The proposed "intentional impact" category similarly would permit evidence of the historical background of a decision and events leading up to it, but would require the evidentiary burden to shift on a showing of historically suspect circumstances coupled with a disproportionate impact.

204. While Title VI itself, like the Fourteenth Amendment, bars only intentional discrimination, the regulations promulgated pursuant to Title VI may validly proscribe actions having a disparate impact on groups protected by the statute, even if those actions are not intentionally discriminatory. See *Guardians Ass'n v. Civil Service Comm'n of New York City*, 463 U.S. 582, 584 n.2 (1983); *Alexander v. Choate*, 469 U.S. 287, 292-94 (1985); *Georgia State Conference of Branches of NAACP v. State of Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985). Upon a showing that an educational admissions policy has a disparate impact upon protected groups, the burden of proof then

impact cases, to prove that a particular merit standard is truly "colorblind." A showing of educational necessity would not be enough, because, as with law school admissions, the educational values and practices of the institutions (like the case-law method) may be as much a product of industry-wide discrimination as the standards themselves.

The intentional impact litigation strategy focuses the court's attention beyond the merit standards to the social values behind those standards, and the relation between those values and race and ethnicity. To the extent that contemporary antidiscrimination law insists on using colorblindness and formal equal opportunity as benchmarks for acceptable ways of distributing resources, those who would defend merit standards should bear the burden of proving their fairness and equality after a *prima facie* showing of unfairness in both their origins and their contemporary application.

No doubt Farber and Sherry would object to the foregoing proposal, most likely on theoretical grounds. In keeping with their conservative pragmatic tradition,<sup>205</sup> Farber and Sherry place the burden of proof on critics of merit, to show that the standards are not race-neutral, fair, just, or equal.

[W]e should be receptive to but critical of challenges to current conceptions of merit. Contemporary standards should receive a rebuttable presumption of validity, and the burden ought to be on challengers to show why particular aspects of those standards ought to be eliminated, amended or expanded.<sup>206</sup>

Asked to explain why merit standards disproportionately exclude applicants of color, Farber and Sherry contend that the simplest and therefore most likely answer is that standards are applied in

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shifts to the defendant, who must show that a selection procedure is justified based on some "educational necessity," or "business necessity" in the case of employer discrimination under Title VII. *See generally* E.E.O.C. v. Steamship Clerks Union, 48 F.3d 594, 602 (1st Cir. 1995).

205. Professor William Eskridge labels Farber and Sherry's prescriptions for social change "conservative pragmatism."

Farber and Sherry's conception of 'practical reasoning' posits that we do not discover truth by logical deduction from grand theoretical premises, but rather create truth as we devise ideas to make sense of our experiences. In explaining this conception of truth, they specifically invoke the philosophy of [Jamesian] American pragmatism. [This philosophy] suggests that we change our views slowly in response to new experiences [by] preserv[ing] the older stock of truths with a minimum of modification, stretching them just enough to make them admit [the new idea], but conceiving that in ways as familiar as the case leaves possible.

William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 612-13 (1994) (quoting William James).

206. Farber & Sherry, *Radical Critique of Merit*, *supra* note 2, at 883.

discriminatory ways. "We do not contend that the current concept of merit is perfect, nor do we deny that discrimination against some groups has denied them their due rewards. Belief in merit is not incompatible with acknowledging that societal standards can be applied in a discriminatory manner."<sup>207</sup> Thus, according to the authors, bias is not contained within the standards themselves, but is external, identifiable, and removable.

Farber and Sherry might similarly separate merit standards' discriminatory past from the question of whether the standards are, nevertheless, theoretically valid or useful in predicting law school success. Farber and Sherry likely would contend that even if the standards were developed in the context of racial exclusion, such inauspicious beginnings do not necessarily negate the idea that the standards now predict law school success with some accuracy.<sup>208</sup> Alternatively, Farber and Sherry might argue that even if contemporary law school admissions standards are discriminatory, it is still theoretically possible to imagine merit standards that are not tainted by bias.

But even a conservative pragmatist would find it difficult to argue that both the discriminatory history of merit standards and their current disproportionate impact on current applicants are the result of mere discriminatory application or unlucky coincidence. At the very least, a conservative pragmatist's suspicions would be aroused that those merit standards which currently produce disparate impact and also were developed in a context of racial exclusion are likely to be discriminatory, not just in their application but in their very structure.

#### IV

##### IS THE RADICAL CONSTRUCTIVIST CRITIQUE NIHILISTIC?

Anticipating the possibility that there are explanations for Jewish and some Asian groups' successes that do not rest on Anti-Semitism,

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207. *Id.* at 857. *See also id.* at 866. ("If success is influenced by merit, racial differences must be attributable to nature, nurture, or discrimination (or some combination of these). Either the less successful groups are born with fewer of the traits that lead to 'good' performance, or their upbringing or environment discourages the development of those traits, or they possess the same traits but are denied equal recognition and reward.")

208. In *Rodrigo's Tenth Chronicle*, fictional character Lazlo Kowalski defends merit testing against the racist history of the SAT:

I'm not sure what it has to do with today. No one advocates those distasteful notions any more. . . . The test may have been biased back then, and maybe a regatta or two creeps in even now. But ETS has professional test validators, experts who comb the items for bias. And surely you cannot say there are no differences in legal aptitude or ability."

Delgado, *supra* note 9, at 1742.

Farber and Sherry reach for their weapon of last resort: they argue that the radical critique of merit is nihilistic.

To say that standards of merit are arbitrary is to say, as Duncan Kennedy says about conflicting paradigms, that no meta-criteria exist for evaluating them or judging between them. If so, then reason can play no role in accepting or rejecting these standards, for there are no criteria to which reason can appeal. But this approach also makes it difficult to criticize the status quo.

We are then back to force as the only arbiter (other than chance). . . .<sup>209</sup>

In Sherry's article *The Sleep of Reason*, she repeats and extends this nihilism argument, contending that the radical critique promotes relativism and precludes us from criticizing the perpetrators of another Holocaust, or refuting those who deny that the Holocaust ever happened.<sup>210</sup> Exhibiting a pragmatist's faith in reason, Sherry argues that "even if there is no epistemology unconnected to power relationships, we tend to—and perhaps we must—behave as if there were."<sup>211</sup>

As Farber and Sherry acknowledge, the portrayal of deconstructive practice as nihilistic or Anti-Semitic is nothing new.<sup>212</sup> Critics repeatedly have raised the same charge against Paul de Man, a noted deconstructionist, who was discovered to have written essays for a Belgian newspaper in which he repudiated Jewish influence in literature.<sup>213</sup> DeMan's detractors pointed to what appeared to be pro-Nazi sentiment in his work to argue that deconstructive practice was linked to moral relativism and Nazism.

The nihilism argument also has been raised more generally,<sup>214</sup> against both deconstructive practice and the so-called "irrationalist" wing of Critical Legal Studies.<sup>215</sup> Guyora Binder articulates the structure of the nihilism argument against deconstruction:

209. Farber & Sherry, *Radical Critique of Merit*, *supra* note 2, at 880-81.

210. See Sherry, *supra* note 80, at 483-84.

211. *Id.* at 473.

212. See Farber & Sherry, *Radical Critique of Merit*, *supra* note 2, at 879 & n.147.

213. See Paul de Man, *The Jews in Contemporary Literature*, *LESOIR*, Mar. 4, 1941, cited in DAVID LEHMAN, *SIGNS OF THE TIMES: DECONSTRUCTION AND THE FALL OF PAUL DE MAN* 269-71 (1991).

214. See Balkin, *supra* note 33, at 1670 (citing JOHN ELLIS, *AGAINST DECONSTRUCTION* (1989) as an example of argument that deconstructing conceptual distinctions leads to end of meaningful discourse and intellectual discussion).

215. See Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1, 48 (1984) (observing that the crux of the nihilism argument against Critical Legal Studies is that

The bases for this suspicion of deconstruction are threefold. First, because deconstruction shows every argument to contain its own opposite, it seems nihilistic. Second, because deconstruction is said to ‘annihilate the subject’—to deny the individual identities of authors and of characters—it seems to deny individual responsibility for evil. Third, because it exposes the futility of efforts to deny loss, contradiction and violence, deconstruction seems to urge acceptance of their necessity. Perhaps an ‘antihumanist’ philosophy that attempts to annihilate the subject sees no great loss in the annihilation of subjects.<sup>216</sup>

Similarly, Farber and Sherry’s argument from nihilism assumes that violence is inevitable once we concede that reason cannot adjudicate neutrally between interpretations.

However, Farber and Sherry’s argument has potency only if reason can indeed fulfill its own promises of adjudicating fairly and neutrally between competing interpretations.<sup>217</sup> In fact, the authors’ faith in reason as a neutral arbiter of competing interpretations is metaphysically misplaced. Reason and merit are culturally and ideologically specific constructs that depend on a particular ideological discourse and can adjudicate only for those who subscribe to that ideology. Nor can reason fulfill the promise of providing objectively “correct” rational choices. Indeed, a scrupulous application of reason would not have prevented the Holocaust. While much of the Nazi scientific reasoning may have been flawed, the Holocaust was not merely bad science or bad reasoning.<sup>218</sup> Condemning the Holocaust necessitates overtly political commitments to compassion, empathy for suffering, and outrage at the exercise of power over innocent victims on the basis of their ethnicity.

Critical legal scholar Joseph Singer points out the fallacy in the notion that reason alone, as a closed system, will generate “correct” theoretical choices between competing alternatives.<sup>219</sup> Rather, Singer

by rejecting a rational method of adjudicating value conflicts, critical legal scholarship removes certainty in all things).

216. Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 YALE L.J. 1321, 1377 (1989).

217. Otherwise the authors are merely fooling themselves into thinking that nihilism does not currently rule, an option that Sherry appears to favor. See Sherry, *supra* note 80, at 455-57, 483-84 (arguing that even if we don’t believe that reason offers a neutral way of choosing between solutions, we should act as if it does).

218. “What protects us against Nazism is not the belief that reason can prove that it is wrong. What protects us is outrage.” Singer, *supra* note 215, at 55.

219. See *id.* at 60.

Theory is useful to the extent that it articulates what we value. Since our values conflict, legal theories express our competing values. We ‘draw a line’ between competing

argues that, on an everyday basis, people make most important choices intuitively, on the basis of preconceived commitments to their ideological political and moral values.<sup>220</sup> He counsels that we should continue to choose based on our political and moral intuitions and convictions about “how we should live” and “what we should do.”<sup>221</sup> Political conversations between competing perspectives must still take place: we must argue, present competing and incompatible bodies of evidence, and try to change someone’s mind, rather than rely on cool reason as a universally valid and objective arbiter to make our decisions for us. The radical critique of merit eliminates the conversation-stopper of claiming that a particular position on affirmative action, for example, is right because it reflects objectively the true nature of merit, economic efficiency and the operation of the marketplace.

Singer’s critics answer that our political commitments are not devoid of reason; we use reason to make intuitive political and moral choices, as is evident in the self-reflective scrutiny and revision to which people subject their moral choices.<sup>222</sup> Commentators also point out that most policy choices contain reasoned conclusions about cause and effect. Of course their claims are correct, but any privilege that reason might enjoy immediately is undermined by its deference to the preexisting nonrational political choices that are embedded within rational discourse. As with all relational binary opposites, reason and intuition, cause and effect, are entwined in an illogical relationship of difference.

Contrary to Farber and Sherry’s assertion, as the foregoing demonstrates, reason plays an absolutely essential role in deconstruction, which uses rigorous logic and reason to expose the limits of rationality.<sup>223</sup> In fact, it is only because Derrida “respects the exigencies” of the rational

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principles and then create a theory to describe where we chose to place the line. But the theory does not itself reconcile those values or tell us where to draw the line. It cannot because it is something we made up to express those values and the ‘liue’ between them.

*Id.*

220. *See id.*

221. *See id.* at 62.

When people decide whether to get married, to have children, to go to law school . . . they do not follow a procedure that generates, by itself, an answer. They do think long and hard about what they want in life; they imagine what their lives would be like if they were to follow one path rather than another . . . and in the end, they make a decision. . . . Legal decisions—deciding a case, voting on a statute, electing a president—are no different . . .

*Id.*

222. *See, e.g.,* John Stick, *Can Nihilism be Pragmatic?*, 100 HARV. L. REV. 332, 398 (1986) (“Singer thinks we just choose our moral and political stands, and that rationality applied to morals can be only rationalization after the fact.”).

223. It is for this reason that Drucilla Coruell calls deconstruction “the philosophy of the limit.” DRUCILLA CORNELL, *THE PHILOSOPHY OF THE LIMIT* 1 (1992).

or philosophical argument right up to its limits, that he is able to expose the “constitutive blind spots” that exist in those discourses.<sup>224</sup> Derridean deconstructive practice—as opposed to the descriptions of deconstruction offered by anti-Enlightenment or post-analytical thinkers like Jean Baudrillard or Richard Rorty—adheres very closely to conventional standards of analytic precision, rigor and consistency.<sup>225</sup>

Contrary to much of postmodernist thinking, Derridean deconstructive practice does not support an argument that all reason is political, that all concept is metaphor, or that all merit is bias. Indeed, Derridean deconstructive practice is designed to expose the circular relationship of mutual dependence and difference between the two terms in a conceptual opposition: reason defers to and depends on political intuition, and at the same time differs from political intuition. Merit defers to, and differs from, bias, and vice versa.<sup>226</sup> Deconstructive practice does not permanently reverse the hierarchical ordering in the opposition between merit and bias; instead, it points out the circular and paradoxical relation between the two concepts.

Thus, deconstructive practice itself does not, and is not meant to, adjudicate between competing interpretations. Deconstruction clears the way for necessary political discussions by demonstrating that what appears to be natural or objective is actually a function or pre-existing contingent categories in political and ideological discourse. But deconstructive practice cannot and does not mean to provide new foundational answers. “[Deconstruction] can displace a hierarchy momentarily, it can shed light on otherwise hidden dependencies of concepts, but it cannot propose new hierarchies of thought or substitute new foundations.”<sup>227</sup>

The deconstructive reading presented in this article, to the extent that it draws directly from Farber and Sherry’s rationalist argument, can

224. See *id.*; see also Curran, *supra* note 31, at 15 (deconstructive practice “is as scientific in rigor and logic as . . . structuralism”).

225. See NORRIS, *supra* note 16, at 146.

226. See *id.* at 142-43.

Derrida’s mode of argument . . . is very far from endorsing the vulgar-deconstructionist view that ‘all concepts come down to metaphors in the end’ . . . . Derrida’s purpose . . . is precisely to deny that we could ever effect such a straightforward reversal of priorities . . . . For, quite simply, there is *no possibility* of discussing metaphor—or defining its attributes, its difference from ‘literal’ usage, or its problematic role within the texts of philosophy—without falling back on some *concept* of metaphor, a concept that will always have been ‘worked’ or elaborated in advance by the discourse of philosophic reason. Thus ‘each time that a rhetoric defines metaphor, not only is a philosophy implied, but also a conceptual network in which philosophy *itself* has been constituted.

*Id.* (citation omitted) (emphasis in original).

227. J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 786 (1987).

be tested by conventional standards of analytical rigor and precision. But Singer is also right when he suggests that society must choose between the current picture of merit and bias in law school admissions and the critical historical account offered by this Article. We must choose, based on our intuitions and political convictions, what we consider important in distributing opportunities for legal education and what is consistent with our own experiences of the social world.

### CONCLUSION

Critical Race Theory scholars have noted that deconstructionist critical theory is theoretically in tension, and may in fact be incompatible, with Critical Race Theory.<sup>228</sup> Angela Harris has pointed out the tension within Critical Race Theory between its theoretical critique of purportedly race-neutral legal institutions and its commitment toward fashioning an affirmative program of racial emancipation, an effort which she calls "reconstruction."<sup>229</sup> Indeed, Critical Race Theory evolved at least in part because Critical Race scholars believed that Critical Legal Studies' general emphasis on theoretical critique, and use of deconstructionist methods in particular, served to undercut the possibility for practical transformation.<sup>230</sup>

This Article demonstrates that deconstruction can be used to argue for practical, transformative change. By exposing how legal concepts like merit defer to, and possess the qualities of, bias, the Article suggests ways in which litigators can make use of deconstructive interpretations of merit to undercut the assumption that merit standards simply reflect objective, race-neutral measurements of social value. As a strategic matter, with its emphasis on critical historical inquiry, deconstruction can produce critical historical accounts, such as the law school

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228. See Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV.C.R.-C.L. L. REV. 301, 313 (1987) (arguing that poorly developed positive program would not serve the needs of minorities); Angela P. Harris, *Foreword: A Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 752 (1994) (arguing that postmodernism and second-wave Critical Legal Studies does not sit easily with normative recommendations that assume the possibility of reasoning through to solutions); Patricia J. Williams, *Alchemical Notes: Reconstructed Ideals From Deconstructed Rights*, 22 HARV.C.R.-C.L. L. REV. 401, 404-06 (1987) (detailing discomfort with Critical Legal Studies' rejection of rights).

229. Harris, *supra* note 228, at 752; see also Robert L. Hayman, Jr. *The Color of Tradition: Critical Race Theory and Postmodern Constitution Traditionalism*, 30 HARV. C.R.-C.L. L. REV. 57, 69-70 (1995) (contending that an affirmative program is not consistent with postmodern theory).

230. See Harris, *supra* note 228, at 751; see also Harlon L. Dalton, *The Clouded Prism*, 22 HARV.C.R.-C.L. L. REV. 435, 436-37.

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admissions narrative, that are consistent with our political and moral commitments to racial emancipation.

In particular, deconstructivist insights and strategies can be used to expose the overtly political commitments behind a defense of merit like Farber and Sherry's. Under the lens of a deconstructive critique, Farber and Sherry's conventional distinction between merit and bias no longer seems self-evident because merit necessarily defers to the social bias it seeks to exclude. Thus, we are left with the task of reconstructing new meanings for merit by having difficult political conversations about what constitutes social value in the legal profession, whether exams accurately predict the ability of a practicing lawyer, whether case law instruction or practical clinical instruction is more appropriate for certain kinds of law, and finally, whether we want our law schools to become resegregated under an admissions process that looks only at the number of a person's LSAT score and GPA, rather than at the content of her character.<sup>231</sup>

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231. See Singer, *supra* note 215, at 55.

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