

**AN EPISTOLARY EXCHANGE**  
**MAKING UP IS HARD TO DO: RACE/GENDER/SEXUAL**  
**ORIENTATION IN THE LAW SCHOOL CLASSROOM**

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**Abstract.** This exchange of letters picks up where Professors Adrienne Davis and Robert Chang left off in an earlier exchange that examined who speaks, who is allowed to speak, and what is remembered.<sup>1</sup> Here, Professors Davis and Chang explore the dynamics of race, gender, and sexual orientation in the law school classroom. They compare the experiences of African American women and Asian American men in trying to perform as law professors, considering how makeup and other gender tools simultaneously assist and hinder such performances. Their exchange examines the possibility of bias that complicates the use of student evaluations in assessing teaching effectiveness. It hypothesizes that the mechanism by which this bias manifests itself is a variant of stereotype threat, one that they call projected stereotype threat, where stereotypes of incompetence or accent are projected onto the bodies of teachers marked by difference. They examine how institutions respond or, as is more typically the case, fail to respond to these problems. They conclude with some suggestions for change, asserting that if institutions want to pay more than lip service to the goal of diversity and improve the success and employment conditions of women and minorities, they must do two things. First, more women and minorities must be hired, and second, the issue of bias must be directly addressed by educating stu-

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<sup>1</sup> Robert S. Chang & Adrienne D. Davis, *The Adventure(s) of Blackness in Western Culture: An Epistolary Exchange on Old and New Identity Wars*, 39 U.C. DAVIS L. REV. 1189 (2005–2006).

dents about bias, its discriminatory effects on instructors whose bodies are marked by perceived differences, and the ways in which bias interferes with their own learning.

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#### LETTER 1: FANCY CLOTHES

Dear Bob,

Some time ago, I found myself in Neiman Marcus, spending the equivalent of half my mortgage on a pair of shoes. This rather outrageous act of consumption was an effort to quell the rage simmering in my stomach since my class the previous day. I had been lulled into complacency by years of rewarding classroom experiences, meaningful connections with diverse students, and more-than-respectable student evaluations. Yet, here we were again: students eye-rolling, audibly snickering, sucking their teeth, and turning in their seats to exchange sneers. I ignored them, I tried to engage them, I indulged them, I pretended, like any good performer, not to see or understand what was happening, sealing a rictus of a smile on my face. I maintained my dignity and professionalism, if not my authority. And then I found myself seeking solace in shoes.

Both the reason for my rage and the therapy I liberally applied to it relate to a symposium I attended several years ago—*Makeup, Identity Performance, and Discrimination*.<sup>2</sup> Makeup is one of several tools people deploy to perform gender and other identity. The symposium was inspired by Darlene Jespersen, a bartender in a Reno casino, who refused to wear the makeup mandated by her corporate employer, and sued the casino for sex discrimination when they fired her. Jespersen's case illustrates the regula-

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<sup>2</sup> Duke Journal of Gender, Law & Policy, Symposium: Makeup, Identity Performance and Discrimination, at Duke University Law School (Oct. 20, 2006). This exchange of letters is indebted to Devon Carbado, Mitu Gulati, and Gowri Ramachandran's collaborations on identity performance. See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Devon Carbado, Gowri Ramachandran & G. Mitu Gulati, *The Jespersen Story: Makeup and Women at Work*, in EMPLOYMENT DISCRIMINATION STORIES 105 (Joel W. Friedman ed., 2006); Gowri RAMACHANDRAN, *Intersectionality as "Catch 22": Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299 (2005–2006).

tory use of makeup to compel certain performances and behavior.<sup>3</sup> Yet, there is another intriguing element to identity performance. When race is introduced into the mix, we find different forms of discrimination and discipline at work. And that is not the refusal of the performance, as Darlene Jespersen did when she refused to see cosmetics as integral to her labor, but the impossibility of the performance for certain bodies. Mary Anne Case has noted how men can suffer discrimination for seeking jobs requiring conventionally “feminine” identity performances.<sup>4</sup> I would like to explore the (im)possibility of black women and Asian American men performing certain identities, specifically, as law professors, and the conventionally gendered tools we grasp to try to embody such performances.

Law school classrooms are curious places, demanding odd performances from teachers and students alike. In the last fifteen years since you and I started teaching, we have seen a lot of innovation in legal pedagogy. Yet the fact remains that, compared to other educational programs, law schools remain enthralled by various versions of the Socratic method. Although many of us would disclaim adherence to the Greek master, we still find in the majority of our classrooms variations on this mode of engagement with students. Professors assume the role as the repository of knowl-

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<sup>3</sup> See *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc) (finding that Jespersen failed on summary judgment for her claim of sex discrimination); David B. Cruz, *Making Up Women: Casinos, Cosmetics, and Title VII*, 5 NEV. L.J. 240 (2004); Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111 (2006) (arguing for superiority of privacy analysis over discrimination claims in challenging workplace dress codes); Jennifer L. Levi, *The Interplay Between Disability and Sexuality: Clothes Don't Make the Man (or Woman), But Gender Identity Might*, 15 COLUM. J. GENDER & L. 90 (2006) (considering disability and sex discrimination claims in tandem as challenges to sex-differentiated dress codes). Several recent case notes criticize the first three-judge panel ruling by the Ninth Circuit in *Jespersen*, especially in light of Supreme Court precedent on sexual stereotyping in *Price Waterhouse v. Watkins*, 490 U.S. 228 (1989). See Hillary J. Bouchard, Case Note, *Jespersen v. Harrah's Operating Co.: Employer Appearance Standards and the Promotion of Gender Stereotypes*, 58 ME. L. REV. 203 (2006); William M. Miller, *Recent Development: Lost in the Balance: A Critique of the Ninth Circuit's Unequal Burdens Approach to Evaluating Sex-Differentiated Grooming Standards Under Title VII*, 84 N.C. L. REV. 1357 (2006); Megan Kelly, Note, *Making-Up Conditions of Employment: The Unequal Burdens Test as a Flawed Mode of Analysis in Jespersen v. Harrah's Operating Co.*, 36 GOLDEN GATE U. L. REV. 45, 46 (2006) (also urging reform of job-relatedness element of unequal burdens test); Recent Case, *Title VII—Sex Discrimination—Ninth Circuit Holds That Women Can Be Required to Wear Makeup as a Condition of Employment—Jespersen v. Harrah's Operating Co.*, 392 F.2d 1076 (9th Cir. 2004), 118 HARV. L. REV. 2429 (2005).

<sup>4</sup> Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); see also Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995) (arguing gender cannot be disaggregated from biological sex and contending Title VII should prohibit sex discrimination that reinforces gender stereotyping); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 3 (1995) (showing how historic and ongoing conflation of sex, gender, and sexual orientation frustrates antidiscrimination law).

edge, which is often withheld and strategically and titillatingly revealed; much learning proceeds through calling on students and subjecting their answers to discernment, probing, and skepticism. In short, the students themselves often become the lenses through which the law is learned. (I note this is arguably the softer version; the “harder” version of the Socratic method would find the error in all answers.) Daily, professors distinguish students, contrast weakness and strength, build and burn straw people, and strategically time the gift of information. Authority and classroom command become crucial in this mode of conveying knowledge. Students often dread being called on or participating, experiencing classroom exchanges as humiliating exercises in which success is futile.

Again, there has been a lot of insightful criticism, innovation, and arguably some outright rebellion in legal pedagogy over the last twenty-five years.<sup>5</sup> Much of it has been focused on the deleterious effects of the “old school” on student learning, both substantively and in how it shapes their conceptions of what it means to be a lawyer. It is more common for larger classes to include role-playing, skills work, problems, and case files, either exclusive of, or in combination with, the Socratic approach. And the remarkable growth in clinical programs, externships, and even seminars has challenged the monopoly of the Socratic method. Yet, large “core” courses remain “iconic” of legal education, and in many schools institutional capital is still linked to number of bodies taught and success in large classes considered part of the curricular “core.” “Real” law teachers teach “big” courses. In addition, the Socratic method is classically hegemonic, in that its norms and values are internalized not only by those of us overtly wielding the power of the podium but also by the students themselves. Few of us, and perhaps fewer students, would accept either complete lectures or discussions as modes of legal learning. Many students expect Socratic experiences, particularly in the first year, and, as Deborah Post has noted, some feel cheated if they do not receive it.<sup>6</sup> Importantly, *they define* the Socratic method as a humiliating, Kingsfieldian type. Pedagogy be damned, whip me harder, sir!

So what does this mean for the bodies performing this authority? Years ago, when I started teaching, there was some attention being given to the effects of bias on the perception of teachers, particularly racial and gender

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<sup>5</sup> See, e.g., Arturo López Torres & Karen E. Harwood, *Moving Beyond Langdell: An Annotated Bibliography of Current Methods for Law Teaching*, 29 GONZ. L. REV. (SPECIAL EDITION) 1 (1994); Arturo López Torres & Mary Kay Lundwall, *Moving Beyond Langdell II: An Annotated Bibliography of Current Methods for Law Teaching*, 35 GONZ. L. REV. (SPECIAL EDITION) 1 (2000). Louise Harmon and Deborah Post published an exchange on their experience trying to engage their faculty on innovative teaching strategies, using cognitive techniques, that would confront questions of power and learning in the classroom. See LOUISE HARMON & DEBORAH W. POST, *CULTIVATING INTELLIGENCE: POWER, LAW, AND THE POLITICS OF TEACHING* (1996). Harmon wryly, and I suspect perceptively, notes that “[a] law teacher found guilty of pedagogical neglect would probably go to a lower circle of hell than one found guilty of pedagogical abuse.” *Id.* at 161.

<sup>6</sup> HARMON & POST, *supra* note 5, at 132.

bias.<sup>7</sup> Studies and anecdotal reports indicated that students had difficulty accepting certain bodies performing this outré authority. In 1991, the *Berkeley Women's Law Journal* devoted an issue to essays by black women law faculty describing their experiences trying to embody, or resist, this aggressive version of Socrates.<sup>8</sup> That same year, passages in Patricia Williams' *The Alchemy of Race and Rights* similarly described students' extreme emotional responses to her teaching.<sup>9</sup>

I can't say how much this work meant to me, and to my career. When I first started teaching, students constantly challenged my right to teach them, questioned my credentials, reviled me on bathroom walls, and went to the dean with regularity. (One student, with whom I subsequently became friends, told me he resented for weeks my opening statement "Hello, I'm Adrienne Davis and welcome to my Property class.") I don't doubt I had some of the arrogance that can characterize new teachers. Nor do I question that I had much to learn about both the material and teaching. Definitionally, all new teachers do. But, I recall some of the instances as a mixture of

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<sup>7</sup> Therese Huston's examination of studies finds gender biased student evaluations in male-dominated disciplines (such as law), and racial bias more generally. Therese A. Huston, *Race and Gender Bias in Higher Education: Could Faculty Course Evaluations Impede Further Progress Toward Parity?*, 4 SEATTLE J. FOR SOC. JUSTICE 591, 591 (2006). On gender bias in law student evaluations, see Kathleen Bean, *The Gender Gap in the Law School Classroom—Beyond Survival*, 14 VT. L. REV. 23, 29 (1989); Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333, 334 (1996); see also Martha Chamallas, *The Shadow of Professor Kingsfield: Contemporary Dilemmas Facing Women Law Professors*, 11 WM. & MARY J. WOMEN & L. 195, 197 (2005) (discussing gender bias generally); cf. Richard L. Abel, *Evaluating Evaluations: How Should Law Schools Judge Teaching?*, 40 J. LEGAL EDUC. 407, 422 n.54 and accompanying text (noting disagreement within literature over gender and student evaluations of teachers but fearing reputation bias as extrinsic variable).

<sup>8</sup> Symposium, *Black Women Law Professors: Building a Community at the Intersection of Race and Gender*, 6 BERKELEY WOMEN'S L.J. 1 (1990–1991) (contributions by Anita L. Allen, Margalynne Armstrong, Taunya Lovell Banks, Robin D. Barnes, Angela D. Gilmore, Linda S. Greene, Lani Guinier, Angela Harris, Emma C. Jordan, Beverly I. Moran, Denise C. Morgan, Odeana R. Neal, Deborah Waire Post, Wilhelmina M. Reuben-Cooke, & Adrien K. Wing); see also, Okianer Christian Dark, *Just My 'Magination*, 10 HARV. BLACKLETTER L.J. 21, 21–28 (1993) (discussing race and gender in the law classroom).

<sup>9</sup> PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 21–32, 95–97 (1991); see also Pamela J. Smith, *Teaching the Retrenchment Generation: When Sapphire Meets Socrates at the Intersection of Race, Gender, and Authority*, 6 WM. & MARY J. WOMEN & L. 53, 106, 156, 157 (1999). Smith parses three distinct types of hostility: authority hostility, credential hostility, and evaluative hostility. Credential hostility is particularly ironic in that the same pedigrees that get us hired often get us hated. *Id.* at 106, 156; cf. Camille A. Nelson, *The Conflicting and Contradictory Dance: The Essential Management of Identity for Women of Colour in the Legal Academy*, in CALLING FOR CHANGE: WOMEN, LAW AND THE LEGAL PROFESSION TEN YEARS AFTER TOUCHSTONES 117 (Elizabeth Sheehy & Sheila McIntyre eds., 2006) (considering experience of women of color more broadly in legal academy with focus on Canadian law schools). Nelson perceptively notes four "interrelated challenges" for women of color in the academy: underrepresentation; the "3-D" experience, or the need to exist simultaneously as "an insider and outsider in a predominantly white male professional environment"; enhanced service demands within university and the community; and lack of mentors. *Id.* at 117–18.

the absurd and the dreadful. One very senior colleague who regularly demeaned and humiliated students in his own class (to their apparent delight) cautioned me that he'd had a conversation with a student in which the student had described me as thinking I was bulletproof. Even now I find that metaphor somewhat chilling. In another instance, a student's father faxed leading law firms in the area a letter in which he accused me of failing a third of the students and conducting a Property class in which I railed about busing, Malcolm X, and the Nation of Islam. Wow, I'm just not that clever, Bob. I was assigning Carol Rose's *Crystals and Mud in Property Law* and Charles Reich's *The New Property*, but I hadn't even thought to connect Malcolm to first-year Property. My colleagues reassured me that they would defend my right to teach these things. (!) Others said I should have been taken in hand from the beginning and assigned to use the casebook and teaching notes of the senior Property teacher. No one asked to see my actual syllabus, or offered to talk about my goals, challenges, or frustrations in teaching the course.

Things got better. I got older, I got tenure, I grew and developed as a teacher in many ways. I even won a teaching award, one of my most treasured professional accomplishments. Classes still sometimes started off rocky, with that old combination of suspicion and hostility, and I developed techniques and performance strategies to overcome that. "Turning classes around" by the third week or so became my specialty. It is a point of pride with me that I have developed long-standing and rich relationships with diverse students at diverse institutions, including several who were initially extremely skeptical of everything I had to say. There is less of myself in the classroom than there used to be, or than I thought there could or would be. Rather, pedagogy is a performance, and I have become a good actress.

I think I also convinced myself that my early experience was a product of my times, of being part of probably only the second generation of black women to enter law teaching in significant numbers. As such, there were dues to pay, and frankly, as a child of the Civil Rights generation, that is, raised in the shadow of moral and political giants, I was happy to have returned to future generations some very small part of that door-busting that had been done for me.

So, back to my Neiman's meltdown. A big part of my rage was not just that I was having an off class. I really think my own ego is beyond that. Rather, my rage was based on the fact that over the last several years I have been hearing stories from black women brand new to teaching, stories eerily reminiscent of my experiences in the early 1990s. Black women being told to change casebooks to use those of senior colleagues (I was never actually made to do so; only threatened); having final grades changed without being consulted; being institutionally reprimanded for alleged criminal acts in the classroom that for some reason could not be confirmed. How can this be? How can it be that after fifteen years, students with, one would presume, far more exposure to black women in diverse social roles could continue to be

so resistant to authority performances in law school? And, perhaps even more troublingly, the stories are not only of student behavior, but of similar institutional responses. Generic student complaints about professors who are unprepared, unduly harsh, or abusive are administratively rebuffed or become the subject of humorous institutional anecdotes, but charges that black women faculty do not deserve to have teaching jobs seem all too often to find sympathetic and curious ears in deans and other faculty. Some would border on the absurd if they weren't so disturbing: one "colleague" stood in the parking lot, pretending to be a janitor, and asked students if an untenured black woman was on time for class. Law schools have developed decent strategies for hiring and recruiting us, but this will be meaningless as long as over a third of our evaluation is turned over to students without any critical assessment.

Bob, there is one more piece to my shopping-as-therapy anecdote. On the one hand, makeup and its sister devices are compulsory tools of gender regulation. We see this, for example, in *Jespersen*. But, by the same token, my rather extravagant response indicates my internalization of identity performance. And similarly, many black women turn to conventional tools of femininity to make up authority. Of course, black women also routinely defy mainstream gender mandates, often in ways that serve us well.<sup>10</sup> Still, we actively consume gender products and perform gender identity for racial reasons as well as the more obvious gender reasons. Historically, racism has shaped our relationship to gender performance. For instance, early eighteenth-century slave masters in the U.S. often prevented enslaved women from wearing "nice" or "fancy" clothes, and "dressing up" could represent a form of rebellion.<sup>11</sup>

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<sup>10</sup> After I visited at the University of Chicago, I was struck that many legal academics assumed I would have found its culture combative and alienating, with many hinting it would have offended feminist (or feminine?) sensibilities. To the contrary, I grew up with my cousins and extended family arguing politics, sports, and the best way to barbeque or change oil, and like many African American women, am completely comfortable with protracted argument and debate.

<sup>11</sup> See, e.g., Stephanie M. H. Camp, *The Pleasures of Resistance: Enslaved Women and Body Politics in the Plantation South, 1830–1861*, 68 J. SO. HISTORY 533, 559–62 (2002); William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711 (1996). As Wiecek explains,

South Carolina . . . enacted a sumptuary law that was unique, but only in the sense of putting into statutory language a detail of racial etiquette elsewhere taken for granted: since "many of the slaves of the province wear clothes much above the condition of slaves," they were forbidden from wearing "any sort of apparel whatsoever [sic], finer, other, or of greater value than negro cloth, duffils, kerseys, osnabrigs, blue linen, check linen or coarse garlix, or callicoes, checked cottons, or Scotch plaids." The statute made an exception for slaves in livery.

*Id.* at 1789 (quoting 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 412 (Thomas Cooper ed., 1836) (1740 code)); cf. An Act for the Better Ordering and Governing Negroes and Other Slaves in this Province, No. 670 (1740), art. XL, reprinted in 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 397, 412 (David J. McCord ed., Columbia, S.C., Printed by

In short, gender performance is intrinsically racialized in our nation, and many black women, myself included, sometimes find the consumption of gender tools to be acts of racial rebellion. We also can find it therapeutic, a sort of soothing indulgence of our stressed out bodies, a racial refuge. A tennis pro hitting with me and another black woman law teacher was stunned to find how tense we were when he tried to physically correct our strokes by moving our arms. Both of us projected calm, humorous, relaxed demeanors on the court, yet when he tried to physically move our bodies, he remarked he had not encountered such tension before (and he coached juniors for Wimbledon). Similarly, black bodies are often associated with abjection, the exclusion of things from the social order as polluting or contaminating.<sup>12</sup> Insisting on manicures or massages or nice clothes is a way of reclaiming our abjected selves. Also, our bodies are still associated with service and menial work. I recall one morning leaving a law school cafeteria, carefully balancing my books in one hand, my coffee in the other, teetering on heels that I am sure were too high for me but that were the right height for my suit. A student I did not know stopped to ask me where the forks were. When I told him I didn't know, he told me he thought I worked there. The cafeteria workers, all black women, wore very distinct uniforms of slacks, shirts, and aprons, while I was in my own "uniform" of a suit, heels, and books, *leaving* the cafeteria.<sup>13</sup> Obviously this is not a new story; we have heard it from generations of African Americans, particularly black men. The point is, many of us dress to try to embody certain social roles, alas, to no avail. In particular, many black women continue to adhere to what Evelyn Brooks Higginbotham identified as the cult of respectability, performance of respectable gender as a strategy for conforming to mainstream social expectations and defying racial stereotypes.<sup>14</sup> Hence, consumption and display of gender tools—gender performance—can reflect rebellion or refuge, e.g., defiance, therapy, class distinction, or conformity. Any and all of these can be present in the same act of consumption of wearing makeup or heels.

Bob, when the cafeteria incident happened, you eloquently explained the relationship between this kind of consumerism in response to classroom

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A.S. Johnston 1840) (stating that "many of the slaves in this Province wear clothes much above the condition of slaves").

<sup>12</sup> On abjection and race in law, see Anthony Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457 (1997); Adrienne D. Davis, *But It Feels So Good to Be Bad: Abjection, Power, & Sexuality Exceptionalism in (Kara Walker's) Art and (Janet Halley's) Law* (unpublished manuscript, on file with Harvard Law School library).

<sup>13</sup> Sociologist Mitchell Duneier perceptively captures the importance of uniforms when he describes working class black men's pride in uniforms as embodying authority, responsibility, and respect, all employment "benefits" historically denied black workers. See generally MITCHELL DUNEIER, *SLIM'S TABLE: RACE, RESPECTABILITY, AND MASCULINITY* (1992).

<sup>14</sup> See generally EVELYN BROOKS HIGGINBOTHAM, *RIGHTEOUS DISCONTENT: THE WOMEN'S MOVEMENT IN THE BLACK BAPTIST CHURCH, 1880-1920* (1993) (discussing black women's club movement and strategies of respectability).



experience. That it is a way to assert a kind of power and privilege even among students that will not recognize what those shoes signify. So what is so amazing about that story is that it is a way of asserting power in a space where you have your power challenged; what is so tragic and significant in relationship to larger histories of discrimination is that it is a sign of power that can be invisible to the very people that you need to recognize it.

I think all of this is at work in law school classrooms: desperate, defiant, and somewhat fruitless attempts to perform gender in defiance of racial impossibility in order to disarm students (and I use that verb purposefully). As one colleague succinctly put it, “The madder I got, the higher my stilettos.” And while I fall down in high heels, I do find that the more antagonism and suspicion I anticipate from an audience, colleagues, or students, the more time I set aside preparing my appearance. I was even cautioned by a black woman at one school where I was to teach, “No one here wears suits, but you should.” (However, Pam Smith argues that such gender performances can generate a severe racial backlash.<sup>15</sup>) These gender tools of makeup, heels, jewelry, and furs become armor for both offensive and defensive workplace maneuvers. For all of these reasons, I was in Neiman Marcus buying shoes I could not afford.

It intrigues me, then, that racial subordination generates responses in support of gender hegemony. Whatever the reasons for our consumption of gender tools, and even with their different meaning from our bodily bases, black women may normalize and reinforce the power of gender and makeup. Can these ever be disaggregated? What are the tradeoffs? Will black women ever be able to make up with our students? And what outside effects, or, in law and economics language, what externalities, are created by some of our efforts to deploy conventional gender tools strategically to achieve authority performances?

And what about you, Bob? Part of the reason I am sharing this with you is to get your considered opinion about parallels in our experiences. People rarely consider the interests of black women and Asian American men as aligned, except in some generic rainbow-y or community of color coalitional way. Yet, as you and I have discussed before, both of our groups share a common social positioning: the impossibility of performing certain

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<sup>15</sup> Smith speculates that students seemed particularly angered about her professional appearance. Students told her they longed to see her out of a suit, acclaiming clothing and hairstyles they perceived as more “feminine and maternal.” Smith, *supra* note 9, at 146–49, 157; cf. K.C. Worden, *A Symposium of Critical Legal Study: Overshooting the Target: A Feminist Deconstruction of Legal Education*, 34 AM. U. L. REV. 1141, 1148–49 (“In my performance evaluation, however, the chief justice (‘Mr. Moot Court’) focused not only on the substance and delivery of my legal argument, but on my failure to wear a suit. The absence of a jacket, he said, made me look unprofessional and detracted from the content of my presentation. He admitted that my opponent was not wearing a jacket either. But, her blouse had a soft bow which tied at the neck. That bow, he informed me, made her lack of a jacket less offensive.”)

racial and gender mandates.<sup>16</sup> In a bizarre hierarchy of intersectional desire and performance concocted in that great melting pot of immigration and slavery that comprises America, black women and Asian American men have emerged as sub-feminine and sub-masculine respectively. Black women are coarse and garish; or hyper-sexualized and inappropriate as intimate partners; or comforting caregivers and more mothers than life partners. Asian American men are small and feminine; nerdy science geeks; without sexual prowess. Crucially, this is not a point just about race; rather, this is a classic intersectional point.<sup>17</sup> Because of our respective inverses and converses, black men and Asian American women embody, in many instances, gender ideals. Black men are hyper-masculine in their bodies and gender performances. Asian American women, of course, are feminine ideals. (In this sense, black women are not only the “biological” inverse of black men, but the converse, i.e., a logical implication with the propositions reversed, of Asian American women. Asian American men are the inverse of Asian American women, and the converse of black men.<sup>18</sup>) It is fascinating that our counterparts are rendered as the ideal; we as the deficiency. For both our groups, there is an impossibility of expected gender performance. That is the “base” from which we work; it is the “base” from which we make up our identities.

So Bob, I’d like us to think about a couple of questions. First, I’d like to get your thoughts on the comparison between black women and Asian American men performing conventional gender identity. How are conventional gender tools operating as compulsory or strategic or therapeutic in these performances? Can we imagine a sort of shared identity between black women and Asian men, akin, perhaps, to the *Berkeley Women’s Law Journal* symposium? Also, how are identity performances at work in the law school classroom? What kinds of performances do students expect and how are those related to the bodily “base”? Finally, does this behavior constitute discrimination? Institutionally, we’re more likely to worry about professors harassing students. But to what extent can students accumulate

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<sup>16</sup> See Chang & Davis, *supra* note 1, at 1195–96.

<sup>17</sup> See Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex*, 1989 U. CHI. LEGAL F. 139 (1989).

<sup>18</sup> Richard Fung’s germinal queer text, *Looking for My Penis*, starts with an interrogation of a psychologist who views race as the primary determinant of sexuality, with “Orientals” on one end of the spectrum and blacks at the other, with whites “squarely in the middle, the position of perfect balance,” without need for analysis or scrutiny. “The contemporary construction of race and sex . . . has endowed black people, both men and women, with a threatening hypersexuality. Asians, on the other hand, are collectively seen as undersexed.” Richard Fung, *Looking for My Penis: The Eroticized Asian in Gay Video Porn*, in *HOW DO I LOOK? QUEER FILM AND VIDEO* 145, 145–46 (Bad Object-Choices ed., 1991) (footnote omitted).

sufficient power to wield it in discriminatory ways? And what can legal institutions do to combat it?

Adrienne

P.S. I took the shoes back. And eventually I again “turned it around.” But I wore lipstick every day.

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LETTER 2: “ARE YOU GAY?”

Dear Adrienne,

As I pictured you standing in the shoe department at Neiman Marcus, I flashed back to our early days when we were baby law professors, as you liked to call us back then. I remembered the many conversations we had about the macro- and microaggressions we experienced in our classrooms, hallways, and offices. When I shared with you the story about my dean at Golden Gate University School of Law, whose first words to me after saying hello were: “I know that you’re into this critical race thing, but I hope you’re not going to teach like Pat Williams,” you were able to tell me about the outlandish things said to you by deans, colleagues, and students. When I told you about my student who berated me during class for spending half a class period on *Williams v. Walker-Thomas Furniture*,<sup>19</sup> you were able to place that outburst in context by telling me about the accusation that you were teaching Malcolm X in your Property class. Perhaps worse than your student’s father faxing this letter was the lack of an appropriate response or support from your colleagues and your institution.

I suppose that I shouldn’t be too surprised. It’s the same institution that asked me during a job interview if I spoke any foreign languages. The question surprised me. I couldn’t see how it related to my teaching Contracts or my interest in critical race theory. It’s not like I was interviewing for a position teaching international law or to help direct some study abroad program where some level of fluency in a foreign language might be relevant. Later, you told me that they were trying to make their first Asian American tenure track hire and they had gotten it into their heads that fluency in my ancestral tongue was a kind of bona fide occupational qualification that would make me a legitimate Asian American hire in the Bay Area. It was unfortunate for me that my internalized racism led me at an early age to resist my parents’ efforts to get me to retain Korean. (How’s that for trying to alter my

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<sup>19</sup> 350 F.2d 445 (D.C. Cir. 1965) (discussing unconscionability in rent-to-own contracts).

“base”?) The chair of the appointments committee ran into me at a Society of American Law Teachers Teaching Conference later that year and went on and on about how nice it had been that my father had been able to attend my job talk, a talk that I had not been invited to give. I don’t know why I remember this, when I am sure that the White man who mistook me doesn’t.

Memory is a funny thing. During that year when our careers overlapped in the Bay Area, I remember spending hours with you and Kevin Haynes. I thought we had talked about all of these things that were happening to us at the beginning of our teaching careers, but I realize now that we didn’t talk about them until a few years later when we had gained some distance from the macro- and microaggressions. I didn’t share my stories then about the difficulties I faced in the classroom because of shame. I think too many of us are shamed into silence. I know that you are finding it difficult to share some of your stories, though this wasn’t always the case in your writing.<sup>20</sup>

When we began talking about our classroom encounters, it helped to normalize things, helped me to know that I wasn’t crazy. Listening to your stories and then reading about what other professors of color experienced<sup>21</sup> helped me to survive. That’s why I’m glad that we are now able to revisit those times, painful though they are to remember. I hope that our exchange will be of some help to the current and future generations of professors from groups underrepresented in law teaching who undergo the tenure gauntlet.

I used to think that time and tenure would diminish the microaggressions or, at least, diminish their effects on us. I wonder, though, after hearing about some of your recent experiences. I’m glad that we are going public with (some of) our stories,<sup>22</sup> because if we allow our shame to keep us silent, then the historical record will never include these stories, and it will be as if these things never happened, and law schools will never change. Though some of the behaviors we are writing about are those of students, institutions bear responsibility for their response to these behaviors and for the creation of institutional cultures that permit, foster, and sometimes support them.

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<sup>20</sup> See, e.g., Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695, 697–99 (1996) (telling her personal narrative about the racial anxiety she felt when she visited Nicaragua and left the racial certainty she had “enjoyed” in the United States).

<sup>21</sup> See, e.g., PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A MAD LAW PROFESSOR* (1991); Derrick Bell, *Strangers in Academic Paradise: Law Teachers of Color in Still White Schools*, 20 U.S.F. L. REV. 385 (1986); Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1988–1989); Richard Delgado, *Minority Law Professors’ Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349 (1989) (with an introduction by Derrick Bell); Rachel Moran, Commentary, *The Implications of Being a Society of One*, 20 U.S.F. L. REV. 503 (1986).

<sup>22</sup> I think it’s important to note that the stories we tell reflect only some of what we have encountered. There’s much more that we don’t talk about, like the time when one of your White male colleagues asked, after you had pulled an all-nighter in the library finishing an article, “What are you, Buckwheat’s sister?”

After learning about the macro- and microaggressions you were going through, I went back and reread Peggy Davis's article, *Law as Microaggression*.<sup>23</sup> I was struck by what a psychologist who studied this phenomenon had to say:

Microaggressions simultaneously sustain[ ] defensive-deferential thinking and erode[ ] self confidence in Blacks. . . . [B]y monopolizing . . . perception and action through regularly irregular disruptions, they contribute[ ] to relative paralysis of action, planning, and self-esteem. They seem to be the principal foundation for the verification of Black inferiority for both whites and Blacks.<sup>24</sup>

If we personalize this notion to what you're going through, then the student microaggressions you experience form the principal foundation that verifies your inferiority as a Black<sup>25</sup> woman for these White male students. It doesn't matter that you are brilliant and articulate beyond belief. They still see you as ebonically inarticulate.<sup>26</sup> It doesn't matter that you have tenure, that you have a chair at the University of North Carolina, that the University of Alabama is trying to woo you to join their faculty with a university chair with access to a lot of resources. It doesn't seem to matter to them that you are flown around the country to give lectures for BarBri. All they see is a Black woman standing in front of them, and they need to not have their worldviews disrupted, need to make sure that you know your place.

It would be nice if shoes and fancy clothes would insulate us from this, because that would be an easy way to make up our bodies. And I suppose our exchange of letters would stop here with this simple prescription to junior scholars of color: WEAR FANCY CLOTHES! But it's not that easy. I remember a story told by our friend John Calmore. He was speaking on a roundtable at the Association of American Law Schools Annual Meeting. After Duncan Kennedy spoke, John got up and said that he aspired some day

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<sup>23</sup> Davis, *supra* note 21.

<sup>24</sup> C. Pierce, *Unity in Diversity: Thirty-Three Years of Stress* 17 (1986) (unpublished manuscript), *quoted in* Davis, *supra* note 21, at 1565–66.

<sup>25</sup> In this set of letters, we adopt opposite conventions with regard to capitalizing “black” and “white.” This follows the conventions we followed in our previous exchange. *See* Chang & Davis, *supra* note 1, at n.4. As I explained in that exchange:

I have chosen to capitalize racial designations such as “Black” and “White” throughout this exchange. *Cf.* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331, 1332 n.2 (1988) (“When using ‘Black,’ I shall use an upper-case ‘B’ to reflect my view that Blacks, like Asians, Latinos, and other ‘minorities,’ constitute a specific cultural group and, as such, require denotation as a proper noun.”). I extend this reasoning to “Whites” to emphasize that “Whiteness” is itself a social construct and not a natural phenomenon . . . I know that we disagree on this, but will save that discussion for another time.

*Id.*

<sup>26</sup> Chang & Davis, *supra* note 1, at 1196.

to dress like Duncan,<sup>27</sup> who was attired in tattered dark jeans, faded red flannel shirt, and ratty leather jacket. John was beautifully dressed in a suit with an impeccably knotted silk tie. For those who may not know, Duncan is White, John is Black. John said that as a Black man traveling, he has no choice but to dress up, to make himself up in this way to avoid hassles at the airport, at the hotel. And even then, he has trouble catching cabs. Add to race the intersection of gender,<sup>28</sup> and you, Adrienne—in your suit and heels, despite your suit and heels—must know where the forks are kept. It's difficult enough teaching Contracts or Property or Trusts and Estates, but what happens when you are operating from a "base" such as ours? When you enter the classroom and step up to the podium, what kind of cognitive dissonance is created? What's that cafeteria worker doing up there?!!! No wonder you've had to become a "turn around" specialist. It's a shame, though, that you have to do so.

You asked me to compare Black women and Asian American men performing conventional gender identity. While I am certain that I am able to access male privilege in ways that are denied to you, my access to traditional male privilege is complicated by my Asian Americanness. It has made it particularly difficult to raise issues about racism, sexism, and homophobia in classes that are not explicitly organized around race, gender, and/or sexuality. This was especially vexing before I was tenured. In the remainder of this letter, I hope to address your question by discussing some of the challenges I face in the classroom operating from my "base."

Ten years ago when I was untenured, I taught a first-year Property course. On the midterm at the end of the first semester, I asked a question involving a restrictive covenant. In the past, restrictive covenants were often used to forbid the sale of homes to people from certain groups, typically racial minorities and Jews. Now, they are often used to limit the use of property. A common restriction is to limit use such that "only a single-family residence may be built on each lot for use by a single family."

My semester midterm asked about a lesbian couple, Pat and Jean, who purchased a home that was subject to such a restrictive covenant. One of the neighbors sues to prevent them from living in the home based on the fact that a lesbian couple is not a family. The students were to discuss the likely outcome of the suit.

I was stunned by the responses. Only a handful of 105 students made the argument that Pat and Jean, although unable to marry because of state law, constituted a family and therefore were not in violation of the restriction. We had dealt with an analogous situation in class that involved a group home for mentally challenged persons. We had discussed the idea of family

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<sup>27</sup> John Calmore, Remarks at the Panel on Teaching and Scholarship in the Service of Redistribution at the Annual Meeting of the Association of American Law Schools (Jan. 1995).

<sup>28</sup> See generally Crenshaw, *supra* note 17 (discussing how race and gender are not mutually exclusive categories in discrimination against Black women).

in its traditional and nontraditional forms. Yet only a handful of students even raised it. Either I did a terrible job teaching them that semester, or something else was going on.

In the exam, I described Pat and Jean as being in a long-term monogamous relationship who would have married if they had been permitted to do so. Why would so many of the students accept, without question, that Pat and Jean did not constitute a family? You can see the power of cognitive categories<sup>29</sup> underwritten by heteronormativity.<sup>30</sup>

Some students talked about Pat and Jean as engaging in deviant sexual behavior, that lesbianism was a sexual abnormality. Other students wrote that homosexuality was a disability and was therefore covered under the Americans with Disabilities Act. These weren't just potential arguments made on behalf of Pat and Jean. They were statements—homosexuality is a physical or psychological disorder that constitutes a disability.

So I'm reading these exams and getting angry. And frustrated. How do I grade these exams? Do I mark off for what I perceive to be homophobic responses? Even if I don't explicitly, am I doing it subconsciously? Then comes the self-doubt. Was this a fair question? If conscious and unconscious homophobia placed blinders upon them so that they could not even see Pat and Jean as a family, does the question test their knowledge of law or the extent of their internalized homophobia? There remains, of course, the pedagogical question of how to construct a positive lesson out of this. After all, I have the same students for another semester. How do I teach them about their homophobia?

As the second semester progresses, a Korean American student stops by my office. He's a recent immigrant. He's agitated. Because I'm Korean, perhaps he feels free to ask, "Are you gay?"

I ask, "Why do you want to know?" He says, "Because the students are talking about it. Saying that you are." I can see that he wants to know that I'm straight, perhaps because I'm Korean like him. How do I answer

<sup>29</sup> See generally Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

<sup>30</sup> Lauren Berlant and Michael Warner define heteronormativity as:

[T]he institutions, structures of understanding, and practical orientations that make heterosexuality seem not only coherent—that is organized as a sexuality—but also privileged. Its coherence is always provisional, and its privilege can take several (sometimes contradictory) forms: unmarked, as the basic idiom of the personal and the social; or marked as a natural state; or projected as an ideal or moral accomplishment.

Lauren Berlant & Michael Warner, *Sex in Public*, 24 CRITICAL INQUIRY 547, 548 n.2 (1998); see also Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1 (1999) (discussing heteronormativity); Francisco Valdes, *Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265, 1280 (1999) (discussing the interrelationships between hetero-normativity and racial binaries).

this question? I can't exactly out myself, because as far as I can tell, I'm not in. And if I tell him I'm straight, although it solves some immediate problems with regard to classroom dynamics, it seems like a copout to exercise straight privilege at the precise moment when I'm trying to expose it.

I told him that it was none of his business. But I wondered about what made it so easy for him and other students to think that I was gay. If a White male professor on a Contracts exam had a question involving people of color, I don't think they would ascribe to that White professor a person of color identity. So what made ascriptive homosexuality fit so easily with an apparently single Asian American man? I suppose it didn't help that I published an article on gay, lesbian, and bisexual rights that was in the faculty publications display.<sup>31</sup>

The rest of the semester, I heard various rumors circulating. That I favor the men. That I'm nice to the women because I'm apparently one of those gay men who like women. Or that I'm mean to the women because I hate women.

Though I didn't come out to my class as straight, I want to be careful not to present myself as the hero in this story. I didn't raise my theory about homophobia and the exam. I couldn't figure out a way to do it without ruining the classroom dynamics. But the dynamics were ruined anyway. I got terrible student evaluations that haunted me through the tenure process over the next couple years. I didn't know, but I suspected, that my race, gender, and presumed sexual orientation played some role in the way my students evaluated me. If this were the case, what should the appropriate institutional response have been?

Consider my institution's response. During my consideration for tenure, there were comments made by some of my colleagues about the operation of race in the classroom and how it might have impacted my student evaluations. These comments were largely ignored. But when it was reported that students had been overheard saying homophobic remarks about me, this apparently caused an audible gasp from the people at the meeting, a reaction that I believe stemmed from the fact that I was perceived by my colleagues as not gay. Misdirected homophobia operated to delegitimize, for some of my senior colleagues, the negative student evaluations. That I might have also been the target of (properly) directed racism was largely ignored. But even with the negative student evaluations cast in doubt because of the narrative of homophobia, and even with the excellent peer reviews of my teaching to date, a number of them needed to see for themselves. Seventeen of them came to watch me teach during the final semester of my tenure clock. I think that's a record at my institution.

I received tenure. I continued using hypotheticals in class and on exams that brought up issues of sexuality, class, gender, and race. Mysteri-

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<sup>31</sup> Robert S. Chang & Jerome M. Culp, Jr., *Nothing and Everything: Race, Romer, and (Gay/Lesbian/Bisexual) Rights*, 6 WM. & MARY BILL RTS. J. 229 (1997).



ously, my student evaluations went way up. I used to connect this improvement to my receiving tenure. But there was another set of events that coincided with the improvement in my student evaluations: I got married, began wearing a wedding ring, and proceeded to have children. Once I was back within the heteronormative patriarchal fold, it became safe(r) for me to deal with Contracts issues affecting LGBT communities.

But as Devon Carbado points out, one must investigate “the politics of sexual identity signification” by asking: “Is it an act of resistance or does it reflect an acquiescence to existing sexual identity social meaning?”<sup>32</sup> Here, Carbado was talking about straight people outing themselves as straight in the context of speaking about LGBT issues. The dilemma for a straight person in this context is that

[o]n the one hand, self-identifying as a heterosexual is a way to position oneself within a discourse so as not to create the (mis)impression of gay authenticity. . . . On the other hand, “coming out” as a heterosexual can be a heteronormative move to avoid gay and lesbian stigmatization.<sup>33</sup>

There is certainly room for a critical heterosexual engagement that is different and distinct from heteronormativity.<sup>34</sup> So which is it in my case? Again, memory is a strange thing. Part of me remembers thinking about this when I decided to wear a wedding ring on the ring finger of my left hand. I recall a conversation with my partner about how some straight couples wear their wedding rings on their right hand out of solidarity with those who cannot legally marry. Another part of me is uncertain about this memory, remembering instead that I didn’t think about it at all. My partner tells me that she recalls a discussion about whether we should get married at all out of solidarity. In any case, I remember the relief I felt later when teaching a case involving a gay male school teacher who had been arrested for solicitation and the issue of undue influence with regard to his resignation.<sup>35</sup> I felt free of the anxiety I used to feel in previous years when I taught this case. I felt free of the threat of homophobic backlash.

Wearing a wedding ring is a form of makeup. Though I don’t have such a picture displayed in my office, having a picture of your opposite-sex partner in your office is a form of makeup. Having pictures of your children in your office, which I do have, is a form of makeup, though what it signifies

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<sup>32</sup> Devon Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN’S L.J. 76, 115 (2000).

<sup>33</sup> *Id.* at 113 (citations omitted).

<sup>34</sup> Cf. José Gabilondo, *Asking the Straight Question: How to Come to Speech in Spite of Conceptual Liquidation as a Homosexual*, 21 WIS. WOMEN’S L.J. 1, 29 (2006) (“[T]he point of critical heterosexual studies is to focus more closely and comprehensively on the relationship between heterosexuality and heteronormativity with an eye to improving the quality and moral stature of heterosexuality.”).

<sup>35</sup> *Odorizzi v. Bloomfield School Dist.*, 246 Cal. App. 2d 123 (Dist. Ct. App. 1966).

may be ambiguous unless you wear a wedding ring or have a picture of your opposite-sex partner displayed. I ultimately made up my identity in a way that fit nicely and safely within the standard heteronormative script. Making myself up in this way allowed me to make up with my classes. This is my analogue to the gender tools that you used to ameliorate race. Others, though, are unable or unwilling to do so. How do we make it safe for those who either cannot access or are unwilling to avail themselves of the privilege that attaches to heteronormative patriarchal orthodoxy?

I wish I had answers. Do you?

—Bob

P.S. My partner and I just switched our rings to our right hands.

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### LETTER 3: "GIVE ME BRUCE LEE OR GIVE ME DEATH!"

Dear Bob,

Our friend Kevin Haynes tells a great story about Lena Horne, the legendary entertainer, musical artist, and icon of black beauty in the 1940s and 1950s. Horne's legacy resides in her off-screen battles for racial access as well as in her legendary performances.<sup>36</sup> Although she was the first black actor to negotiate a long-term studio contract, MGM shot her scenes so that southern theaters could easily cut them, deferring to mainstream audience demands that black women be rendered only in roles as subservient to whites. This logic of racial inferiority through difference was reinforced in other ways as well. Studio heads concluded that Horne did not appear sufficiently "black" on screen, and they asked cosmetics giant Max Factor to develop a makeup line, "Light Egyptian," to make the actress appear darker on screen. Still, Horne rejected the performances the studio offered her. She avoided the ubiquitous "mammy" roles depicting black women as menial, unattractive, and asexual, even writing this into her contract.<sup>37</sup> Instead,

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<sup>36</sup> Megan E. Williams, *The Crisis Cover Girl: Lena Horne, The NAACP, and Representations of African American Femininity, 1941–1945*, 16 AM. PERIODICALS 200, 212–13 (2006). See generally GAIL LUMET BUCKLEY, *THE HORNES: AN AMERICAN FAMILY* (1986); JAMES HASKINS, *LENA HORNE* (1983); JAMES HASKINS WITH KATHLEEN BENSON, *LENA: A PERSONAL AND PROFESSIONAL BIOGRAPHY OF LENA HORNE* (1984); LESLIE PALMER, *LENA HORNE: ENTERTAINER* (1989).

<sup>37</sup> EMILY YELLIN, *OUR MOTHERS' WAR: AMERICAN WOMEN AT HOME AND AT THE FRONT DURING WORLD WAR II* 218 (2004) ("In 1942, she had signed one of the first long-term contracts between a black actress and a major studio, Metro-Goldwyn-Mayer ('MGM'). In her contract she had stipulated that she would not play maids or the jungle native roles that were typically the only opportunities for black actresses at the time.");

Horne sought leads in several big box office pictures in the 1940s and 1950s that featured black or “mixed-race” women as romantic and desirable leads.<sup>38</sup> But studio heads determined that casting white actresses as these romantic leads would generate more box office appeal than black actresses. Horne recounts how she lost the role of the “passing” heroine in the now classic melodrama *Pinky* to Jeanne Crain and the lead in *Showboat* to her best friend Ava Gardner, who got the role by using the “Light Egyptian” makeup made for Horne.<sup>39</sup> Frustrated by Hollywood’s required racial performances, Horne turned away from screen roles, instead concentrating on a music career, and achieved immense success. Horne could wow audiences in nightclubs, on Broadway, and on vinyl, but she was prohibited from non-compliant performances in the new blockbuster medium of celluloid.

The impossibility, indeed, the prohibition, of certain gender performances for black women reminds us (again) how intrinsically racialized gender is. In the language of makeup, there is no neutral “base.” Rather, makeup and its meaning, its performance, take on radically different meanings depending on who comprises the base. Horne understood her base. Still, she could not maintain complete control.

In Horne’s era, when more complex racial performances were called for, studios preferred to disassociate Horne’s color from her body and make up white women to inhabit those roles. Studio execs prohibited certain performances by Lena Horne, even wearing “Light Egyptian,” reserving those roles for white B-list actresses. Even as she became the literal model for the makeup, she could not embody the performance. Importantly, as Gardner’s mimicry of her recordings suggests, Horne’s performances were not prohibited because they feared she was “unqualified.” Rather, she was cinematically sidelined because (white) audiences simply rejected such performances as “inauthentic,” or, perhaps they could accept them as authentic and feared they would undermine the tenets of structural racial supremacy. Horne’s story embodies Hollywood’s notorious racial and gender politics, but studios in the main both reflected and reinforced social and cultural norms about

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see also, BUCKLEY, *supra* note 36, at 152–58; Williams, *supra* note 36 at 212–13. Williams quotes Horne’s autobiography,

“Walter’s concern, and mine too, was that in the period while I was waiting for *Cabin in the Sky* they would force me to play roles as a maid or maybe even as some jungle type.” She continues, “Walter felt, and I agreed with him, that since I had no history in the movies and therefore had not been typecast as anything so far, it would be essential for me to try to establish a different kind of image for Negro women.”

*Id.* at 215.

<sup>38</sup> Of course, playing the roles Horne rejected made careers for actresses Hattie McDaniel, Louise Beavers, and others. See generally DONALD BOGLE, *TOMS, COONS, MULLATTOES, MAMMIES, AND BUCKS: AN INTERPRETIVE HISTORY OF BLACKS IN AMERICAN FILMS* (1992); Linda L. Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 *Wis. L. Rev.* 1003, 1064 n.220 (1995).

<sup>39</sup> Ammons, *supra* note 38.

how race and gender were to be performed. Jobs associated with classic femininity, indeed that mandated its performance, were verboten to black women. In more national markets, airlines declined to hire them as flight attendants; hospitals refused to train them as nurses; nor were they hired into clerical positions in offices, except in the most token numbers.<sup>40</sup> Yet, this has all changed, right? Haven't Beyoncé Knowles, Halle Berry, and Tyra challenged the limits of this old logic? Each is a "covergirl" for a leading makeup or fashion line. Haven't we seen the end of the embarrassing era that led Lena Horne to proclaim her frustration in a radio interview: "I wanted to be Pinky!"?

I am not so sure, Bob. Writing about African American authors' distrust of readers, literary critic Robert Stepto contrasts how readers can either complete or compete with a text.<sup>41</sup> He argued that reader responses to black authored texts often stem from a distrust of the author's knowledge and competency. In the case of "completed" texts, readers authenticate the narrative, identify with the author or the narrative, intuitively filling in gaps, smoothing over contradictions, deferring to the author's expertise in cases of confusion.<sup>42</sup> In contrast, they compete with a text when they seek to "subvert" it, or even "hasten its death."<sup>43</sup> Although Stepto is a literary critic, he developed his model of reader response to take explicit account of the performative quality of some written texts.<sup>44</sup> He wants us to see how "acts of listening and reading may be complicated by race."<sup>45</sup> I think his model sheds some light on the performed texts we are discussing, including classroom ones. Lena Horne's experiences indicate that white audiences' "competition" with her textual performance so undermined the overall cinematic narrative that studio execs edited her out. They could "complete" narratives featuring blacks in menial performances and as subservient to whites, but not more complex performances, ones that competed with an ideology of racial inferiority.

I find Stepto's notion helpful in explaining and understanding some of the hostile resistance to us as teachers. The idea of teaching as performance

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<sup>40</sup> According to Teresa Amott and Julie Matthaei, "Even though the clerical and sales sectors were growing rapidly after World War I, these sectors accounted for only 1 percent of Black women's employment in 1930, compared to over one-third of white women's." TERESA AMOTT & JULIE MATTHAEI, *RACE, GENDER, AND WORK* 167 (rev. ed. 1996). "As late as 1920, 97 percent of the trained nurses in the United States were white." *Id.* at 121.

<sup>41</sup> Robert B. Stepto, *Distrust of the Reader in Afro-American Narratives*, in *RECONSTRUCTING AMERICAN LITERARY HISTORY* 300, 304 (Sacvan Bercovitch ed., 1986). Stepto was questioning the adequacy of existing models of reader response criticism, seeking to complicate them by considering how the "Afro-American discourse of distrust" shaped reading practices and authorial responses.

<sup>42</sup> *Id.* at 307.

<sup>43</sup> *Id.* at 308.

<sup>44</sup> Stepto distinguishes conventions of storywriting from storytelling, arguing the latter can be present in written as well as oral texts. *Id.* at 305-15.

<sup>45</sup> *Id.* at 313.

might be a facially counter-intuitive notion. Yet, I think it is quite descriptive of what we do in many ways, particularly in larger lectures.<sup>46</sup> Many of us view our courses as complex narratives, with arcs, denouements, themes, and sometimes even red herrings and cliff-hangers. Certainly that is how I try to teach Property, Contracts, and Trusts and Estates. In each class students help to generate a piece of the text, but in fairly limited and carefully focused ways. If we are honest about it, most of us will admit that, in our large lectures, our pedagogic goals have more to do with conveying a “story” about Contracts, Torts, or Corporations, than with doing diagnostics of each student’s needs and interests. We orchestrate interactions, some of us more carefully than others, again typically designed to move the doctrinal “plot” or conceptual “narrative” along. Some of us leave more room for improvisation, call and response, or audience participation, but I think most of us would be horrified by a professor whose classroom technique was completely student-centered, say consisting of, so, what do you all want to talk about today? The other piece of this is that, as lecturers in large classrooms, sometimes we take on personas that are larger than life, purposely or unintentionally. To say that teaching is performative is not to say it is without content; to the contrary, it is to assert it as a process of generating carefully orchestrated, complex texts and narratives to convey a narrative about law to eighty-odd individuals.

So, is it possible that students are engaged in both conscious and unconscious completions and competitions in law school classrooms? Perhaps students “complete” lecture performances by professors they identify with, personally, intellectually, or politically. On the other hand, they may be subconsciously “competing” with outsider performances. This is not to make identity determinative, of course. I think we all make connections with students facially very different from ourselves. Still, as I find myself reading more and more teaching evaluations for lateral hiring, tenure, promotion, or post-tenure review, I am struck by the sorts of minor mistakes that students focus on in some classes and the seemingly major mistakes that they dismiss, gloss over, or find humorous in others. (“Professor X can never remember case names!” can be an indictment or affectionate, depending.) In one set of evaluations I read, several students had counted and reported the number of times the professor used a particular phrase (“let’s marshal our facts,” I believe was the offending term); in another, they were infuriated that she used a common alternate pronunciation of a word. Now, either a set of students coincidentally shared an idiosyncratic intolerance or they had coordinated their evaluations to attack their professor—but was this her greatest transgression against them, I found myself wondering?<sup>47</sup> It didn’t

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<sup>46</sup> *But see* HARMON & POST, *supra* note 5, at 156 (resisting notion of classroom as performative space because of the privacy it confers on the teacher).

<sup>47</sup> The first woman to earn tenure at Southern Methodist University law school reports that students conspiring against her actually helped her at tenure time. “My credibility was saved because the negative evaluations went beyond believability. . . . At that

add up! Surely to generate the level of hostility they felt (these students rated her unqualified to teach) there should be far worse mistakes she had made, deeper injustices, or incompetence. Yet, they clearly reported they had been unable to learn in her class. And, I believe them. I believe they competed every day with what she was trying to do, thereby exhausting themselves and most likely her as well.

I also think it is important to acknowledge that the processes of completion versus competition have become far more complex. For instance, so many television shows and movies now depict black women as judges, as the embodied images of ultimate authority and discretion in our democracy. (In fact, very few judges in the United States are black women.<sup>48</sup>) But, from *Legally Blonde* to *Law and Order* to reality court Judges Mablean and Glenda Hatchett, we find black-robed black women dominating the celluloid bench. Why? In one iteration, the American imaginary associates black women with a keeping-it-real authority, an intriguing update of Hattie McDaniel's command over her "charge" Scarlett O'Hara.<sup>49</sup> Black women can be dignified, authoritative, and commanding as part of daytime entertainment or in dramatic plots in which justice-seeking white attorneys try to fend for their clients. Unlike Lena Horne's experience, audiences can complete such performances. Still, when a "real" black woman judge was charged with being "disrespectful" of an attorney in the courtroom, the Mississippi Supreme Court admonished her and ordered she be recused from that case and seven others pending before her.<sup>50</sup> An interesting discussion followed on the Association of American Law Schools ("AALS") minority listserv, suggesting many black women law professors identified with the judge, feeling as though they too were disciplined for disciplining.

Bob, despite "progress," I think I remain unconvinced that race and gender don't continue to have a significant effect on how we are expected to perform. The Duke makeup symposium is filled with examples of on-going

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point, the protective instincts of the faculty were aroused and many of them rallied to my defense." Ellen K. Solender, *The Story of a Self-Effacing Feminist Law Professor*, 4 AM. U. J. GENDER & L. 249, 254-55 (1995).

<sup>48</sup> For insightful discussion of diversity in the judiciary, see generally Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95 (1997) (noting that there are very few minority judges and arguing that racial diversity among judges can increase impartiality by bringing together diverse perspectives on the bench); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000) (arguing that the lack of racial diversity on American courts threatens their quality and legitimacy).

<sup>49</sup> Of the 2003 television season, Taunya Banks notes, "it is surprising that two black women, one Cuban American woman, one white woman, two black men and only one white man preside over the seven reality court television shows that air daily in most major cities." Taunya Lovell Banks, *Will the Real Judge Stand-Up: Virtual Integration on TV Reality Court Shows*, PICTURING JUST., Jan. 16, 2003, [http://www.usfca.edu/pj/realjudge\\_banks.htm](http://www.usfca.edu/pj/realjudge_banks.htm) (identifying effects of portrayals of women and black men as judges in reality court shows).

<sup>50</sup> *In re Blake*, 912 So. 2d 907, 917-18 (Miss. 2005); see also Jimmie E. Gates, *Judge Shrugs Off Claims of Impartiality*, THE CLARION LEDGER, May 4, 2005, at 1B.

mandates and prohibitions organized around identity in varying forms. Your letter has piqued my curiosity even more about parallels between our experiences. To what extent have Asian men suffered similar gendered limits on permissible celluloid and other performances? *M. Butterfly*, David Hwang's 1990s hit Broadway riff on the Puccini opera, angered some Asian Americans for its portrayal of an Asian male spy passing as a woman for twenty years, successfully duping his European male lover. Law professor Williamson Chang concluded a strong indictment of the play's emasculation of Asian men with the manifesto, "give me Bruce Lee or give me death."<sup>51</sup> Chang's desire for a normalized Asian masculinity is completely comprehensible as a rebellion against racist imagery. Yet, given Bruce Lee's actual experience with masculinity performances, Chang may have been overly optimistic.

There is an ironic backstory to Lee's rise to international Kung Fu movie stardom, one eerily and poignantly similar to Horne's exit from Hollywood and "Light Egyptian."<sup>52</sup> I was surprised to learn that Bruce Lee had conceived the 1970s television show, *Kung Fu*, now legendary popular kitsch. He "desperately" wanted to play the lead role, and having had a successful run as the martial arts proficient sidekick Kato on *The Green Hornet*, one might imagine he would have been offered the role (especially as the show aired on the same network as *The Green Hornet*). Instead, the show's producers gave the part to David Carradine, a white actor, and changed the role from Chinese to half-Chinese/half-white. Lee's powerhouse, "authentic" martial arts skills and proven popularity with television audiences did not prevent his losing the part he conceived to a "scotch-tape Asian" with no martial arts experience. Horne left Hollywood for Broadway, subsequently winning Tony and Grammy awards for her theatrical and cabaret work. Lee also exited the American film industry, moving to Hong Kong and achieving international stardom in non-American-made Kung Fu movies.<sup>53</sup>

David Eng asks whether "[b]eing Oriental [is] the antithesis of manhood, of masculinity?"<sup>54</sup> This reminds me, Bob, of how your students derived a sexual orientation of you based on your performance in the classroom and how that troubled your Asian American student. Challenging conventional Freudian psychoanalysis based on heterosexual difference, Eng contended that this paradigm does not take account of ways in which this heterosexual difference is also racialized: "Asian American male subjectiv-

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<sup>51</sup> Williamson B.C. Chang, *M Butterfly: Passivity, Deviousness, and the Invisibility of the Asian American Male*, in BEARING DREAMS, SHAPING VISIONS: ASIAN PACIFIC AMERICAN PERSPECTIVES 181, 183 (Linda A. Revilla, Shawn Wong, Shirley Hune & Gail M. Nomura eds., 1993).

<sup>52</sup> TIMOTHY P. FONG, THE CONTEMPORARY ASIAN AMERICAN EXPERIENCE: BEYOND THE MODEL MINORITY 186 (1998).

<sup>53</sup> *Id.*

<sup>54</sup> DAVID L. ENG, RACIAL CASTRATION: MANAGING MASCULINITY IN ASIAN AMERICA 1 (2001).

ity is psychically and materially constrained by a crossing of racial difference with homosexuality.”<sup>55</sup> Eng deconstructs Hwang’s play, *M. Butterfly*, as an example:

[R]ather than seeing at the site of the female body a penis that is not there to see, Gallimard refuses to see at the site of the Asian male body a penis that *is* there to see. The white diplomat’s “racial castration” of Song thus suggests that the trauma being negotiated in this particular scenario is not just sexual but racial difference.<sup>56</sup>

In this era in which feminist and queer thought are often posited as if they are at odds in the legal academy, Eng also deftly and self-consciously demonstrates how both queer theory (i.e., sexuality and desire) and feminist theory (i.e., gender and identification) are at work in the construction of Asian American male identity.<sup>57</sup> Eng’s path-breaking book builds on Richard Fung’s earlier germinal queer text, *Looking for My Penis: The Eroticized Asian in Gay Video Porn*. Fung noted, “In my lifelong vocation of looking for my penis, trying to fill in the visual void, I have come across only a handful of primary and secondary references to Asian male sexuality in North American representation.”<sup>58</sup> Fung elaborates that gay pornography “narratives privilege the penis while always assigning the Asian the role of bottom; Asian and anus are conflated.”<sup>59</sup> Eng and Fung are both known for their analysis of film and other cultural productions. Fung observes,

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<sup>55</sup> *Id.* at 14. Eng is also careful to note the ways in which sexuality and gender are both operative.

<sup>56</sup> *Id.* at 2.

<sup>57</sup> For instance, Eng notes,

[T]he high concentration of Asian American male immigrants in what are typically thought of as “feminized” professions—laundries, restaurants, tailor’s shops—further illustrates a material legacy of the intersectionality of gender and race. Collectively, these low-wage, feminized jobs work to underscore the numerous ways in which gender is mapped as the social axis through which the legibility of a racialized Asian American male identity is constituted, determined. . . .

*Id.* at 17. Similarly, having excluded Chinese women from immigrating, Western culture then projected their own anxieties onto the all-male Chinatowns that resulted. “Physically, socially, and psychically isolated, these segregated bachelor communities might easily be thought of as ‘queer’ spaces institutionally barred from normative (hetero)sexual reproduction, nuclear family formations, and entitlements to community.” *Id.* at 18.

<sup>58</sup> Fung, *supra* note 18, at 149–50.

<sup>59</sup> *Id.* at 153; see also, ENG, *supra* note 54, at 1 (stating that in narratives like *M. Butterfly*, “the Westerner monopolizes the part of the ‘top’; the Asian is invariably assigned the role of the ‘bottom.’”). Law professor Gary Atkins’s recent survey of gay personals on Fridae.com supports their conclusions. Atkins identifies seven cultural and biological gender tools at work in gender interpretation and on the Fridae site:

Among the biologically *influenced elements* that may arise in the male gender interpretations are: (1) body size and muscular structure; (2) quantity of hair on the body and texture of the skin; and (3) the size of the penis, which is transformed into a symbol of virility. For example, a typical Orientalist portrayal of an Asian male might emphasize his slimness, his smoothness, and (through subtle



[T]he race of the producer is no automatic guarantee of ‘consciousness’ about these issues or of a different product. Much depends on who is constructed as the audience for the work. In any case, it is not surprising that under capitalism, finding my penis may ultimately be a matter of dollars and cents.<sup>60</sup>

Eng also offers insight into both Williamson Chang’s and your student’s responses. He contends that if Asian men are effeminized, or bottomed, then they may “internalize[ ] these dominant images as processes of self-regulation.”<sup>61</sup> This had led to the embrace of a sort of “cultural nationalist project” in which “the rehabilitation of Asian American masculinity depends on the programmatic reification of a ‘pure’ Asian martial tradition.”<sup>62</sup> (Hence Professor Chang’s charge, “Give me Bruce Lee or give me death!”) In addition, such a project “often engenders displaced masculinist attacks against Asian American women socially for their ‘treasonous’ romantic filiations with white men . . . .”<sup>63</sup> He concludes that these “racial problems consistently manifest themselves in questions of sexual relations between Asian American men and women, with the figure of the Asian American homosexual entirely banished from this heterosexual landscape.”<sup>64</sup> Eng’s insight could just as persuasively be applied to black gender and sexual relations, except the genders would be reversed. Is this another parallel in the experiences of Asian men and black women?

Crucially, in the cases of both Asian men and black women, our racial base further distances us from gendered ideals of masculinity and femininity. I find this all the more intriguing given that our respective “inverses” and “converses,” black men and Asian women, set the bar of masculinity and femininity respectively. In the mishigas that comprises American culture, black men and Asian women—rendered as predatory beasts or Mandingos and Suzie Wongs or geishas—have emerged as both caricatures and aspirational ideals of masculinity and femininity, “hyper” masculine and femininity respectively. In the arenas of sports, sex, and entertainment, people often view black men as prototypes of a “hard,” excessive masculinity.<sup>65</sup> Asian

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connotations) his presumably smaller-than-European phallic endowment. On the other hand, *culturally influenced elements* may include: (1) style of physical mannerisms and movements expected of a “man”; (2) socially appropriate erotic desire to be asserted in sex; (3) the ways in which sex and emotion are to be connected, if at all; and (4) strength of economic independence asserted, which itself becomes another symbol of virility. Cultures interpret these elements differently, allowing gender to become an imaginative performance by the individual actor as well as an imaginative reading by the audience.

Gary L. Atkins, *My Man Fridae: Re-Producing Asian Masculinity*, 4 SEATTLE J. SOC. JUST. 67, 78–79 (2005).

<sup>60</sup> Fung, *supra* note 18, at 160.

<sup>61</sup> ENG, *supra* note 54, at 19.

<sup>62</sup> *Id.* at 21.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Herman Gray writes:

women similarly are “[f]etishized as the embodiment of perfect womanhood and genuine exotic femininity . . . .”<sup>66</sup>

I would like to make one final point about how sexual orientation fits into all of this. You noted that, while admittedly ambivalent about doing so, you could at times mobilize straight privilege to compensate for the masculinity deficit. Many liberals and progressives remain surprised by the homophobia in racial minority communities. They expect an automatic convergence of all subordinated interests—call it a “universal subordination” approach—that would predict common cause. Yet, while disappointed and frustrated, many race critics are not surprised by our communities’ backlash against gay rights and sexual minorities. Under a “privilege seeking” model, the community as a whole seeks to gain rights by conforming through respectable behavior, and individuals hope to alleviate their individual oppression by seeking privilege where they can find it.<sup>67</sup> Hence your student’s anger, and his urging you to tell “them” you’re not gay, thereby restoring your own respectability and that of your common community. As you point out, the privilege-seeking model can make teaching about equality for sexual minorities doubly challenging. Not only do conventionally “conservative” students resent such discussions, but students of color can interpret it as a betrayal, sacrificing ethnic solidarity and calling into question

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Black heterosexual masculinity is figured in the popular imagination as the basis of masculine hero worship in the case of rappers; as naturalized and commodified bodies in the case of athletes; as symbols of menace and threat in the case of black gang members; and as noble warriors in the case of Afrocentric nationalists and Fruit of Islam. While these varied images travel across different fields of electronic representation and social discourse, it is nevertheless the same black body—super star athlete, indignant rapper, “menacing” gang member, ad pitchman, appropriate middleclass professional, movie star—onto which competing and conflicting claims about (and for) black masculinity are waged.

Herman Gray, *Black Masculinity and Visual Culture*, 18 CALLALOO 401, 402 (1995); see also David Rowe, Jim McKay & Toby Miller, *Panic Sport and the Racialized Masculine Body*, in MASCULINITIES, GENDER RELATIONS, AND SPORT 245 (Jim McKay, Michael Messner & Donald Sabo eds., 2000); cf. REPRESENTING BLACK MEN (Marcellus Blount & George P. Cunningham eds., 1996) (essays complicating black masculinity).

<sup>66</sup> YEN LE ESPIRITU, *ASIAN AMERICAN WOMEN AND MEN: LABOR, LAWS, AND LOVE* 109 (2d ed. 2008). Le Espiritu continues:

Asian women are pitted against their more modern, emancipated Western sisters. In two popular motion pictures, *Love is a Many-Splendored Thing* (1955) and *The World of Suzie Wong* (1960), the white women remain independent and potentially threatening, whereas both Suyin and Suzie give up their independence in the name of love. Thus, the white female characters are cast as calculating, suffocating, and thoroughly undesirable, whereas the Asian female characters are depicted as truly “feminine”—passive, subservient, dependent, and domestic.

*Id.*

<sup>67</sup> As Richard Fung perceptively points out, “Creating a space for Asian gay and lesbian representation has meant, among other things, deepening an understanding of what is at stake for Asians in coming out publicly. As is the case for many other people of color and especially immigrants, our families and our ethnic communities are a rare source of affirmation in a racist society. In coming out, we risk (or feel that we risk) losing this support . . . .” Fung, *supra* note 18, at 149 (footnote omitted).

their own sexual mores and commitments. This is something I'd like to see the Society of American Law Teachers ("SALT") address. SALT has long hosted exceptional teaching conferences, many focused on teaching about issues of equality, justice, and access. I have long wished they would incorporate sessions or panels on how the identity of the teacher may affect our ability to teach such topics. I recall a SALT conference I attended early in my career, in which panelists were urging Property teachers not to wait to introduce the manifold equality and access questions that come up in the course. Others urged dropping or minimizing future interests as a way to find more time to talk about discrimination and property. Yet, I recall thinking to myself that I had just discovered a way to secure some authority in my Property class, by devoting the initial weeks to future interests. This earned me some respect from students, lessened suspicion and hostility of my competence and political bias, and assured them this would be, in the main, a "regular" Property class (hopefully staving off future Malcolm X accusations). Similarly, in Trusts and Estates, I decided to defer discussing issues of same-sex equality to the final third of the course, when I have earned student trust and respect and can hopefully generate more wide-ranging, thoughtful dialogue, respectful of the material, me, and the sexual minorities in the class. I have been teaching for fifteen years now; will I ever be able to perform without regard for my identity?

Bob, you also noted something else about our scholarly and classroom performances: my increasing hesitation with first-person narratives and revelations.<sup>68</sup> I first noticed this two years ago when I was talking about our last epistolary exchange as an invited guest at a graduate seminar. Several students queried two distinct voices in the essays, one they characterized as "analytic" and "remote," the other they associated with a more conventional critical race theory narrative approach. They identified specific passages as examples and asked about the narrative decisions. I was stunned by their finely tuned distinctions. As you recall, we had started that exchange a decade ago, and when we resumed it, we re-wrote some portions, wrote new material, and left some passages as they were. The students had picked up on precisely this disjuncture. What they did not realize, what they could not realize, was that, in my letters, it was the older sections that were written in first person narrative; the newer ones in a more conventional academic voice. This is counter-intuitive: we expect that we become more free academically as we become more senior. In fact, there has been something of a trend in the humanities of memoir writing among very senior literary

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<sup>68</sup> Some of the authors in the *Berkeley Women's Law Journal Symposium* also expressed some hesitancy in writing about their experiences in the classroom, fearing undermining their future classroom performances or reinscribing what had happened. See, e.g., Emma Coleman Jordan, *Images of Black Women in the Legal Academy: An Introduction*, 6 BERKELEY WOMEN'S L.J. 1, 4 (1990-1991); Angela D. Gilmore, *It Is Better to Speak*, 6 BERKELEY WOMEN'S L.J. 74, 80 (1990-1991).

and cultural studies theorists.<sup>69</sup> Since that discussion with the graduate seminar, I have been wondering, why is my academic biography arguably the opposite?

So, I find my fears of stories odd, especially given that it was Patricia Williams's, Mari Matsuda's, and Stephen Carter's legal memoirs that pulled me into law teaching. What happened? Was this a mere intellectual moment? I don't think so. Part of it is the subject matter: as I started writing more and more about slavery, I let the cases tell their own stories; there simply is neither room nor necessity for me in those analyses. But, that only begs the question; the passages the students identified to me were not about slavery. At their prompting, I did tell them the first person narratives behind some of the analysis. After a few minutes, at least two of them were in tears, they were so upset by what had prompted the passages. And I was livid. And so I explained to them, that some of what we experience is so debilitating, so exhausting, that sharing it would be disabling, to me and to them.

Bob, as you pointed out, memory is a funny thing. Both of our memories repressed teaching experiences that we had experienced as shameful until later, when viewed perhaps through the lens of subsequent successes we could better cope with them. And the last reason I think I have embraced the conventional scholarly voice is the privacy it provides, given the increasing performative requirements of the job in all ways. Similarly in classes, I am also interested in how we edit our own performances to try to render ones that will be acceptable to our students. But what, and who, gets lost in the process?

Beverly Guy-Sheftall is exploring black women and memoir writing, arguing that both black and white expectations severely constrain the personal narratives black women can tell, limiting us to political autobiographies, but setting true memoirs off-limits. I used to reveal a lot of myself to my students; I felt that they were owed some authenticity of performance. Yet, following Stepto again, I also feel that they competed continuously with these authentic classes, these renderings of a "real" Adrienne. In place of that, I have crafted a persona that they seem to be able to complete, at least over the long course of the semester. And, in truly post-modern fashion, I am unsure what the real me would look like in a classroom anymore, so attuned am I to certain completions, certain competitions.

I suspect a lot of our colleagues will not like this exchange—either the form or the substance of what we argue, that our students may be laboring under distorting burdens of racism and sexism. Yet I also suspect that some junior professors will be relieved that their experiences are shared, that we are admitting these experiences are humiliating, devastating, and heartbreaking; but also that they are not determinative, that is, one can still achieve some career success even in the face of constrained identity performances. I

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<sup>69</sup> See, e.g., Nancy K. Miller, *Public Statements, Private Lives: Academic Memoirs for the Nineties*, 22 SIGNS 981 (1997).

suspect many of our colleagues will dismiss this as senseless and incomprehensible whining. After all, isn't the "real" problem "out there"? Yet, in *The Rage of a Privileged Class*, Ellis Cose tells us, the "quiet desperation" so many successful professional blacks report stems precisely from "anger, confusion, and pain" in their work lives.<sup>70</sup> Lena Horne said, "I never felt like I really belonged to Hollywood. At that time, they did not know what to do with me, a black performer. So, I usually just came on, sang a song, and made a quick exit."<sup>71</sup> Horne eventually turned away from Hollywood and film; this is not what I want for junior faculty of color. How can we work with students, to encourage less competition and more completion? And to avoid our own wholesale exit?

Adrienne

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LETTER 4: ODE TO PULCHRITUDE

Dear Adrienne,

Your discussion of performance led me to think about the ways that I have performed my identity at various points in my life. In order to avoid the Asian nerd/geek label, I used to include on my resume that I had a black belt in Taekwondo. I realize of course that it plays into the other stereotype of Asian men as kung fu or karate masters, which comes with its own drawbacks and occasional danger,<sup>72</sup> but for much of my life I preferred that to the geek/nerd label. Much of my college life was spent being a slacker, with the foolish notion that I could single-handedly undo the model minority label imposed upon Asian Americans.

Related to the geek/nerd stereotype, there is also a profile of Asian men as being effeminate. Some Asian American men work hard to overcome that stereotype. Several years ago, some Asian American male students at the University of Michigan School of Law told me that they made a point of working out to overcome the effeminate Asian male stereotype. I empathized with them and wondered if that was why I ran so many miles, lifted so many weights. But then playing against type can play into another stereotype, the fit gay male aesthetic. Do you remember the makeover that our

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<sup>70</sup> ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* 11 (1993).

<sup>71</sup> *THAT'S ENTERTAINMENT! III* (Metro-Goldwyn-Mayer Pictures 1994).

<sup>72</sup> See, e.g., Cynthia K. Y. Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 438–41 (1996) (discussing the successful use of self-defense asserted by Anthony Simon, a man who killed his neighbor, Steffen Wong. Wong was an Asian American whom the killer believed to be an expert in martial arts because of his racial heritage).

friend Jayne Lee engineered before I began my first tenure track job? We called the new me “D-Bob.” What was I thinking?

Do you remember that *Newsweek* article published in 2000 that heralded Asian American men as overcoming the stereotype of being “weak, sexless and unable to offer the status and security that white men could.”<sup>73</sup> The primary evidence for this was the increase in outmarriage rates for U.S.-born Asian American men in California, with the imputation that White women were now discovering what one *Newsweek* reader already knew: “Let me say from personal experience, Asian men are the best-kept secret around.”<sup>74</sup> The article was published the semester I was up for tenure. Standing in front of my classroom, trying to teach, trying to get tenure, I wasn’t really feeling it.

Teaching class, I’m not concerned about my prospects for outmarriage, but the outmarriage discussion is important in terms of how we are regarded when we stand in front of the classroom. In one study of assessments by strangers of teachers and their correlation with actual student evaluations, the researchers assumed that physical attractiveness was a component that had to be controlled for in examining the assessments and student evaluations of teachers.<sup>75</sup> This seems to be confirmed by a recent study about the relationship between the physical attractiveness of instructors, student evaluations, and implicit labor market outcomes (salaries, promotion, and awards).<sup>76</sup> What are we to make of the fact that Black women and Asian American men are the least desirable outmarriage partners? Are we less attractive? Does that translate as a factor with regard to hiring, promotion, and salaries?

I’ve also been thinking about your cafeteria worker story. I wonder what goes on in the minds of students when you walk in and take your place at the front of the classroom. What kind of cognitive dissonance is produced when they realize that your Black female body is their professor and not a cafeteria worker? I imagine that the cognitive dissonance is eased by the realization that you must be there because of affirmative action. “A two-fer! That explains it!” Their cognitive dissonance eases, but you begin with your competence compromised.

When you are performing, constituting your identity in the classroom, how do you negotiate the affirmative action presumptions? When we give talks at conferences or to students at other institutions, we often begin by

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<sup>73</sup> Esther Pan, *Why Asian Guys Are on a Roll*, NEWSWEEK, Feb. 21, 2000, at 50.

<sup>74</sup> Mary Stevenson, Letter to Editor, NEWSWEEK, Mar. 13, 2000, at 17.

<sup>75</sup> See Nalina Ambady & Robert Rosenthal, *Half a Minute: Predicting Teacher Evaluations From Thin Slices of Nonverbal Behavior and Physical Attractiveness*, 64 J. PERSONALITY & SOC. PSYCHOL. 431, 437 (1993) (discussing methodology used to control for effect of physical attractiveness).

<sup>76</sup> Daniel S. Hamermesh & Amy M. Parker, *Beauty in the Classroom: Professors’ Pulchritude and Putative Pedagogical Productivity*, (Nat’l Bureau of Econ. Research, Working Paper 9853, 2003), available at <http://www.nber.org/papers/w9853>. This study examined undergraduate education at the University of Texas, Austin.

saying that we are proud beneficiaries of affirmative action.<sup>77</sup> The earliest I recall you doing it was in 1995 at a conference at American University.<sup>78</sup> I thought it was very brave of you to do this at your home institution. Your example led me to follow suit at later conferences.<sup>79</sup> I think we do it, though, for very different reasons. I do it because Asian Americans are often thought not to be the beneficiaries of affirmative action but instead its victims. So my narrative attempts to disrupt this master narrative<sup>80</sup> by noting that Asian Americans have been and continue to be beneficiaries of affirmative action in specific contexts. In other contexts, Asian Americans are harmed, not by affirmative action, but by negative action or discrimination that treats Asian American applicants less favorably than White applicants, about which Jerry Kang, Dana Takagi, and Grace Tsuang have written.<sup>81</sup> I think that you tell your affirmative action story for a reason similar to Bryan Fair's: "[U]nlike Stephen Carter, I am not an 'affirmative action baby' who now, belatedly, disdains it and its supposed stigma. . . . I would never pull up the ladder that helped me climb out of racial poverty."<sup>82</sup> Though your family's circumstances were different from Bryan's, you tell your story to make clear that one need not be ashamed of being an affirmative action beneficiary. It is our society that ought to be ashamed that affirmative action is necessary to open doors that would otherwise have been shut to your Black female body and voice, to ensure that the ladder is not pulled up for the next generation.

I've never talked about being a beneficiary of affirmative action in my large first-year classes. I wonder how the students would react if I did. I wonder how your students would react if you did, drawing direct attention to the pink elephant in the room that many students likely believe but would never acknowledge. What's even worse is that although you likely count as a "two-fer" for the purpose of your law school or university when they

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<sup>77</sup> I know that we've done it as recently as the spring of 2005. See Robert S. Chang & Adrienne D. Davis, "The Adventure(s) of Blackness in Western Culture: An Epistolary Exchange on Old and New Identity Wars," presented at the U.C. Davis Law Review Symposium: The Future of Critical Race Feminism (Apr. 2005).

<sup>78</sup> See Proceedings, *Conference on Race, Law & Justice: The Rehnquist Court and the American Dilemma*, 45 AM. U. L. REV. 567, 614 (1996) ("Let me start by saying that I, as a black woman, am a very proud beneficiary of affirmative action."). The conference took place on Sept. 21, 1995, at the Washington College of Law at American University.

<sup>79</sup> See, e.g., Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream that Is America*, 23 HASTINGS CONST. L.Q. 1115 (1996).

<sup>80</sup> On the power of master narratives, see Lisa Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles,"* 66 S. CAL. L. REV. 1581 (1993).

<sup>81</sup> DANA Y. TAKAGI, *THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS* (1992); Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1 (1996); Grace W. Tsuang, Note, *Assuring Equal Access of Asian Americans to Highly Selective Universities*, 98 YALE L.J. 659 (1989).

<sup>82</sup> BRYAN K. FAIR, NOTES OF A RACIAL CASTE BABY: COLOR BLINDNESS AND THE END OF AFFIRMATIVE ACTION 182 (1997).

report faculty diversity, you likely did not gain the presumed double advantage when you were hired.

Work done by Deborah Merritt and Barbara Reskin suggests that women of color are at the bottom when it comes to law faculty hiring if you consider institutional prestige, rank, and courses.<sup>83</sup> Their examination of those securing tenure track law faculty positions between 1986 and 1991 debunks the commonly held perception that Black women gain a double benefit from affirmative action and that White men are diametrically harmed.<sup>84</sup> Instead, their work shows that “[a] woman of color and a white man with comparable credentials could expect to secure appointments at schools with equivalent prestige—nothing more and nothing less.”<sup>85</sup> This is not to say that White men are not affected by affirmative action. Merritt and Reskin report:

A man of color . . . might teach at Yale (tied for first at 4.03 on our prestige scale) while a white man with similar credentials might win appointment at Berkeley (ranked eight at 3.37 on the same scale). Similarly, a man of color might teach at the University of Washington in Seattle (rated 2.43) while a white man with a comparable resume would find tenure-track work at the University of Florida (1.73) or Emory University (1.79).<sup>86</sup>

Merritt and Reskin report also that White women receive an upward bump on the prestige scale, though the bump is smaller than that received by minority men.<sup>87</sup> But the affirmative action bump White women receive with regard to the institutional prestige is counteracted for women generally by their appointment at a lower rank and salary<sup>88</sup> and by the assignment of

<sup>83</sup> Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199 (1997).

<sup>84</sup> A set of three articles written by White men, at least two of whom appear to have gone through the law school hiring process during the periods analyzed by Deborah Merritt, all contain this presumption. See, e.g., Ken Feagins, *Wanted—Diversity: White Heterosexual Males Need Not Apply*, 4 WIDENER J. PUB. L. 1 (1994); John Hasnas, *Affirmative Action and the New Discrimination: A Reply to Duncan Kennedy*, 54 LA. L. REV. 263 (1993); Michael S. Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993 (1993).

<sup>85</sup> Merritt & Reskin, *supra* note 83, at 251–52.

<sup>86</sup> *Id.* at 250–51.

<sup>87</sup> *Id.* at 252.

White women also received some preference in hiring, although the advantage was smaller than that afforded minority men. Our analysis suggests that if a white man and white woman entered the academic market with identical and exceptional credentials, the woman might win a job at Harvard (tied for third at 3.76) while the man would secure an appointment at Berkeley (ranked eighth at 3.37). A white woman with somewhat weaker credentials might teach at the University of Colorado (rated 2.27) while a man with those same credentials would begin teaching at Fordham University or the University of Georgia (both rated 1.82).

*Id.* at 251.

<sup>88</sup> *Id.* at 254–56.



courses such as Trusts and Estates that carry with them less prestige and diminished scholarship opportunities.<sup>89</sup> Women of color, who receive no affirmative action bump with regard to institutional prestige, are hired at a lower rank and salary and given less prestigious courses.<sup>90</sup> Women of color come out at the bottom. Adrienne, how did you come to teach Trusts and Estates?

During a time when law schools almost universally expressed a strong commitment to diversity and affirmative action, how does it come about that White men and Black women, with equivalent credentials, achieve the same outcome with regard to institutional prestige? I take this equivalent result to be evidence of the heightened intersectional discrimination that Black women encounter, and that the equivalent result is achieved only by affirmative action canceling out this discrimination.<sup>91</sup> Merritt and Reskin cite to a body of social science research that consistently shows that “employers rate white male applicants more highly than they score women or minority candidates with identical credentials.”<sup>92</sup> Perhaps we shouldn’t be too surprised that a similar dynamic is going on in faculty appointments committees and law school faculties, with the interplay of race and gender operating to put women of color at the bottom.

I ran across a similar dynamic with regard to the assessment of Asian American applicants to elite institutions of higher education. Investigations at Stanford and Brown in the 1980s revealed that low scores on personal ratings of Asian American applicants by alumni interviewers and admissions officers may have been influenced by unconscious biases and stereotypes which then had a negative impact on their admissions prospects.<sup>93</sup> These investigations showed that there was, using Jerry Kang’s phrase, negative action directed toward Asian American applicants, and not just an indirect effect of the strongest form of affirmative action exercised by elite institutions—preferences for legacies, preferences that amplify the effects of past discrimination.<sup>94</sup> I used to think of George W. Bush as a poster child for affirmative action. Look at what he’s been able to achieve through the benefits that he’s received as a legacy. With preferences, anyone can be president! But with all that he’s done to this country and the world, I wonder why anti-affirmative action proponents haven’t chosen him as a poster child for all the problems with affirmative action. But I digress.

If those making hiring or admissions decisions engage in these practices and are influenced in their assessments because of stereotypes and unconscious biases, it does not seem a stretch to speculate that students do this

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<sup>89</sup> *Id.* at 275.

<sup>90</sup> *Id.* at 254–56, 275.

<sup>91</sup> *See id.* at 290 (“It is troubling to consider how poorly minority women might have fared had schools not endorsed any affirmative action goals.”).

<sup>92</sup> *Id.* at 293–94, 229 n.98.

<sup>93</sup> *See* Tsuang, *supra* note 81, at 664–65.

<sup>94</sup> *See* Chang, *supra* note 79, at 1124–25 (discussing legacy admits).

in assessing teachers. I just read a study about attitudes formed based on nonverbal cues from “thin slices” of behavior, ten second clips taken from the first ten minutes, the middle ten minutes, and the final ten minutes of college teachers’ classes.<sup>95</sup> These clips, totaling thirty seconds per teacher, were played with no volume, and then the study’s subjects were asked to rate fifteen characteristics (molar nonverbal behaviors).<sup>96</sup> These characteristics were then correlated with teacher effectiveness.<sup>97</sup> The researchers’ overall conclusions are startling:

On the basis of observation of video clips just half a minute in length, complete strangers were able to predict quite accurately the ratings of teachers by students who had interacted with them over the course of a whole semester! Furthermore, these predictions retained their accuracy after we adjusted for physical appearance of the teachers, indicating that the judges were picking up very subtle nonverbal cues.<sup>98</sup>

The study examined participant responses to thirteen teachers (six women and seven men) but did not include a gender or race analysis. I am curious what such an analysis might reveal. The race and gender of the teacher are very salient nonverbal cues. Attitudes stemming from stereotypes of race and gender are likely formed as quickly and quite likely unconsciously or subconsciously.<sup>99</sup> If those attitudes then predict fairly accurately student evaluations of teachers, and if there is a presumption of incompetence projected onto Black female bodies, then it’s no wonder that you’ve had to become an expert at turning things around.

But not everybody is able to turn it around. The Association of American Law Schools issued a report in 2005 indicating that although tenure rates were reaching parity between White men and White women, minority men and minority women continued to lag far behind and their situation had in fact worsened.<sup>100</sup> For the cohort that began tenure-track law teaching in 1996-1997, “73% of white law professors but only 47% of minority law professors were awarded tenure by year eight [of the tenure clock].”<sup>101</sup> This racial tenure gap of 26% is nearly twice as great as the 14% gap that existed

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<sup>95</sup> Ambady & Rosenthal, *supra* note 75, at 1.

<sup>96</sup> *Id.* at 433.

<sup>97</sup> *Id.* at 434–35.

<sup>98</sup> *Id.* at 435.

<sup>99</sup> See Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1247–50 (2002) (discussing the automaticity of stereotyping on the basis of race); Jerry Kang, *The Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1498–1506 (discussing racial schemas).

<sup>100</sup> ASS’N OF AM. L. SCH. COMM. ON THE RECRUITMENT AND RETENTION OF MINORITY LAW TEACHERS, *THE RACIAL GAP IN PROMOTION TO TENURE OF LAW PROFESSORS* (2005), available at <http://www.aals.org/documents/racialgap.pdf>.

<sup>101</sup> *Id.* at 3.

with regard to those who began tenure-track law teaching in 1990–1991.<sup>102</sup> Things have gotten much worse.

So why are we not getting tenure? It's hard to generalize about tenure because, as Jerome Culp often said, tenure is local and personal.<sup>103</sup> The mantra is that you need to pass muster with regard to scholarship, teaching, and service, though I've never seen or heard anyone denied tenure on the basis of service or lack thereof. I've heard of flunking lunch; flunking service, never.

I wonder how much of the difference in tenure rates can be attributed to teaching. Difficult classroom moments such as the ones we've described can lead to negative student evaluations. They can have an impact by distracting you from your scholarship. Though indirect, its effect on your scholarly productivity can be quite damaging. Negative student evaluations can lead your tenure and promotions committee to tell you to focus on teaching in the early years, which can lead to difficulty meeting the writing standards as your tenure clock winds down. So even if you get your house in order with regard to teaching, spending time on teaching at the expense of scholarship can lead you to get dinged on scholarship. Or in my case, in my penultimate review before my tenure year, I was discouraged by my tenure review committee from pursuing a book project, an anthology on reparations that Richard Delgado encouraged me to do. My committee was not concerned that I wasn't spending enough time on my teaching; rather, they were concerned about how it would appear to my colleagues if I were to be working on another book instead of focusing on my teaching. More directly, negative student evaluations can lead to the conclusion by your tenure and promotions committee or your senior colleagues that you are an ineffective teacher who does not meet your school's standards with regard to teaching excellence.

This begs the question of what can be concluded on the basis of student evaluations. Do student evaluations correlate with teaching productivity or effectiveness? I read one study based on accounting courses that indicated a negative correlation between student evaluations and teaching effectiveness.<sup>104</sup> In this study, the researchers followed students in Introductory Accounting I who then went on to take Intermediate Accounting II.<sup>105</sup> These courses were part of a progression, with Intermediate Accounting building on what was taught in the previous courses in the sequence.<sup>106</sup> The researchers noted that studies to date had tended to find that there was a positive correlation between student evaluations and teaching effectiveness, meaning

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<sup>102</sup> *Id.* at 3–4.

<sup>103</sup> His colleagues remember him saying this at the 1992 Southeast/Southwest Law Teachers of Color Conference held in Tucson, Arizona in April 1992. This phrase is often invoked at the LatCrit/SALT Junior Faculty Development Workshop.

<sup>104</sup> Penelope J. Yunker & James A. Yunker, *Are Student Evaluations of Teaching Valid? Evidence from an Analytical Business Core Course*, 78 J. EDUC. FOR BUS. 313 (2003).

<sup>105</sup> *Id.* at 314–15.

<sup>106</sup> *Id.*

that students tended to learn better in classes in which they gave the instructor high evaluations.<sup>107</sup> But in this study, controlling for student ability/achievement,<sup>108</sup> they found that students from Introduction to Accounting I classes in which their instructors received strong student evaluations tended to do worse in the subsequent course in the sequence, Intermediate Accounting II, than students from classes that had rated their instructors more negatively.<sup>109</sup> In other words, students appeared to retain less from classes in which the instructors were more highly rated and appeared to retain more from the classes in which the instructors were less highly rated.

In another study, student evaluations and student performance were examined in courses taught by a professor of developmental psychology at Cornell.<sup>110</sup> He had been teaching the same large lecture course for nearly twenty years. In the fall, he taught the course in his usual manner. Then he attended a teaching skills workshop. In the spring, "he attempted to teach the identical course he had taught in the fall, using the identical materials on a lecture-by-lecture basis, with one exception: his presentation style was more enthusiastic."<sup>111</sup> In the spring, not only did they rate the instructor more highly overall, they also thought that they had learned more, that the instructor was more knowledgeable, more tolerant, more accessible, and more organized. Even the text was more highly rated, going from poor in the fall to average in the spring! Despite these marked differences between the fall and the spring, student performance in the fall and spring were nearly identical.<sup>112</sup>

Are these two studies anomalies? The most extensive meta-analysis of student ratings and teaching effectiveness, published in 1981, is typically cited for the proposition that there is a strong positive correlation between student ratings and teaching effectiveness, thus validating the use of student evaluations for purposes of hiring, tenure, and salaries.<sup>113</sup> What puzzles me, though, is the difference between the abstract for that article and the author's conclusion at the end of that article. The abstract concludes: "The results of the meta-analysis provide strong support for the validity of student ratings as measures of teaching effectiveness."<sup>114</sup> The author's concluding paragraph, though, is more qualified:

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<sup>107</sup> *Id.* at 316.

<sup>108</sup> The researchers accounted for student ability-achievement according to three variables: student grade in Introductory Accounting II, student grade point average, and student ACT score. *Id.* at 314.

<sup>109</sup> *Id.* at 316.

<sup>110</sup> Wendy M. Williams & Stephen J. Ceci, "How'm I doing?" *Problems with Student Ratings of Instructors and Courses*, CHANGE, Sept.-Oct. 1997, at 12, 13.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 21.

<sup>113</sup> Peter A. Cohen, *Student Ratings of Instruction and Student Achievement: A Meta-analysis of Multisection Validity Studies*, 51 REV. EDUC. RES. 281, 281 (1981).

<sup>114</sup> *Id.*

[W]e can safely say that student ratings are a valid index of instructional effectiveness. Students do a pretty good job of distinguishing among teachers on the basis of how much they have learned. Thus, the present study lends support to the use of ratings as *one* component in the evaluation of teaching effectiveness. Both administrators and faculty should feel secure that *to some extent* ratings reflect an instructor's *impact* on students.<sup>115</sup>

As a faculty member who is in a position to assess candidates at the hiring and tenure stage, I don't know how secure such a conclusion makes me feel. So I keep reading the literature about student evaluations and find it to be a hopeless muddle.<sup>116</sup>

The author of the 1981 study revisits the topic with other researchers in 1990, and after assessing forty-three multisection validity studies finds that "opinions about rating validity have differed markedly."<sup>117</sup> The ultimate conclusion is disappointing:

Despite many decades of research on the validity of student ratings, the thrust of our conclusion is that additional research lies ahead. This research should lead to a better understanding of the teaching-learning process and a better use of ratings for summative and formative decisions about instruction.<sup>118</sup>

If the validity of student ratings is uncertain, what are we to make of the use of student evaluations with regard to hiring, retention, tenure, salary, and other determinations? One of the worst questions that seems to be fairly common to evaluations asks students to assess the instructor's knowledge of the subject matter. I've seen and have been told about White male instructors who receive poor marks in that category only to have those assessments discounted or ignored. After all, especially with regard to first-year students, what do they know? I've seen and have been told about minority professors who receive poor marks in this same category where these poor marks are not discounted and instead are taken seriously where the minority professor then has to prove her or his knowledge to the satisfaction of their senior colleagues. The same holds for student assessments of overall instructor effectiveness. If my observations and if the stories I have been told are correct, then we see that objective data in the form of student evaluations are applied in ways that are at best arbitrary or at worst discriminatory on the basis of race and/or gender.

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<sup>115</sup> *Id.* at 305 (emphasis added).

<sup>116</sup> *Id.* at 285–86 (summarizing the major studies).

<sup>117</sup> Philip C. Abrami, Sylvia D'Apollonia & Peter A. Cohen, *Validity of Student Ratings of Instruction: What We Know and What We Do Not*, 82 J. EDUC. PSYCHOL. 219, 230 (1990).

<sup>118</sup> *Id.* at 231.

This last is an example of institutional or evaluator bias with regard to how similar student ratings are treated based on the race and/or gender of the instructor. Let's add to that the possibility that the student evaluations themselves are tainted by student bias. Unfortunately, the 1990 meta-analysis of the validity of student ratings I discussed above did not examine the possibility of student bias in rating instructors. In a brief paragraph, they exclude from their examination studies that measured the effect of student bias because "the typical design of bias research makes it inadmissible as evidence of the validity of ratings as measures of the products of instruction."<sup>119</sup>

So is there bias? There have been many studies of gender bias in student evaluations.<sup>120</sup> Although a number of studies report that students have different expectations and criteria by which they assess female and male instructors,<sup>121</sup> "there is a growing consensus among large-scale, carefully controlled, multidisciplinary studies that no statistical difference exists in the average ratings for male and female instructors."<sup>122</sup> However, as you noted in Letter 1, several studies have found that gender bias disadvantaging women "appear in fields that are traditionally and currently populated largely by male students and male faculty (i.e., science, mathematics, engineering, economics)."<sup>123</sup> Law isn't one of the disciplines mentioned, and although many schools now have as many female as male students, law teaching remains largely male-dominated.<sup>124</sup> These studies would predict that gender bias exists with regard to the evaluation of female law professors. Another area where female instructors appear to be vulnerable to lower student ratings is in large, required, introductory courses.<sup>125</sup>

In looking at bias and student evaluations, I was surprised to see so few studies about the impact of race. There are even fewer studies that examine the effect of instructor sexual orientation, presumed or otherwise, on student evaluations. One study that surprised me was designed to get at the problem of attributional ambiguity. Does someone get poor ratings because of their

<sup>119</sup> *Id.* at 221.

<sup>120</sup> See, e.g., ANNE STATHAM, LAUREL RICHARDSON & JUDITH A. COOK, *GENDER AND UNIVERSITY TEACHING: A NEGOTIATED DIFFERENCE* (1991); Susan A. Basow & Nancy T. Silberg, *Student Evaluations of College Professors: Are Female and Male Professors Rated Differently?*, 79 J. EDUC. PSYCHOL. 308 (1987); Sheila Kishler Bennett, *Student Perceptions of and Expectations for Male and Female Instructors: Evidence Relating to the Question of Gender Bias in Teaching Evaluation*, 74 J. EDUC. PSYCHOL. 170 (1982).

<sup>121</sup> See sources cited *supra* note 120.

<sup>122</sup> Huston, *supra* note 7, at 599.

<sup>123</sup> *Id.* at 600.

<sup>124</sup> See ASS'N OF AM. L. SCH., *ON LAW SCHOOL FACULTY AND CANDIDATES FOR LAW FACULTY POSITIONS: ALL FACULTY IN THE 2005-06 DIRECTORY OF LAW TEACHERS (2005-2006)*, <http://www.aals.org/documents/statistics/20052006statisticsonlawfaculty.pdf> (showing that 81.2% of Deans, 63.6% of Associate Deans with Professor title, 74.1% of Professors, 55.2% of Associate Professors, and 54.9% of Assistant Professors are male).

<sup>125</sup> Huston, *supra* note 7, at 602 (citing Jennifer Franklin & Michael Theall, *Student Ratings of Instructors and Sex Differences Revisited*, Presented at the 75th Annual Meeting of the American Educational Research Association (Apr. 7, 1994)).

race, gender, and/or sexual orientation? Or does that person get poor ratings because they are in fact bad teachers? I'm going to bury the study's methodology in a footnote,<sup>126</sup> but the researchers found that a strong lecture was rated more poorly if students were given a c.v. before a guest lecture that implied that the guest lecturer was lesbian or gay compared with students in the same class who received a c.v. with no information suggesting the instructor's sexual orientation.<sup>127</sup> Here, this study seems to provide strong evidence of bias based on sexual orientation that avoids the problem of attributional ambiguity. The thing that surprised me, though, was that students rated more highly the weak lecture given by an instructor that they perceived as gay or lesbian as opposed to the instructor of unknown sexual orientation. The researchers suggest that this latter result might stem from students moderating their negative evaluations of gays or lesbians in order to avoid the appearance of discrimination;<sup>128</sup> they explain the former through the mechanism whereby positive evaluations are withheld based on bias.<sup>129</sup> This suggests that there may be asymmetric treatment of positive and negative evaluations depending on the evaluation object's characteristics. The more I read, the more complex it gets.

The studies about racial bias with regard to student evaluations aren't really studies of the phenomenon—they tend to simply document that minority professors receive lower student ratings on average than do White professors and to suggest that this may or may not be caused by racial bias. For the most part, they don't get to the problem of attributional ambiguity. In the study of the effect of beauty on student ratings by Hamermesh and Parker, they find that beauty, while still having an impact, does not have as large an impact in upper division courses as it does in lower division courses.<sup>130</sup> They're surprised, though, to find that the size of the negative impact suffered by minority or non-native English speaker faculty members persists in lower and upper division courses.<sup>131</sup> They find the different effect of racial bias and beauty bias troubling because they can't account for it by student maturity, "that class ratings by more mature students, and students

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<sup>126</sup> In this particular study, the researchers have one male and one female instructor give guest lectures to four undergraduate introductory psychology classes. The female instructor gave a guest lecture to two of the classes. To one of the classes, she gave what was characterized as a strong lecture; to the other, a weak lecture. In each class, half the class was given a c.v. that strongly implied that she was a lesbian; the other half was given a c.v. that gave no indication of sexual orientation. The same methodology was employed with the male instructor. Both instructors were white, approximately 30 years old, had 3–5 years teaching experience, and previous teaching evaluations similar to each other. Vanessa Lynn Ewing, Arthur A. Stukas, Jr. & Eugene P. Sheehan, *Student Prejudice Against Gay Male and Lesbian Lecturers*, 143 J. Soc. PSYCHOL. 569, 573–74 (2003).

<sup>127</sup> *Id.* at 576–77.

<sup>128</sup> *Id.* at 576.

<sup>129</sup> *Id.* at 577.

<sup>130</sup> Hamermesh & Parker, *supra* note 76.

<sup>131</sup> *Id.* at 7.

who are learning beyond the introductory level in a subject, are less affected by factors such as beauty that are probably unrelated to the instructor's knowledge of the subject."<sup>132</sup> They conclude this section weakly saying that they can't account for the persistence of the negative impact faculty receive that is correlated with their minority or non-native English speaker status, that it "may imply the existence of discrimination by students in their evaluations, or it may result from shortfalls in the ability of those instructors to transmit knowledge."<sup>133</sup> Attributional ambiguity!

The persistence of the size of the negative impact for minority or non-native English speaker faculty seems to me to be strong evidence of bias. It doesn't surprise me that maturity with regard to beauty and maturity with regard to race or gender operate or progress differently.

If student evaluations do not equate to teaching effectiveness, then what do they reflect? In a recent study on the validity of student ratings of instruction, the researchers write that according to "one view, student ratings are valid if they accurately reflect students' opinions about the quality of instruction, regardless of whether ratings reflect what students learn. That is, the rated satisfaction of students with instruction is considered worth knowing because students are consumers of the teaching process."<sup>134</sup>

So what do we have so far:

- (1) there is inconclusive evidence about the validity of student evaluations with regard to teaching effectiveness measured by student learning or achievement;
- (2) factors such as the physical attractiveness or race or gender or sexual orientation of the instructor affect student evaluations in a way that does not correlate with teaching effectiveness;
- (3) yet law schools continue to rely on student evaluations in making decisions with regard to hiring, retention, promotion, tenure, and salary.

Does this constitute discrimination? My area is not employment discrimination, but this seems to bear some similarities to *Wilson v. Southwest Airlines*.<sup>135</sup> In that case, the plaintiffs challenged the airline's blanket refusal to hire men as flight attendants or ticket agents and its height/weight requirements for flight attendants, which, if men were actually considered, would have had a disparate impact on men.<sup>136</sup> Obviously, the law school context is different in that, unlike Southwest Airlines, law schools will not admit that they are discriminating on the basis of a protected category. The law school context does not present a facial disparate treatment case. But if (2) is true,

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Abrami, D'Apollonia & Cohen, *supra* note 117, at 219.

<sup>135</sup> 517 F. Supp. 292 (N.D. Tex. 1981).

<sup>136</sup> *Id.* at 293.



then the use of student evaluations as discussed in (3) would have a disparate impact on women, racial minorities, and members or perceived members of LGBT communities. If disparate impact is established or conceded, then continued reliance on student evaluations could be justified only on the basis of business necessity. But if (1) is true, then law schools would be putting forth an argument not dissimilar to the one put forward by Southwest—that in order to succeed, they must cater to consumer/student satisfaction. Southwest Airlines can't help it if their customers are sexist. Law schools can't help it if their students are racist/sexist/homophobic. Can they?

—Bob

P.S. I apologize for the length of this letter. I needed to share with you some of the stuff I've been reading. I promise that my next letter will be briefer.

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#### LETTER 5: PLANET FEEDBACK AND ELLA FITZGERALD

Dear Bob,

Wow. D-Bob. I still remember our collective effort to have you perform that identity, Bob. I wonder what people today would make of D-Bob, as the search for gender “identity” becomes more and more complicated by race and sexual minority status. Teaching in Alabama, I became intrigued by black women’s scrutiny of black men as on the “down low” (secretly engaging in homosexual activity). In response to this, some black women began to search for “real” markers of sexual orientation and to rely on “out” gay black men for the keys to crack the code. The emergence of the down low phenomenon (some would say paranoia) in the black community intersects interestingly with the metrosexual craze among white professionals, in which behavior previously thought to cue “gay” now is read through a consumptive lens. David Eng reminds us that we need to “further explor[e] the intersection of sexual and racial difference.”<sup>137</sup> I was really intrigued by your points about the *Newsweek* article and the view of outmarriage as a proxy for physical attractiveness. Outmarriage has emerged as a popular “racial progress narrative,” one that privileges the privatization of racial relief and colorblindness as legal principles.<sup>138</sup> Yet, as you point out, we may

<sup>137</sup> ENG, *supra* note 54, at 13.

<sup>138</sup> Rebecca Wanzo argues that progress narratives represent race on an ever-upward trajectory toward equality, with slavery as the nadir of course. REBECCA WANZO, *THE SUFFERING WILL NOT BE TELEVISED: AFRICAN AMERICAN WOMEN AND SENTIMENTAL POLITICAL STORYTELLING* (2009) (analyzing cultural and political illegibility of black women’s suffering and how identity affects groups’ claims to “suffer”).

not all be equally situated within economies of desire. How does this translate into the classroom?

So, what do we do? How do we change things? Increasing numbers of lawyers of color seek the life of the mind. This is due in some part to the success of law schools in diversifying not only our student bodies, but also our faculties (bodies, scholarship, and curriculum) so that more kinds of students and alums can envision themselves as scholar/teachers. In addition, as we have discussed in the past, teaching is a profession with a long and distinguished pedigree in both of our cultures.<sup>139</sup> By the same token, many students, including white ones, report that teachers of color have transformed their law school learning. This goes far beyond the “role model” hypothesis or the myth that all people of color embrace a particular “voice of color.” As Lani Guinier argues, “[t]he first problem with the role model argument is that it trivializes the important contribution that outsiders play in diversifying a faculty. Presenting black women law professors primarily as role models ignores their roles as scholars and intellectual leaders whose presence on a faculty might alter the institution’s character, introducing a different prism and perspective.”<sup>140</sup>

The fact is that forty years after the civil rights and black and yellow power movements many people agree on the value of diversity in hiring. Whether it is the military’s endorsement of affirmative action “as deadly serious,” private employers’ desire to reach broad markets (witness insurance companies’ hiring women to reach housewives and people of color to reach minority communities), liberals’ faith in integration to facilitate color-blindness, or lefty beliefs in compensatory measures, broad coalitions support a diverse workforce.<sup>141</sup>

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<sup>139</sup> Chang & Davis, *supra* note 1, at 1224.

<sup>140</sup> Lani Guinier, *Of Gentleman and Role Models*, 6 BERKELEY WOMEN’S L.J. 93, 99 (1990–1991). Several of the other essays in the *Berkeley Women’s Law Journal Symposium* address the merits and downsides of the role model theory. See Anita L. Allen, *On Being a Role Model*, 6 BERKELEY WOMEN’S L.J. 22 (1990–1991) (defending and critiquing role model theory); Taunya Lovell Banks, *Two Life Stories: Reflections of One Black Woman Law Professor*, 6 BERKELEY WOMEN’S L.J. 46, 47 (1990–1991) (contrasting role model with mentor); see also Coleman Jordan, *supra* note 68, at 6–8 (citing the role model theory as one of three primary arguments for including black women on law faculties); Nelson, *supra* note 9 (urging attention to various leadership roles women of color play on law faculties).

<sup>141</sup> Consol. Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents at 13, *Grutter v. Bollinger*, 539 U.S. 982 (2003) (No. 02-241) and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516). The amicus curiae brief filed by high ranking military officers in the 2003 affirmative action case, *Grutter v. Bollinger*, reminded the Supreme Court that during the Vietnam War era, “The absence of minority officers seriously threatened the military’s ability to function effectively and fulfill its mission to defend the nation.” *Id.* at 7. The brief continued:

The crisis that resulted in integration of the officer corps is but a magnified reflection of circumstances in our nation’s highly diverse society. In the 1960s and 1970s, the stark disparity between the racial composition of the rank and file and that of the officer corps fueled a breakdown of order that endangered the military’s ability to fulfill its mission. That threat was so dangerous and unacceptable

Workforce diversity takes on particular moral and pragmatic power in the context of the legal profession and legal education. Part of the proclaimed mission of law schools is to prepare lawyers to represent a population increasingly diverse in background, needs, and basic cultural competency. Our member association, the AALS, announces:

[Its] commitment to equality of opportunity and diversity reflects the judgment of the member schools that these are core values in legal education and in the legal profession. The objective reaches beyond simply ensuring access to all who are qualified. It seeks to increase the number of persons from underrepresented groups in law schools, in the legal profession and in the judiciary in order to enhance the perception of fairness in the legal system, to secure legal services to all sectors of society, and to provide role models for young people.<sup>142</sup>

Similarly, the American Bar Association has stated: “The ABA strongly believes that the full participation of all racial and ethnic groups in the legal profession is a compelling interest. It preserves the legitimacy of our legal system, and safeguards the integrity of our democratic government.”<sup>143</sup> How

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that it resulted in immediate and dramatic changes intended to restore minority enlisted ranks’ confidence in the fairness and integrity of the institution. In a highly diverse society, the public, including minority citizens, must have confidence in the integrity of public institutions, particularly those educational institutions that provide the training, education and status necessary to achieve prosperity and power in America.

*Id.* at 28–29. In her conversation with engineers at Texaco, Mari Matsuda reports that they claim, “for example, that they can’t make money if everyone in the room thinks the same way.” They then described the role of women in developing the modern “C-store,” the convenience store with clean restrooms, wide glass fronts and aisles, and more meal and grocery options. Mari J. Matsuda, *Who Is Excellent?*, 1 SEATTLE J. SOC. JUSTICE 29, 33 (2002–2003).

<sup>142</sup> ASS’N OF AM. L. SCH., Statements of Good Practices, STATEMENT ON DIVERSITY, EQUAL OPPORTUNITY AND AFFIRMATIVE ACTION (1995), [http://www.aals.org/about\\_handbook\\_sgp\\_div.php](http://www.aals.org/about_handbook_sgp_div.php). The Association reports:

Diversity means more, however, than expanding access to those historically underrepresented in and underserved by legal education and the legal profession. Its objective is also to create an educational community—and ultimately a profession—that incorporates the different perspectives necessary to a more comprehensive understanding of the law and its impact on society; and to assure vigorous intellectual interchanges essential for professional development. It also implies changing the culture of educational institutions—making learning, the curriculum, and pedagogy more responsive to the needs of a changing student population and a changing world. It presumes an obligation to create a greater sense of belonging, of connectedness, and of place for all members of the educational community.

*Id.*

<sup>143</sup> American Bar Association, Diversity Matters at the ABA—A Guide to ABA Diversity Resources, <http://www.abanet.org/legresource/minority.html> (last visited Oct. 21, 2009).

The ABA has three standing committees on diversity, The Commission on Racial and Ethnic Diversity in the Profession addresses those issues related to racial and ethnic di-

can we honor these goals if we can't even expect law students to learn from diverse bodies and styles? How can they represent people who they can't respect?

One tempting response, of course, is to assume that things will get better as law faculties become more diverse. The assumption here is that student bias results from their lack of exposure and unfamiliarity with people of color behind podiums and will "naturally" resolve itself as more faculty of color enter teaching. Yet, several of our colleagues caution against this "critical mass" hypothesis. While what Rebecca Wanzo identified as racial "progress narratives" are very appealing, Pam Smith and others argue instead that "retrenchment and resegregation" have generated more student bias over the last twenty years.<sup>144</sup> As you point out, Bob, contra the critical mass hypothesis, the racial tenure gap has increased, not decreased.

So, again, what is to be done? I would like to think about a set of responses to the question of how gender and race make up authority and knowledge in the legal classroom. One response is doctrinal, one institutional, one empirical, and the last focuses on self-preservation through conceiving teaching as performance.

First, a doctrinal response is one you identify: to consider whether student behavior rises to the level of cognizable racial harassment or discrimination. The obvious difficult question is how what Gary Becker would call a student's "taste for discrimination" fits with conventional accounts of power in law schools.<sup>145</sup> Under what we might think of as a classically juridical model, professors have it, students do not. And certainly, faculty do maintain and wield significant power over students in on-going direct and indirect evaluation, control over the substance of what is learned, as well as who speaks and when, etc. Yet, this top-down model of power has come under much critique in the last thirty years. Most notably, Michel Foucault argued for power as circulating between groups, as deeply contested, and unpredictable in its appearances and flows. One node of student power is what I mentioned earlier, whether students "complete or compete" their professors' classroom performances. Ongoing competition can wreak havoc with prom-

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versity in the legal profession; the Council on Racial and Ethnic Justice works on issues of race and ethnicity as they pertain to issues of social justice; and the Advisory Council on Diversity supports issues related to the "pipeline" and encourages more minorities to pursue a career in law. Its CLEO program providing law school access for disadvantaged students dates back to 1968. *Id.*

<sup>144</sup> See, e.g., Farley, *supra* note 7, at 334 ("Attempts simply to deny these stereotypes, with the expectation that they will disappear as more women enter the academy, will be unsuccessful because they fail to recognize the crux of the problem. The presumption that women lack authority is not simply replicated in legal academia, but is actively produced there as well."); Smith, *supra* note 9, at 85 ("Consequently, those people of color who entered legal academia early on were unable to change their environments in a fundamental way to make them less hostile and more friendly for themselves and their successors."); see also WANZO, *supra* note 138 (refuting notion of racial progress narratives); *supra* note 138 and accompanying text.

<sup>145</sup> GARY BECKER, *ECONOMICS OF DISCRIMINATION* 14 (2d ed. 1971).

ising academic careers, particularly when motivated by conscious or unconscious bias.

Bob, you pointed out some of the destructive professional effects. Constant student hostility generates destructive classroom dynamics, which then have to be “managed,” making other students uncomfortable and distracted and forcing new faculty to invest disproportionate amounts of time in teaching compared to their cohort. This leaves less time for producing scholarship, or leaves the faculty member more exhausted than her peers. What you recount is startling, Bob—students being used to punish scholarship, with your colleagues suggesting you forego excellent scholarly opportunities merely for the sake of appearances. Student bias also can result in poor student evaluations that, as part of the personnel file, limit opportunities for tenure and promotion, pay raises, institutional capital, as well as lateral mobility. And, perhaps most destructively, student bias can generate institutional discord and discomfort, making our colleagues and deans defensive and isolating us from them at the very time when we most need their input and support. Not to mention the significant personal emotional toll of being the constant object of dynamics ranging from irritating micro-aggressions to explicit racist or sexist hate mail or libel.

Impeding scholarly productivity, creating institutional isolation, and exacting emotional exhaustion are some of the classic effects of impermissible workplace harassment. In addition, where racist and sexist evaluations become part of teachers’ personnel files, and the basis of employment decisions, this might also be impermissible discrimination. There are some important pieces to sort through: whether such a claim would be made under disparate impact or disparate treatment law; whether law schools could claim a business necessity or bona fide occupational qualification defense; how to configure students and teachers within Title VII’s employment map; how to sort through the “hopeless muddle” on the integrity of student evaluations. At a minimum, pursuing these doctrinal questions may help us to better account for how student “tastes to discriminate” may combine with other institutional power flows in complex and unexpected ways. Deferring to students’ “taste for discrimination” is arguably not different than historic justifications of discrimination in the service sector based on customer “preferences.”<sup>146</sup> Of course, it also suffers from what you characterized as attributional ambiguity: how do we know when students are reacting to poor teaching, versus when they are victims of their own bias? The airlines cases you reference offer intriguing possible precedent that forces us to confront the legitimacy of various student preferences and “tastes.” I think this raises real questions about the scope of Title VII, and I invite our colleagues who study employment discrimination law to pursue these questions. Yet, my impulse is that the litigation avenue will not be optimal for most faculty of

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<sup>146</sup> Duke Journal of Gender, Law & Policy Symposium, *Makeup, Identity Performance and Discrimination*, at Duke University Law School (Oct. 20, 2006).

color; what we want is to be effective teachers. Hence, I would like to consider another set of responses.

The institutional response is a continuation of the previous point. Law schools rightfully reject analogies to market sector employers; our fundamental mission is different. Yet, as Richard Markovits points out, there are ways in which we unthinkingly commodify our institutions, cravenly deferring to students as “consumer sovereigns,” even when their immediate individual goals differ from our own longer-term institutional pedagogic goals.<sup>147</sup> In addition, deference to student biases may impede universities’ goals for diversity in identity or thought. Part of our goal should be to encourage students to be at least open to diverse teaching styles, approaches, and bodies. To that extent, both faculty and administrators should be cautious of, and thoughtful about, subtly undermining their colleagues. Much as faculties have begun to take hiring women and racial minorities quite seriously, we need to turn our attention to the role that student evaluation plays in personnel decisions and how we enable students to either compete or complete, or even just give a fair chance, to our colleagues.

In addition, law schools need to rethink, collectively and individually, the role anonymous numerical student evaluations play in personnel decisions. We are not reinventing the wheel here; there is a vast literature on the limitations of numerical student evaluations.<sup>148</sup> Your letter raises points faculties should discuss, including identifying contradictions within the literature and some troubling counter-intuitions. I suspect many law faculties would be surprised by the “Accounting Study” showing an inverse correlation between high student evaluations and performance in the next course sequence;<sup>149</sup> I certainly was. Yet a stunning number of institutions continue to evaluate teaching efficacy solely or primarily through anonymous student evaluations, in spite of concerns over bias, statistical integrity, and even non-predictiveness. At a minimum, administrators can make some of the insights on bias in student evaluations available to tenure, promotion, and hiring

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<sup>147</sup> Richard S. Markovits, *The Professional Assessment of Legal Academics: On the Shift from Evaluator Judgment to Market Evaluations*, 48 J. LEGAL EDUC. 417, 418 (1998). Indeed, Markovits attributes an increasing deference to numerical evaluations to a broader law school trend in “substitution of ‘market evaluations’ for direct personal assessments of quality.” *Id.* at 417. Markovits notes that student immediate goals and interests, in a “right” answer and practical skills may not be the sum total of institutional goals in “increasing the students’ inclination or ability to perform various official public roles or to provide information about legal issues and institutions to their fellow citizens, and increasing the intellectual satisfaction the students get from their practice of law or their lives in general.” *Id.* at 421. Indeed, he notes that sometimes students don’t recognize the value of alternative content, pedagogical approaches, and role-modeling until they themselves are out in the workforce. His article also contains an admirable list of teaching goals. *Id.* at 418–19 & n.2.

<sup>148</sup> See, e.g., Abel, *supra* note 7, at 417 n.30 (explaining that there are hundreds of empirical studies); Judith D. Fischer, *How to Improve Student Ratings in Legal Writing Courses: Views from the Trenches*, 34 U. BALT. L. REV. 199, 200 (2004) (finding more than 2,000 articles on teaching evaluations).

<sup>149</sup> Yunker, *supra* note 104.

committees, as well as to administrators who mediate between faculty and students.<sup>150</sup> (I remember how reassured I was when my then-dean Elliott Milstein shared with me an article on bias in teaching evaluations; his acknowledgment meant so much.) In addition, many other evaluative devices have been proposed for assessing teaching competency, including student interviews, reading random samples of student papers or exams, examining course materials, and alumni or subsequent student assessments in addition to the now fairly standard peer observations. Of course, these have their own downsides, and chances are there are no perfect metrics for teaching assessment, but that does not mean we should limit ourselves to only one, particularly one that is so susceptible to bias and statistical flaws.<sup>151</sup> Richard Abel urges us to apply to teaching assessment the same openness to new voices and new perspectives and genres that we have tried to apply to scholarship.<sup>152</sup>

As we both know, Bob, the reality is that bias and prejudice may indeed impede student learning. As Kathleen Bean points out, “students who are busy being hostile have less energy to devote to learning. Students will not commit their time and energy to learning when they do not trust the teacher’s abilities. Quite simply, students will not learn as much.”<sup>153</sup> Taunya Banks reports that a white student asked to be transferred to another class because of his own prejudice.<sup>154</sup> How should law schools respond? Should they defer to the student’s assessment of his own limits? Subject him to psychological testing first, akin to disability testing? Or leave him in the class on the theory that learning to work in diverse populations, achieving the aforementioned cultural competency, is part of legal training, even if it is done at the expense of class dynamics and possibly the teacher’s own evaluations?

We also need to generate more complex accounts of power. Obviously, student evaluations are one of the only sources of institutional power they have, a point reinforced by the rise of websites for students to evaluate their professors. There is speculation that evaluations take on heightened significance in law schools.<sup>155</sup> On the one hand, teaching rightfully occupies a central place in our mission as training qualified and ethical professionals. On the other hand, law school administrators know that today’s student is tomorrow’s alum and that alumni giving is a big part of law school budgets and endowments. This double whammy of professional training and com-

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<sup>150</sup> See, e.g., Smith, *supra* note 9, at 202–03.

<sup>151</sup> But see Abel, *supra* note 7, at 204 (downsides of relying on student interviews); Markovits, *supra* note 147, at 422 (conceding faculty visits and paper assessments may be too “expensive” in terms of faculty time and social harmony); cf. HARMON & POST, *supra* note 5, at 170 (noting potential downsides of a system of peer review that “requires us to evaluate each other’s cognitive goals and methods of achieving them”).

<sup>152</sup> Abel, *supra* note 7, at 452.

<sup>153</sup> Bean, *supra* note 7, at 34.

<sup>154</sup> Banks, *supra* note 140, at 52.

<sup>155</sup> Abel, *supra* note 7, at 410–11 (compared to other university departments, law schools pay considerably more attention to teaching).

modification may explain why teaching merits relatively more attention in law schools than in other parts of the university.

The final institutional point is a small one, and an obvious one, I think. You asked how I came to teach Trusts and Estates (a course I love, by the way). It was on a visit to a school that had detected a pattern of student bias against visiting faculty. The school cared a great deal about good teaching and valued student input, but the school also recognized that student biases could and had distorted classroom dynamics, placing visiting faculty at a significant disadvantage and leaving visitors with negative impressions of the institution. This school implemented one of the above recommendations, flexibility in scheduling, and avoided putting visitors into required classes. They suggested I teach Trusts and Estates as a class that would allow me to showcase my large classroom skills, but not in a required first-year class. Their experiment proved successful: ninety students came to my first lecture, and around seventy-five remained in the course and enjoyed the course very much. I praise the school's politics and commitment, and in fact I had a fine visit and memorably pleasant experiences with their students. (I note, though, teaching a new class on a visit did generate significant extra work and anxiety on my part.)

The third response is an empirical one. We need more information. There is much anecdotal evidence of bias, reported from white male colleagues doing peer evaluations and from students themselves, as well as from us. But, as we have both noted, the statistical evidence of bias in evaluations is itself in dispute, and, despite several highly publicized incidents, the weight of evaluations in personnel decisions also remains in dispute. The AALS should request data on tenure denials and deferrals and the extent to which *student evaluation* of teaching was a factor.<sup>156</sup> Another revealing statistic would be the extent to which negative teaching evaluations affect lateral hiring of women and people of color. Pamela Edwards has argued the converse of our hypothesis, that the predominance of women as legal writing teachers contributes to the low status accorded to that part of the curriculum.<sup>157</sup> If the AALS predictions are correct, more of us will be going

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<sup>156</sup> The AALS has generated revealing data on hiring and retention of law faculty of color. See, e.g., Lee E. Teitelbaum, *First-Generation Issues: Access to Law Schools*, in PERSPECTIVES ON DIVERSITY: AALS SPECIAL COMMISSION ON MEETING THE CHALLENGES OF DIVERSITY IN AN ACADEMIC ENVIRONMENT 21, 29–31 (1997).

<sup>157</sup> Pamela Edwards, *Teaching Legal Writing as Women's Work: Life on the Fringes of the Academy*, 4 CARDOZO WOMEN'S L.J. 75, 90 (1997). Edwards characterizes student bias against writing instructors as "institutionalized contempt." *Id.* at 77 (citing Mary Ellen Gale, *Legal Writing: The Impossible Takes a Little Longer*, 44 ALB. L. REV. 298, 320 (1980)). Christine Farley agrees:

Another practice that reinforces women's role in legal academia is the gendered hierarchy of legal education. It comes as no surprise that at the same time women are pushing their way into the academy, we are also witnessing the feminization of certain skills training. These positions are the most recent additions to the curriculum, are accorded less prestige, and are—not coincidentally—more open to women applicants.



into areas of the curriculum even more susceptible to student bias than the curricular “core.”

Of course, tenure decisions are inherently balancing tests and motivated by a complex range of factors. Still, there are occasions when it seems clear that otherwise good and competent scholars with outstanding service records are denied tenure or promotion largely due to student evaluations. Collecting such data would help to confirm or deny our anecdotal sense of any effects of student bias. I suspect that collecting data would also prompt more thoughtfulness on these questions for individual institutions, itself a benefit. But beyond the benefits to individual law schools, we might detect patterns across institutions that can help us. Empirical work is ideally suited to detecting such trajectories and patterns. Are public schools less susceptible to student hostility than private? How do gender and sexual orientation intersect with race? Is there a critical mass effect? Is age a factor, as some have speculated it might be? Does region of the country make any difference?

Finally, such information would comprise a vital resource for candidates trying to make employment decisions. An entry level person contemplating a job offer might very well still opt for a school with recent tenure denials if she believes her scholarly record will be stellar. On the other hand, she might be more reticent if she knows the tenure denial was motivated in some large part by negative student evaluations, something she might rightfully detect as more beyond her control than the quality and quantity of her scholarship. Law schools can give us all the scholarly support, research time, and travel funds at their disposal, but if their students have a “taste for discrimination,” we deserve to know whether we will be at their mercy and what the institutional records are. Prospective professors deserve to know how they will be required to make up, as it were.

Another recommendation would be to create websites for faculty to share our experiences. Right now, there are several student websites, some that allow discussions in addition to pure numerical evaluations. Professors, on the other hand, frequently do not share our experiences. Certainly we recount funny stories, frequently ones that do not cast our students in the best light. But we rarely share concerns over student hostility and fears of poor evaluations, I suspect, out of embarrassment, shame, fear of prematurely publicizing our inadequacy, and loss of institutional capital. Particularly when we are junior, there is real risk in doing anything other than acting like everything is going well in our classes. With all of the legal academic blog sites, perhaps one dedicated to discussing our experiences in teaching would be helpful (with appropriate caveats for protecting personal and student anonymity, of course). This would help break the isolation, es-

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Farley, *supra* note 7, at 335; *see also* HARMON & POST, *supra* note 5, at 43–44, 58–59 (describing institutional marginalization of research and writing faculty, mainly women, at their institution).

establish connections, and provide a resource for shared strategies. It would also conceivably help to address a point of what you so rightly call attributional ambiguity: to what extent are these instances linked to race, gender, and, as we have sought to explore, intersectionality? I know that white male professors experience student hostility; it would be helpful to know if it was as personal, threatening, and *ad hominem*, and whether they also receive explicitly racial and sexist hate mail.

My last thought is about teaching and self-preservation. Pam Smith's comprehensively researched article encourages black women to prepare for the various types of student hostility she identifies.<sup>158</sup> She also suggests that black women demand the timing of teaching evaluations be altered and insist biased evaluations be revised or expunged. I am empathetic to Smith's goal of providing black women academics with support mechanisms, but I have some concerns that her suggestions will pit faculty of color against their administrators, colleagues, and students, further reinforcing their isolation, while generating discord and institutional defensiveness. I also fear that such an antagonistic posture does not leave enough room for educational and pedagogical goals. I would like to explore a supplemental approach, embracing teaching as performance.

This one will surprise some. I wonder what, if anything, we might learn, from some of the black artists who transformed American music, while playing to deeply prejudiced audiences. In keeping with our theme of teaching as performance, what might the ebullient Louis, dark Billie, happy Ella, and complex Monk and Trane be able to teach us about teaching? (And, of course, recall that Lena Horne turned away from movies to stage and cabaret work, where she could more effectively control her own performances.) At first glance, there appears little in common between our mission as legal educators and theirs as entertainers. In addition, the black blues and jazz artists of the middle third of the twentieth century struggled against a racist and sexist industry it is difficult for many of us to imagine, with significantly less "cultural capital" than we enjoy as law professors. But, I would argue that, in fact, there are striking similarities, and ones that might offer us some insight.

Unlike much music today, which relies on recordings or the Internet, blues and jazz artists introduced many of their innovations to live audiences. They struggled to remain true to the integrity of their crafts and to satisfy

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<sup>158</sup> Smith articulates:

By not succumbing to the rhetoric of inclusion and the seduction of denial, Black women who enter and who are in legal academia may be more emotionally prepared if and when hostility occurs to ascertain whether their environment is hostile due to the synergism of negativity. Critiquing the environment is a much healthier response for a Black woman than asking herself if she caused the hostility and can prevent it by changing her hair, clothing, demeanor, teaching style, credentials, pedagogy, classes, and the like.

Smith, *supra* note 9, at 207.

their audiences while also taking into account the need for self-preservation. They managed complex relations with their audiences who could be deeply racist and sexist in order to share their talent and artistic insight, while maintaining some emotional distance and preserving their privacy. In other words, their audiences were not entitled to their “real” selves, nor was this necessary in order for their artistic goals to be met. All of this is at play in the law school classroom, I think. Part of what we can do is to resist the image of teaching as requiring us to put our authentic selves into the classroom, thereby opening our real selves up to injury and attack. Instead, we can think of the classroom as a stage, one that we do need to control, yet one that does not require our authentic selves to be present for successful learning. Do you remember, Bob, Kellis Parker’s work on the jurisprudence of jazz?<sup>159</sup> I wonder what he might make of a pedagogy of performance, one dedicated to sharing our knowledge with our students, teaching them what they need to know, riffing and improvising what we say and how we respond, while controlling how much of our real selves we reveal?

Undoubtedly, this suggestion will trouble some. It may fly in the face of some of the excellent feminist literature on authenticity in teaching, or what bell hooks calls “teaching to transgress.”<sup>160</sup> In addition, these black entertainers arguably were not struggling against the same sorts of cognitive dissonance law students experience, that is, blacks as entertainers is an expected performance, in fact, probably part of what we as academics struggle against. Nor, do I mean to suggest a classroom designed solely for laughs (or any emotion), one that is devoid of all content. And, finally, let me be clear: I am not encouraging that we reinforce racist/sexist behavior and expectations.

My point is a rather small one: to consider what we as teacher/scholars might learn from these great artists who took account of their audiences, while maintaining true to their craft and protecting themselves. One benefit of such an approach is it leaves room for our pedagogical goals. Unlike our counterparts in the humanities, we’re not taught to teach. Yet, many of us enter legal academia because of a commitment to teaching. Margalynne Armstrong notes the connection that many of us feel to our students, as, regardless of their background, sometimes there are more students who are like us than we are like our colleagues.<sup>161</sup> In addition, some of my most rewarding relationships have ended up being with students facially utterly unlike me, rich blond women, very poor white men, second-career students, conservative students. Okianer Dark cautions against falling prey to the

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<sup>159</sup> See, e.g., Kellis Parker, Remarks at the Cardozo Law Review Symposium: Modes of Law: Music and Legal Theory—An Interdisciplinary Workshop (Apr. 26, 1998) (transcript on file with the Cardozo Law Review).

<sup>160</sup> BELL HOOKS, *TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM* (1994).

<sup>161</sup> Margalynne Armstrong, *Meditations on Being Good*, 6 BERKELEY WOMEN’S L.J. 43 (1990-1991).

“control” and “proprietary” models of legal classrooms.<sup>162</sup> Deborah Post and Louise Harmon remind us that the power the privacy of the classroom confers does not always bring out the best in us.<sup>163</sup> Kathleen Bean recommends that, even as we try to close the gender gap (and presumably other biases) in law teaching, “women, and feminists, begin *not* with the goal of survival in the classroom, but with a goal of providing a good education to their students.”<sup>164</sup> She notes that survival techniques can metamorphose into good teaching strategies, but cautions that, to avoid reinforcing the gender gap, it is important to identify survival techniques as such. She encourages us to move beyond survival of the gender gap and search for something more.<sup>165</sup> Perhaps we can find this in my performance metaphor.

In addition, I like the aspects of self-preservation embedded within this approach. It places a primacy on the integrity of our craft and finding ways to share what we know and care about and to find true connections with our students. By the same token, it rejects the idea that effective teaching requires sacrificing our dignity or our self-respect. It may allow us to create separate teaching personas and to protect our true selves from hurt or pain.

Bob, you asked whether I ever reveal in the classroom my affirmative action beneficiary story. I think I have, once or twice. It’s never been planned. I am reminded again of Frances Foster’s work on black women and autobiography and that what we reveal depends on whether it helps us, and our audience, to understand the narrative. Authenticity can be a strategy, too.

Adrienne

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#### LETTER 6: INOCULATING STUDENTS AND INSTITUTIONS

Dear Adrienne,

When I read in your letter about students having a “taste for discrimination,”<sup>166</sup> all I could think about was Hannibal Lecter. I had visions of students sitting around a table elegantly set, supping on the remains of bodies marked by perceived difference. A taste for discrimination, indeed. I

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<sup>162</sup> Dark, *supra* note 8, at 22–23; *see also*, Anita L. Allen, *On Being a Role Model*, 6 BERKELEY WOMEN’S L.J. 22, 38 (1990-1991); Deborah Waire Post, *Reflections on Identity, Diverstiy, and Morality*, 6 BERKELEY WOMEN’S L.J. 136, 149–53 (1990-1991).

<sup>163</sup> HARMON AND POST, *supra* note 5, at 156–61.

<sup>164</sup> Bean, *supra* note 7, at 47.

<sup>165</sup> *Id.* at 48.

<sup>166</sup> *Supra* text accompanying note 145.

apologize for the macabre image, but that's what comes to mind when I think about our friends who are no longer in our profession.

We've both been talking about the problems with student evaluations and the need for law faculties and administrators to get better information about what the problems might be, so that the evaluation system can be modified and supplemented. But what if it turned out that when bias is at play, students in fact learn less?

In your last letter, you talked about Kathleen Bean's comment that students who are hostile to the instructor won't learn as much.<sup>167</sup> Bean also states "[t]hat student hostility toward the instructor's . . . presumed lack of credibility will disrupt the learning process does not seem to need much discussion or explanation."<sup>168</sup> While you and I know this, and it seems intuitive, I think it does need some discussion or explanation if we are to persuade law school faculty and administrators.

None of the studies I discussed earlier about student evaluations and teaching effectiveness explored the possible interaction between student bias and teaching effectiveness. The only one I've found is the following experiment recounted by Kimberly Yuracko:

Rubin had sixty-two study participants, all undergraduates at a large southeastern university, listen to one of several tape-recorded speeches lasting about four minutes. The tapes were all recorded by a single speaker who was a doctoral student in speech communications and a native English speaker raised in central Ohio. As the participants listened, a slide representing a photo of the speaker was projected on a screen. Participants were shown a picture of either a Caucasian or an Asian woman. Both women were similarly dressed, were of similar size and hairstyle, and were photographed in the same setting and pose standing at a lectern in front of a chalkboard. Rubin found that comprehension was "lower for the groups exposed to an Asian visage, and higher for groups that saw a Caucasian instructor." Moreover, "accent was perceived as more foreign and less standard in the case of the Asian instructor's photograph." Participants not only "heard" a foreign accent when presented with the picture of the Asian instructor, they actually understood less of what she said as a result.<sup>169</sup>

Rubin's study focused on perceived accent based on listener bias and its effect on listener comprehension. In essence, these students internalized their bias in such a way that they learned less.

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<sup>167</sup> See *supra* text accompanying note 153.

<sup>168</sup> Bean, *supra* note 7, at 34.

<sup>169</sup> Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 400 (2006) (quoting Donald L. Rubin, *Nonlanguage Factors Affecting Undergraduates' Judgments of Nonnative English-Speaking Teaching Assistants*, 33 RES. HIGHER EDUC. 511, 514-18 (1992)).

One critique of Rubin's experiment is that the study participants had a very short exposure to the test object, a short audiotaped lecture. One might hypothesize that if the students were exposed over the course of a semester or year to a U.S.-born Asian American, the initial bias and misattribution of accent would not persist. There has been no research on this, but do you remember the story our friend Lisa Ikemoto told us about teaching in Indiana? Lisa is a sansei, a third-generation Japanese American, who was born and grew up in southern California. Even after a full semester in her class, a student commented on her foreign accent in an anonymous student evaluation. Does bias persist despite prolonged exposure to evidence that strongly contradicts the initial impression or bias? It's hard to imagine the kind of study that could demonstrate as nicely and elegantly as Rubin's the effect and persistence of accent bias in the face of consistent contrary evidence. But maybe we already have evidence about the persistence of unsupported bias, except we're not calling it evidence. It's not produced by nice neat studies, but I've heard many examples where there is a strong disconnect between student evaluations and peer evaluations of law professors, particularly when the professor being evaluated is a woman, a person of color, and/or a member of an LGBT community. Take, for instance, the question surrounding knowledge of subject matter. If the peer reviewer reports that the professor in question displays a superior command of the material, what if students after a semester of persistent exposure to that superior command still rate the professor as having weak knowledge? Do the students see something that the peer reviewer doesn't? Did the peer reviewer happen to see a class that was the exception rather than the rule? Or might there be bias at work? The psychological mechanism that would explain the persistence of bias despite contradictory evidence is provided by cognitive dissonance theory, whereby a person, in order to avoid cognitive dissonance, will ignore or discount evidence that contradicts that person's worldview.<sup>170</sup> What kind of study could be done looking at old evaluations that could try to account for different variables? What kind of study could be done in live classes? Given the difficulties in proving bias and the mechanisms by which bias operates and manifests itself, will institutions hide behind attributional ambiguity to never reach strong conclusions about or to act on the possibility or probability of bias?

I've gone beyond accents, but what if listener bias has an effect beyond cases of perceived accent such that listener comprehension is affected by listener bias with regard to competence? This is returning to Bean's earlier comment about the effect of student hostility on student learning. If you are perceived as incompetent, you may in fact be a less effective teacher, if student learning is the measure. Should this be an appropriate basis for making hiring, retention, promotion, and tenure decisions? And if it is an inap-

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<sup>170</sup> See generally Symposium, *Symposium on Behavioral Realism*, 94 CAL. L. REV. 945 (2006).

appropriate basis for making such decisions, how would we go about proving it in any particular real world circumstance, especially at a school that takes seriously teaching as measured in part by student evaluations? What is the appropriate institutional response when it is nearly impossible to demonstrate specific proof of student bias on student evaluations with regard to a particular instructor? And for the disappointed candidate for hiring, retention, promotion, tenure, or salary, what is the legal recourse when it is nearly impossible as a doctrinal matter to get at whatever unconscious impulses drive these employment decisions?<sup>171</sup>

If you are the candidate or teacher who believes that bias might be at play in your student evaluations, aside from suing under Title VII, what are you to do? I went back and read the study Kimberly Yuracko discusses. The conclusion reached by the author is even more depressing:

The pessimistic conclusion warranted here is that at least among this particular sample of undergraduates even vigorous pronunciation training for NNSTAs [nonnative English-speaking teaching assistants] will matter little. Ethnically Asian instructors who speak SAE [standard American English] apparently confront similar dysfunctional attitudes as those who do speak with marked nonnative accents.<sup>172</sup>

To repeat: vigorous pronunciation training for non-native-English-speaking teaching assistants will matter little. Shifting to competence, vigorous teaching preparation may matter little. Some of your students just won't care.

Let's give this dynamic a name—projected stereotype threat. It is the mechanism by which attribution of accent or incompetence affects not just student ratings but student comprehension. I am of course drawing from Claude Steele's work on stereotype threat, whereby negative relative stereotypes associated with a group are internalized in such a way that a group member's performance on a test is undermined or in some cases enhanced.<sup>173</sup> Though Steele's initial work was on the performance of African Americans, subsequent research has shown that the effects of stereotype threat are not limited to subordinated minorities.<sup>174</sup> In the case I'm talking about, students

<sup>171</sup> See generally Krieger, *supra* note 29 (critiquing the intent requirement in light of cognitive bias theory); Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (critiquing the intent requirement in light of the prevalence of unconscious racism).

<sup>172</sup> Donald L. Rubin, *Nonlanguage Factors Affecting Undergraduates' Judgments of Nonnative English-Speaking Teaching Assistants*, 33 RES. IN HIGHER EDUC. 511, 519 (1992).

<sup>173</sup> See Claude M. Steele, *Thin Ice: "Stereotype Threat" and Black College Students*, THE ATLANTIC MONTHLY, Aug. 1999, at 44.

<sup>174</sup> See Joshua Aronson, Michael J. Lustina, Catherine Good, Kelli Keough, Claude M. Steele & Joseph Brown, *When White Men Can't Do Math: Necessary and Sufficient Factors in Stereotype Threat*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 29 (1999); see also Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1429, 1520–22 (2005) (surveying the stereotype literature).

project a stereotype onto the body of the instructor. This stereotype can trigger conscious and unconscious responses in the student. The student will internalize the effect of the instructor's presumed accent or incompetence by believing consciously or unconsciously that his or her educational experience is being harmed or threatened. The conscious belief can lead to active disruption of the learning process for that student and for others in the class through classroom disruptions and hostile engagement with the instructor, the competing that you talked about in Letter 3.<sup>175</sup> The unconscious belief will create internal, non-verbalized resistance that also disrupts the learning process.

I am positing a twofold problem based on the race, gender, and/or sexual orientation of the instructor: (1) bias with regard to student evaluations; and (2) diminished learning related to bias. In the face of these problems, what is the appropriate institutional response?

If we do not accept that women and racial/ethnic minorities are in fact worse teachers, then the use of student evaluations for making employment decisions will necessarily have a disparate impact on members of statutory categories. In the face of this disparate impact, can educational institutions put forward a business necessity defense? And if they did, what precisely would this business necessity be? Rather than think defensively in order to win a discrimination lawsuit, is there anything these schools can do proactively to diminish or eliminate this kind of racial harassment?

A kernel of a solution can be found in the overall lack of gender bias in teaching disciplines that are not male dominated. Another kernel of a solution can be found in one of Rubin's studies. The strength of the persistence of bias and effect on comprehension was not diminished by one semester's exposure to a non-native graduate teaching assistant. However, Rubin and another researcher found that "the more often students had sat in classes [i.e., multiple semesters] with NNSTAs the more satisfied they were with their instruction and the more skilled they became at listening to accented speech."<sup>176</sup> They conclude that while "there is no justification for reducing efforts at NNSTA training . . . the problem will also need to be attacked by working with listeners . . . [who] need to be disabused of the stereotype that teachers who speak with nonnative accents are necessarily going to be poor instructors."<sup>177</sup> Persistent exposure was the answer. One semester wasn't enough.

Put these kernels together and we have a strengthened diversity rationale. More consistent, repeated exposure will diminish student bias on student evaluations. It will lead to greater student satisfaction with their

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<sup>175</sup> See *supra* notes 41–50 and accompanying text.

<sup>176</sup> Donald L. Rubin & Kim A. Smith, *Effects of Accent, Ethnicity, and Lecture Topic on Undergraduates' Perceptions of Nonnative English-Speaking Teaching Assistants*, 14 INT'L J. INTERCULTURAL REL. 337, 350 (1990).

<sup>177</sup> *Id.*



learning experience which will then reduce the barriers to learning that stem from projected stereotype threat.

Adrienne, earlier you mentioned some skepticism about the idea of achieving a critical mass of bodies marked by perceived difference. I think that you're right about the fact that just hiring us will not be enough. Institutions must engage directly with bias until they've created the conditions such that bias largely disappears. They will have to think creatively about how to disabuse students of the stereotypes associated with bodies marked by difference. The nice thing is that working on this will promote student learning. Good for the instructor, good for the student, good for the institution. Win, win, win. And law schools, as part of the university system, should put pressure on other departments to engage in the same policies. The task for law schools will be easier if student exposure begins at the undergraduate level.

None of this is to give a free pass for teachers who are women, minorities, and/or members of LGBT communities. We must continue, as we've always done, to strive for excellence in the classroom.

I've had a great time corresponding with you. What do you want to talk about next?

—Bob

