

# Richard Delgado and the Politics of Citation

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Twenty-five years ago, Professor Richard Delgado published *The Imperial Scholar*.<sup>1</sup> The article asserted that a group of white scholars dominated the field of civil rights scholarship to the exclusion of minority scholars.<sup>2</sup> It created a firestorm of sorts with what one critic called a “serious charge of invidious racism on the part of respected legal scholars.”<sup>3</sup> Professor Derrick Bell described the piece as “an intellectual hand grenade, tossed over the wall of the establishment as a form of academic protest.”<sup>4</sup> Whether as firestorm or grenade, this foundational piece had a tremendous impact on the legal landscape. In this brief essay, I examine the claims made by the article and the way that it laid the groundwork for much of critical race theory.

At the level of topic or method, there is not much controversial about the article. Building upon the growing interest in citation practices that began in the mid-1960s<sup>5</sup> and came to law twenty years later,<sup>6</sup> the article looked at the citation practices of a group of civil rights scholars. It observed that in this field, “an inner circle of about a dozen white, male writers... comment on, take polite issue with, extol, criticize, and expand on each other’s ideas”<sup>7</sup> and “only infrequently cite a minority scholar.”<sup>8</sup> The controversy, though, lies in its

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

2. *Id.* at *passim*.

3. Lloyd Cohen, *A Different Black Voice in Legal Scholarship*, 37 N.Y.L. SCH. L. REV. 301, 311 (1992).

4. Jon Wiener, *Law Profs Fight the Power*, THE NATION, Sept. 4, 1989, at 246 (quoting Derrick Bell).

5. See Norman Kaplan, *The Norms of Citation Behavior: Prolegomena to the Footnote*, 16 AM. DOCUMENTATION 179, 179 (1965) (noting that “little is known about the norms and behavior surrounding citation practices in the sciences”) [hereinafter Kaplan].

6. See, e.g., *Imperial Scholar*, *supra* note 1; Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CALIF. L. REV. 1540 (1985).

7. *Imperial Scholar*, *supra* note 1, at 563.

8. *Id.*

thinly veiled charge of racism. Professor Delgado was quick to disclaim “conscious malevolence or crass indifference” as possible explanations for this practice,<sup>9</sup> instead placing the blame “at the level of unconscious action and choice.”<sup>10</sup> However, it is very disturbing to find that liberal white scholars, who in their writings advocated for the rights of minorities, were blind to a practice that might be characterized as racist. Derrick Bell had already hinted at this dynamic earlier in his examination of *Regents of the University of California v. Bakke*<sup>11</sup> and the ensuing legal commentary.<sup>12</sup> He observed that black voices were excluded or ignored and likened this practice to the attitude of traditional parents who tell their protesting children, “Keep quiet. We are talking about you, not to you.”<sup>13</sup> But it was Delgado who provided empirical evidence that this practice was widespread.<sup>14</sup>

In reviewing *The Imperial Scholar* and the ensuing commentary, I find it curious that it has been maintained that Professor Delgado is responsible for politicizing citation practices.<sup>15</sup> An argument such as this presumes a position of innocence, a place and time when objectivity reigned with regard to the production of legal scholarship. In this morality play, perhaps Professor Delgado might be likened to the serpent that persuades Eve to bite the apple and hence precipitates the fall from innocence, at least with regard to legal scholars and legal knowledge. Yet why would legal scholarship be immune to the social forces at play in other scholarly disciplines, including even the “hard” sciences?<sup>16</sup> Part of the problem is that a scholar’s public act of citation does not reveal much about the scholar’s motives for the citation.<sup>17</sup> Studies of citation behavior indicate that scholars are motivated by a variety of factors that have little to do with objective knowledge production.<sup>18</sup> One commentator has

9. *Id.* at 574.

10. *Id.*

11. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (addressing constitutionality of affirmative action).

12. Derrick A. Bell, Jr., *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3 (1979) (discussing *Bakke*, 438 U.S. 265 and commentary following).

13. *Id.* at 4.

14. *Imperial Scholar*, *supra* note 1, at 562 n.3 (listing the twenty-six authors whose citation practices were studied).

15. See, e.g., Arthur Austin, *The Reliability of Citation Counts in Judgments on Promotion, Tenure, and Status*, 35 ARIZ. L. REV. 829, 834 (1993) (also accusing Mari Matsuda of politicizing citation practices).

16. Cf. Kaplan, *supra* note 5 (studying citation practices in science).

17. See, e.g., Terrence A. Brooks, *Private Acts and Public Objects: An Investigation of Citer Motivations*, 36 J. AM. SOC’Y FOR INFO. SCI. 223 (1985).

18. *Id.* at 224-25 (reviewing the literature and noting (1) “we do not know the author’s motive for his referencing behavior nor what informational unit he was targeting in the cited work”; (2) there are “no governing norms controlling citational practices”; (3) there exists “political background, personal motives, or even ‘games authors play’ in promoting their careers, departments, schools, friends, bosses, etc., by selecting referencing”; and (4) only if the human act of referencing “can be considered unbiased and objective can the resulting product ... be

even likened citation practices to courtship rituals that “work to create group cohesion in academic disciplines”<sup>19</sup> and determine entry into these communities.<sup>20</sup> If the legal academy blames Delgado for anything, it should only be for revealing an uncomfortable truth that forced the academy to take a closer look at its citation practices.

There are two primary reasons why we should pay attention to these exclusionary citation practices. The first concerns the distortion of legal knowledge and limited vision of justice that result from the exclusion of minority scholars. The second concerns the material conditions for the production of scholarship. I look at each of these in turn.

#### DISTORTIONS OF LEGAL KNOWLEDGE AND LIMITED VISIONS OF JUSTICE

In *The Imperial Scholar*, Delgado anticipates the “so what” question, asking “what difference does it make if the scholarship about the rights of group *A* is written by members of group *B*?”<sup>21</sup> Delgado notes that “members of group *B* may be ineffective advocates of the rights and interests of persons in group *A*. They may lack information; more important, perhaps, they may lack passion, or that passion may be misdirected.”<sup>22</sup> Delgado’s argument here is that legal knowledge is distorted by the exclusion of minority scholars.

One example of such a distortion comes from the critique of rights within critical legal studies (CLS). CLS scholars critique rights as being indeterminate and as legitimizing inequality.<sup>23</sup> They blame rights for reinforcing “a soulless, alienating vision of society made up of atomized individuals whose only concern is to protect their own security and property.”<sup>24</sup> CLS scholars also see rights as simultaneously ineffective in addressing inequality and as creating a barrier to real human connection and community.<sup>25</sup> In a symposium entitled *Minority Critique of the Critical Legal Studies Movement*, a group of minority scholars challenged this vision of rights in CLS.<sup>26</sup> In one of this set of articles that proved to be foundational for critical race theory, Richard Delgado argued that the exclusion of minority perspectives and interests made it possible for

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considered unbiased and objective”) (internal citations omitted).

19. Shirley K. Rose, *What’s Love Got to Do with It? Scholarly Citation Practices as Courtship Rituals*, 13 LANGUAGE AND LEARNING ACROSS THE DISCIPLINES 34, 45 (1996).

20. *Id.* at 41.

21. *Imperial Scholar*, *supra* note 1, at 566.

22. *Id.* at 567.

23. See Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 303 (1987) [hereinafter *Ethereal Scholar*].

24. *Id.* at 304.

25. *Id.*

26. Symposium, *Minority Critique of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987) (containing articles by Harlon L. Dalton, Richard Delgado, Mari J. Matsuda, and Patricia J. Williams).

CLS scholars to ignore the crucial role that rights play for minorities.<sup>27</sup>

Delgado then moves from this exclusion thesis to make a strong claim for inclusion, suggesting that minority scholars have a form of racial standing.<sup>28</sup> This claim of racial standing presages the different voice debate and helps create space for the use of narrative in critical race theory.<sup>29</sup> Racial standing here might be connected with standpoint epistemology whereby a certain group is identified as the victim whose perspective is privileged because they have an “understanding about oppression that others cannot have.”<sup>30</sup>

Professor Delgado posits that in addition to distorting legal knowledge, the exclusion of minorities from the conversation leads to limited visions of justice:

[W]hile the *B*'s might advocate effectively, they might advocate the wrong things. Their agenda may differ from that of the *A*'s; they may pull their punches with respect to remedies, especially where remedying *A*'s situation entails uncomfortable consequences for *B*. Despite the best of intentions, *B*'s may have stereotypes embedded deep in their psyches that distort their thinking, causing them to balance interests in ways inimical to *A*'s.<sup>31</sup>

Professor Delgado highlights the lack of serious attention that white scholars paid to reparations during that time.<sup>32</sup> These scholars emphasized utility and distributive justice, both of which focus on the present and future in such a way that the past becomes largely irrelevant.<sup>33</sup> A vision of justice that is not grounded on the past can limit greatly the justice that is achieved.<sup>34</sup> Utility

27. See, e.g., *Ethereal Scholar*, *supra* note 23, at 306 (“For minorities, however, that rights minimize many forms of coercion is of enormous importance.”).

28. See *Imperial Scholar*, *supra* note 1, at 566-67 (arguing by way of analogy that legal doctrines such as standing and real party in interest apply to legal scholarship). For further development of this point, see Richard Delgado, *Rodrigo's Book of Manners: How to Conduct a Conversation on Race – Standing, Imperial Scholarship, and Beyond*, 86 GEO. L.J. 1051 (1998) (reviewing DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997)).

29. The use of narrative in outsider legal scholarship has been captured by a focus on the existence of a different voice. This preoccupation with “voice” sparked the rather acrimonious Racial Critiques Debate. See Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1770-78 (1989); Colloquy, *Responses to Randall Kennedy's Racial Critiques of Legal Academia*, 103 HARV. L. REV. 1844 (1990) (containing contributions by Scott Brewer, Milner S. Ball, Robin D. Barnes, Richard Delgado, and Leslie G. Espinoza); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993); and Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993).

30. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 872 (1990).

31. *Imperial Scholar*, *supra* note 1, at 567.

32. *Id.* at 569, 571.

33. *Id.* at 569-70.

34. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307-10 (1978) (finding redress and amelioration for specific identified instances of racial discrimination as a sustainable rationale for affirmative action in higher education, but not “remediating the effects of ‘societal

and distributive justice allow not just the past to be avoided, but the uncomfortable discussion of white privilege and what follows from it—responsibility for discrimination—is carefully cabined in the perpetrator perspective,<sup>35</sup> a position that leaves intact white privilege while absolving the beneficiaries of past discrimination.<sup>36</sup> The result is addressing racial discrimination with “all deliberate speed... a utility-based perspective which ignores the past injustices and simply seeks to engineer a solution with the most utility to society as a whole and the minimal amount of disruption.”<sup>37</sup>

Professor Delgado concluded his critique with two suggestions. First, he suggests that “minority students and teachers should raise insistently and often the unsatisfactory quality of the scholarship being produced by the inner circle—its biases, omissions, and errors... [such that] when a well-wishing white scholar writes about minority problems, he or she will give minority viewpoints and literature the full consideration due.”<sup>38</sup> Second, he calls on white liberal scholars “who write in the field of civil rights to redirect their efforts and to encourage their colleagues to do so as well” in order to make room for minority scholars.<sup>39</sup>

I agree wholeheartedly with Delgado’s first suggestion, that we, as minority professors, students and scholars, should expose the biases, omissions, and errors of the white scholars who have dominated the field. I am less sanguine about the second. White scholars stepping aside might create what Richard Posner calls the academic ghetto of critical race theory,<sup>40</sup> where the field then is occupied by minority scholars in conversation only with ourselves, with white scholars ignoring us.<sup>41</sup> Further, it seems that Frances Ansley may

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discrimination,’ an amorphous concept of injury that may be ageless in its reach into the past”). The Court further held that “the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of ‘societal discrimination’ does not justify a classification that imposes disadvantages upon persons like respondent, *who bear no responsibility* for whatever harm the beneficiaries of the special admissions program are thought to have suffered.” (emphasis added).

35. See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

36. Cf. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1776 (1993) (discussing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (holding that a collective bargaining agreement that gave some preferences to recently hired minorities violated the seniority rights of whites who were hired and accrued seniority during a period when minorities were excluded)).

37. *Imperial Scholar*, *supra* note 1, at 577 (internal citation omitted).

38. *Id.*

39. *Id.*

40. See RICHARD A. POSNER, *OVERCOMING LAW* 106 (1995) (discussing the marginalization of black law professors into the academic ghetto of critical race theory).

41. See also Harvey Gee, *Perspective: Beyond Black and White: Selected Writings by Asian Americans Within the Critical Race Theory Movement*, 30 ST. MARY’S L.J. 759, 767 (1999) (“Many detractors of Critical Race Theory also consider it a ‘conceptual ghetto filled with dangerous low-income scholarship unworthy of reading.’” (quoting Patricia J. Williams, *De Jure*,

be right when she states:

[W]hite civil rights scholars should (1) listen carefully to Delgado's telling words and to the energy and anger behind them, (2) work well past the boundaries of their personal comfort zone in efforts to converse inclusively, interactively and attentively with scholars of color, and (3) keep thinking and writing about race. I believe that white scholars have a special responsibility to deal with white supremacy and the social and legal construction of racial visions and identities, particularly white visions and identities.<sup>42</sup>

Nor should minority scholars replicate the practices of white scholars by ignoring the work of white scholars.<sup>43</sup> Instead, the key to resolving Richard Delgado's charge is to work toward constructive engagement that produces better knowledge and expansive notions of justice to serve subordinated communities. However, in order for minority scholars to be heard, they must have a place from which to write. How citation practices directly impact careers is explored in the next section.

#### MATERIAL CONDITIONS FOR THE PRODUCTION OF SCHOLARSHIP

The voices of minority scholars will not be heard if we do not have the opportunity to write. In order to write, we must have a place from which to write. If we are not cited, then we are less likely to advance in the profession. This is amplified if the leaders in our field do not cite us or engage our work. If we are denied tenure, then we are very unlikely to produce legal scholarship. And even if tenure is achieved, lack of citation by the leaders in our field can limit the possibility for advancement and influence, as it is quite probable that our influence is connected to the reputation of our institution.<sup>44</sup> In short, being cited as well as who cites us matters.

In 1992, nearly a decade later, Delgado revisited *The Imperial Scholar* and found that while some things had changed, many things remained the same.<sup>45</sup> He asked, "What happens when a group of insurgent scholars gains

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*De Facto, De Media*, THE NATION, June 22, 1997, at 10)).

42. Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1041 n.190 (1989).

43. Cf. Richard Delgado, *The Colonial Scholar: Do Outsider Authors Replicate the Citation Practices of the Insiders, But in Reverse?*, 71 CHI.-KENT L. REV. 969, 975 (1996) (concluding in a limited study that outsider scholars did not exclude white scholars in their citations and that "[m]ost of the citations were respectful and treated the white scholar or authority in much the same way the author treated other scholars of Critical orientation or minority hue") [hereinafter *The Colonial Scholar*].

44. Cf. Deborah Jones Merritt, *Scholarly Influence in a Diverse Legal Academy: Race, Sex, and Citation Counts*, J. LEGAL STUD. 345 (2000) (attributing some difference in citation counts to the prestige of the institution where the professor teaches).

45. Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992).

admission,... earns the credibility and credentials that warrant consideration by mainstream scholars?"<sup>46</sup> He found that although "the new voices are finding their way into the pages of the top reviews and journals, they are not being quickly and easily integrated into the conversations and dialogues of traditional legal scholarship."<sup>47</sup>

As illustrated by Delgado's findings, the relationship between citation, retention and promotion is important to investigate, especially today. In 2005, the Association of American Law Schools issued a report indicating that although tenure rates were reaching parity between white men and white women, minority men and women continued to lag far behind and their situation had in fact worsened.<sup>48</sup> For the cohort that began tenure-track law teaching in 1996-97, "73% [were] white law professors but only 47% of minority law professors were awarded tenure by year eight [of the tenure clock]."<sup>49</sup> This racial tenure gap of 26% is nearly twice as great as the 14% gap that existed with regard to those who began tenure-track law teaching in 1990-91.<sup>50</sup> Rather than seeing progress, we see that things are much worse than they were in the period shortly after *The Imperial Scholar*. What might account for this lack of progress?

When Delgado wrote in 1984, extremely little was known about the norms and behavior surrounding citation practices in law. Professor Delgado's work drew much-needed attention to the sociology of citation practices in legal scholarship. Yet despite two major symposia on this topic,<sup>51</sup> there remains nothing definitive about citation norms in legal scholarship. Nor do we know anything definitive about how citations are used or abused in the context of hiring and promoting faculty.

My own experience as a law professor is that law faculties make what they want of citation practices. If it is useful to them, they will count them. If it is not useful to them, they will discount them. Either way this leaves things in dangerous territory, with minority scholars remaining subject to the good faith of their colleagues. In addition, anecdotal and empirical evidence

46. *Id.* at 1350.

47. *Id.* at 1368.

48. AM. ASS'N OF LAW SCH., COMM. ON THE RECRUITMENT AND RETENTION OF MINORITY LAW TEACHERS, THE RACIAL GAP IN PROMOTION TO TENURE OF LAW PROFESSORS, available at <http://www.aals.org/documents/racialgap.pdf> (last visited Nov. 8, 2008).

49. *Id.*

50. *Id.*

51. Symposium, *Interpreting Legal Citation*, 29 J. LEGAL STUD. (2000) (citing articles by William M. Landes, Richard A. Posner, Deborah Jones Merritt, Theodore Eisenberg, Martin T. Wells, Fred R. Shapiro, Ian Ayres, Fredrick E. Vars, Brian Leiter, Frederick Schauer, Virginia Wise, Robert C. Ellickson, David Post, Michael Eisen); *Symposium on Trends in Legal Citations and Scholarship*, 71 CHI.-KENT L. REV. 743 (citing articles by Richard Delgado, Jean Stefancic, Fred R. Shapiro, James Lindgren, Daniel Seltzer, R.H. Coase, Gerald Gunther, Charles A. Reich, William M. Landes, Richard A. Posner, J.M. Balkin, Sanford Levinson, Deborah J. Merritt, Mark Tushnet, Frances Olsen, Nancy Levit, William N. Eskridge, Jr., Melanie Putnam).

suggests that minority professors face bias in the classroom.<sup>52</sup> Perhaps, we should not be surprised by the numbers. Perhaps, the legal academy has not continued to heed the lessons of Delgado's *Imperial Scholar*. Perhaps, we need to remind the legal academy of these lessons.

Overall, minority scholars have benefited from Richard Delgado's courage in calling out white scholars for their discriminatory practices. His "intellectual hand grenade" created the space for many of us to write and to advance. It is a debt that can be honored by us if we work to ensure that the next generation gets the same opportunity to develop their voices. This will require us to pay attention to the citation practices of our colleagues as well as our own.<sup>53</sup> We must call on our senior colleagues to engage with the work of junior scholars. And as we become senior scholars, we must engage with the work of the next generation of junior scholars. Here, Richard Delgado sets a good example. More than others in his generation, he demonstrates his engagement with the work of junior scholars of all hues in his scholarship, his anthologies, and as co-editor of the Critical America Series with New York University Press.<sup>54</sup>

Let us follow his example. Let us avoid becoming imperial scholars.

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52. See Daniel S. Hamermesh & Amy M. Parker, *Beauty in the Classroom: Professors' Pulchritude and Putative Pedagogical Productivity* 7 (Nat'l Bureau of Econ. Research, Working Paper No. 9853, 2003), available at <http://www.nber.org/papers/w9853> (discussing their surprise at the persistence of the size of the negative impact that minority and non-native English speaking faculty encountered in student evaluations in both lower and upper level classes). For a discussion of the anecdotal and empirical evidence, see generally Robert S. Chang & Adrienne D. Davis, *Making Up Is Hard to Do: Race/Gender/Sexual Orientation in the Law School Classroom*, 33 HARV. J.L. & GENDER (forthcoming 2010) (unpublished manuscript, on file with authors).

53. Cf. *The Colonial Scholar*, supra note 43.

54. See, e.g., CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 2000); NYU Press, Critical America Series, available at <http://www.nyupress.org/criticalamerica.php>; Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121, 131-35 (2003) (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., Temple University Press 2002) and DERRICK BELL, ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH (Bloomsbury 2002) (criticizing the discursive turn in more recent critical race theory writings, especially as embodied in the Valdes et al. anthology).