A Reaction to "The Imperial Scholar" and Professor Delgado's Proposed Solution

Robert M. O'Neil*

Professor Richard Delgado makes a telling and timely point in his article on "The Imperial Scholar"[1]—a point that all legal scholars must take seriously. He argues that most non-minority law professors, when writing on civil rights issues, rely unduly upon the published scholarship of white-Anglo colleagues and neglect the burgeoning contributions of minority scholars. In support, he marshals impressive and credible evidence from the footnotes and references of what he terms "white inner circle authors," chiefly citing colleagues of the same race, color and, incidentally, the same gender. As a result, not only are minority writers insufficiently recognized; equally serious, an elliptical and incomplete version of civil rights law becomes enshrined in the legal journals. The more sensitive and more accurate assessment which minority scholars would provide is de-emphasized to the detriment of all. Such "[s]tudied indifference to minority writing on issues of race,"[2] Delgado argues, must come to an end. To improve the balance, he urges that minority scholars take a more aggressive stance and that non-minority scholars should "stand aside."[3]

It would be pointless to argue that neglect has not occurred, or that we white-Anglo scholars who have addressed these issues recently are not culpable. Individually, of course, we might offer partial extenuation. In my own case, I would recall that in a lengthy study of preferential admissions in the *Yale Law Journal*[4] I cited many of the very experts Professor Delgado argues have been neglected—and for essentially the reasons he urges their recognition. The writings of psychologist Kenneth Clark,[5] of psychia-

* Kaufman Professor of Law and President, University of Virginia.

1. Richard Delgado, Commentary, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. Pa. L. Rev. 561 (1984).

2. *Id.* at 573.

3. *Id.* at 577-78.

4. Robert O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 Yale L.J. 699 (1971).

5. *E.g.*, Kenneth Clark & L. Plotkin, The Negro Student at Integrated Colleges (1963).

trists William Grier and Price Cobbs,[6] and of law professor and dean Harry Groves,[7] among other Black scholars, appear in footnotes in that and other articles[8] from the early 1970's. Minority-oriented periodicals such as the *Journal of Negro Education* (cited no fewer than eight times in the *Yale* piece) also received more than passing attention—and precisely because they offered a vital perspective not found in the more accessible and familiar writings of white-Anglo colleagues. Similar pleas, I am sure, could be entered by other whites (Ernest Gellhorn[9] and Sanford Rosen[10] come readily to mind) who addressed issues of equality in education a decade or more ago.

Such extenuation, apart from sounding vaguely defensive, misses much of Delgado's point. Even those of us who did seek out minority scholarship in the 1960's and 1970's—and cited it for the best of reasons—would have to concede the propensity of prestigious journals to publish already published and cited authors, who are mostly white, and of white scholars to cite one another's articles. The causes of these conditions are rather complex. Thus, the real question may lie deeper than the one Professor Delgado poses; it may be why those of us who shared his feelings and wanted to do what he urges found the effort so intractable.

Several factors belong in the equation. One, surely, is the miniscule number of minority legal scholars as recently as a decade and a half ago. I vividly recall in the spring of 1968 asking a veteran Black law teacher how many minority professors he thought there were outside the predominantly Black law schools. He knew them all, and started counting; he stopped before he had used the fingers of both hands. However prolific that small group of pioneers may have been—and some of them were—the sheer weight of numbers would at that time have relegated Black scholarship to a subordinate role. The numbers changed dramatically, of course, and for some very specific reasons. Beginning in 1968, those of us responsible for the early summer institutes of the Council on Legal Education Opportunity [CLEO] insisted that at least half the faculties consist of minority teachers. To any institute director who demurred, we offered assistance in finding

6. William Grier & Price Cobbs, Black Rage (1968).

7. Harry Groves, *The Revolt of Black Students*, 1969 Utah L. Rev. 13.

8. *E.g.*, Robert O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 U. Tol. L. Rev. 281. *Cf.* Robert M. O'Neil, Discriminating Against Discrimination (1974).

9. *E.g.* Ernest Gellhorn, *The Law Schools and the Negro*, 1968 Duke L.J. 1069.

10. Sanford Rosen, *Equalizing Access to Legal Educaton: Special Programs for Law Students Who Are Not Admissible by Traditional Criteria*, 1970 U. Tol. L. Rev. 321.

Blacks and Chicanos qualified for summer teaching. Should such efforts be unavailing, we were quite prepared to relocate the institute—though happily that sanction was never used. A fair number of the minority law teachers currently on the faculties of major law schools entered the professoriate through the CLEO summer institutes.

Apart from the sheer force of numbers, there are two other causal factors. First, not all minority legal scholars have chosen to write about equal opportunity and civil rights. Looking back through three law faculties of which I have been a member during this period, I recall that my senior Black colleague at Berkeley specialized in international development and organization;[11] my first Black colleague at Indiana made his mark in corporate responsibility;[12] and my senior Black colleague at Wisconsin is nationally known for his work in labor law.[13] None of them, nor other minority professors with whom I have taught over the years, are indifferent to the concerns of minorities or the shaping of civil rights; their major scholarly interest includes but transcends minority rights and issues. Such diversity seems to me entirely appropriate, and reflects the integration of the law professoriate in the best sense; any other view of the minority law teacher would imply a kind of academic ghetto. I do not suggest that Professor Delgado believes otherwise. In fact his own scholarship belies any such inference. I first encountered his work through a seminal article[14] on which I have relied heavily in some first amendment research; it touches upon minority interests but quite apart from the fourteenth amendment issues with which we are primarily concerned here.

The final factor is more elusive. One result of white involvement in the civil rights movement was a fascination for many of us with the underlying legal and constitutional issues. Many who had written little about equal protection and race before the late 1960's were so stirred by a sense of injustice, or simply intrigued by the prospect of litigation on issues like preferential admissions, that they reshaped their own interests at precisely the time when concern for minority scholarship first emerged. Most of the white

11. *E.g.*, John Wilkins, *Legal Norms and International Economic Development: The Case of the Cuba Shipping Restriction in the United States Foreign Assistance Act*, 55 Calif. L. Rev. 977 (1967).

12. *E.g.*, John Baker, *Community Development Corporations: A Legal Analysis*, 13 Val. U.L. Rev. 33 (1978).

13. *E.g.*, James Jones, Jr., *Toward A Definition of "National Emergency Dispute,"* 1971 Wis. L. Rev. 700.

14. Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name Calling*, 17 Harv. C.R.-C.L. L. Rev. 133 (1982).

scholars whose works Professor Delgado cites as preemptive in fact came to race relations and equal protection from other areas of interest. Quite obviously the subject on which Professor Delgado laments minority recognition was of vital interest to a great many constitutional scholars in the late 1960's and early 1970's. The preoccupation of some of the best legal writers—white, Black and Chicano—was hardly surprising and is not, I think, fairly a cause of criticism.

There is no doubt that white-Anglo law teachers tend to cite one another consistently, and that prestigious journals give top billing to those who have been and are likely to be cited. There are, however, other culpable factors—the existence of which is no more defensible than the factors at which Professor Delgado aims his criticism. Those of us who have recognized minority scholarship earlier should not take much comfort in a more complex analysis of the causes. The problem is there; it is real and substantial; and it must be of genuine concern to any responsible legal scholar.

What, then, should be done to remedy the imbalance? Professor Delgado proposes two correctives. One of them I would applaud; the other I would reject. His first proposal is that minority scholars and students should "raise insistently and often the unsatisfactory quality of the scholarship being produced by the inner circle"[15]—with the likely result that greater recognition would follow for minority contributions in the future. One need not accept the term "unsatisfactory" to concur as I do with the general sentiment. Such a commitment to self-recognition seems the least that should be expected.

Indeed, the burden for righting the balance should not fall solely upon minority scholars. Salutary steps can be taken by white-Anglo law teachers as well. We should enlist minority colleagues as co-authors wherever appropriate. We should suggest symposia and special issue topics for prestigious journals, dealing with equal opportunity and other subjects likely to provide forums for minority writers. We should encourage minority research assistants and other students to submit outstanding seminar papers for publication. Also, we should nominate minority judges, lawyers and government officials for distinguished lectureships, thus enhancing the likelihood of their publication in prominent periodicals. All these steps and more I would applaud. In this respect, Professor Delgado is right on target.

His other suggestion I find deeply troubling—that "white liberal authors . . . [should] redirect their efforts" from this field of

15. *Supra* note 1, at 577.

scholarship. As a result, he expects that "the gap will quickly be filled by talented and innovative minority writers and commentators."[16] There are several flaws in this proposal. First, it argues that non-minority writers should abstain from a field of interest for reasons unrelated either to the subject itself or to the purposes to which the resulting scholarship might be applied—a plea which finds neither precedent nor parallel in legal scholarship. Second, it suggests that minority scholars need a "gap" in order to gain recognition for their works—the consequence of which might well be a double standard of legal scholarship. Third, it implies that minority scholars need an artificial boost in one subject area but not in others—or that those who deal with civil rights are less capable than their colleagues who write about corporate, labor or international law. Finally, there is a subtle hint that civil rights is somehow a "preserve" or "domain" of the minority scholar. Such a notion could replace one kind of "imperialism" with another. It reminds me, by analogy, of a white colleague who argued in 1963 that Black ministers were wrong to criticize the Supreme Court's ban on prayer in the schools; they should, he remarked, be so grateful for the Court's beneficial civil rights judgments that they should withhold even deeply felt objections in other fields of law. I was appalled by this suggestion. The candor of the Black clergy seemed to me extremely healthy, and I am sure the Justices felt the same way. To suggest now that concerned and knowledgeable non-minority scholars refrain from writing about civil rights implies a comparably faulty logic, even if it shares a laudable motive.

The proper solution is the one that Professor Delgado first offers, and which I would enthusiastically endorse. The more good scholarship we have in the area of equal opportunity and civil rights the better for us all—minority and non-minority alike. Surely this is the field in which, of all areas of legal scholarship, any sort of intellectual segregation would be inappropriate.

16. *Id.*