

HEINONLINE

Citation: 83 Cal. L. Rev. 853 1995

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Thu Jul 26 12:18:51 2012

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0008-1221](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0008-1221)



Retrieved from DiscoverArchive,
Vanderbilt University's Institutional Repository

This work was originally published in
83 Cal. L. Rev. 853 1995

Is the Radical Critique of Merit Anti-Semitic?

Daniel A. Farber†
Suzanna Sherry‡

Conventional concepts of merit are under attack by some Critical Legal Scholars, Critical Race Theorists, and radical feminists. These critics contend that “merit” is only a social construct designed to maintain the power of dominant groups. This Article challenges the reductionist view that merit has no meaning except as a tool for those in power to perpetuate the existing social order. The authors observe that certain traditionally oppressed groups, most notably Jews and Asian Americans, are disproportionately represented in some desirable economic and educational positions. They have in that sense “succeeded” beyond the supposedly dominant majority. The economic and educational accomplishments of these groups are hard to reconcile with the notion that “merit” exists solely to perpetuate the power of the dominant majority (white Gentiles). Because the radical critique of merit denies that the accomplishments of these minority groups can be explained by genuine merit, it necessarily implies that these groups have obtained an unfair proportion of desirable social goods. Therefore, the authors suggest, the radical critique of merit has the wholly unintended consequence of being anti-Semitic and possibly racist. The Article concludes that the radical critique equates merit with raw power and approaches moral relativism. The authors call for continued scrutiny and improvement (rather than wholesale repudiation) of current conceptions of merit.

The anti-Semite is not too anxious to possess individual merit. Merit has to be sought, just like truth; it is discovered with difficulty; one must deserve it. Once acquired, it is perpetually in question: a false step, an error, and it flies away. Without respite, from the beginning of our lives to the end, we are responsible for what merit we enjoy. Now the anti-Semite flees responsibility as he flees

Copyright © 1995 California Law Review, Inc.

† Henry J. Fletcher Professor of Law and Associate Dean of Faculty, University of Minnesota.

‡ Earl R. Larson Professor of Civil Rights and Civil Liberties Law, University of Minnesota.

We would like to thank Jim Chen, Paul Edelman, Bill Eskridge, Bernard Farber, Dianne Farber, Paul Finkelman, Phil Frickey, Sandy Levinson, Robert Levy, Michael Paulsen, Roger Park, Suzanne Park, Richard Posner, Gerald Torres, and Mark Tushnet for reading and commenting on earlier drafts of this essay, and Kristin Johnson for her research assistance.

his own consciousness, and choosing for his personality the permanence of rock, he chooses for his morality a scale of petrified values.¹

INTRODUCTION

Several years ago, the *Duke Law Journal* published a remarkable exchange over the validity of societal standards of merit. Duncan Kennedy, one of the founders of Critical Legal Studies, opened the debate. In support of affirmative action in law school faculty hiring, Kennedy attacked existing standards of merit as socially constructed and impossible to apply in a colorblind fashion.² In response, Judge Richard Posner, a leading pragmatist and pioneer in Law and Economics, criticized Kennedy's affirmative action proposal and implicitly defended merit standards.³ Posner, in turn, was labeled a racist by Jerome Culp, a prominent advocate of Critical Race Theory. Culp accused Posner of exercising the "majority voice, attempting to silence black voices."⁴ Posner's fatal flaw was his failure to acknowledge that "facially objective and disinterested standards in fact serve the interests of the white majority,"⁵ and therefore are not truly objective at all. As we will see, a similar position on merit is taken by other leading critical theorists such as Catharine MacKinnon.⁶ This essay will suggest the existence of deeply troubling links between the logic of this position and historic forms of racial and religious discrimination.

More than the evaluation of the merit of legal scholarship is at stake in this debate. Although the debate about merit was sparked by a disagreement over the narrower question of law school hiring, the critique of merit is tied to fundamental philosophical issues. As critical scholar Gary Peller has pointed out, the critique of merit stems from philosophical attacks on the concepts of objectivity and knowledge currently employed in our society.⁷ For example, Catharine MacKinnon disavows "standard scientific

1. JEAN-PAUL SARTRE, *ANTI-SEMITES AND JEWS* 27 (George J. Becker trans., 1948).

2. Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705 [hereinafter Kennedy, *Cultural Pluralist*]. For example, he states that we can only rank articles "within a particular genre" and that "[t]he vast majority of recognizable genres . . . have a specifically white, ideologically moderate or conservative history . . . built into their rules." *Id.* at 754. This article has been republished in his recent book, DUNCAN KENNEDY, *SEXY DRESSING ETC.* 34 (1993) [hereinafter KENNEDY, *SEXY DRESSING*]. Except as otherwise noted, all citations are to the *Duke* article.

3. Richard A. Posner, *Duncan Kennedy on Affirmative Action*, 1990 DUKE L.J. 1157.

4. Jerome M. Culp, Jr., *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, 41 DUKE L.J. 1095, 1097 (1992). The accusation of racism is explicit. *See, e.g., id.* at 1101 (Posner "is racist while claiming to be a neutral observer of racial circumstances"). *See also id.* at 1113 (comparing Posner with "white slaveowners in the antebellum South who were kind to their slaves").

5. *Id.* at 1097.

6. We will use "critical theory" as a blanket term including radical feminism, Critical Legal Studies, and Critical Race Theory. We recognize that not every member of these groups adheres to the positions criticized in this essay.

7. Gary Peller, *The Discourse of Constitutional Degradation*, 81 GEO. L.J. 313, 339 (1992).

norms” because the radical feminist critique of “the objective standpoint as male” is necessarily “a critique of science as a specifically male approach to knowledge.”⁸

Similar attacks have been mounted on traditional moral concepts such as fairness and justice. According to Richard Delgado, a leading critical race theorist, “[n]ormative orderings always reflect the views of the powerful” and therefore serve to stifle social change.⁹ Consequently, the “game” of normative discussion is “rigged against” the oppressed, for “one cannot use categories like justice, equality, etc., to overturn the very system” that created those values.¹⁰ Normative talk, Delgado suggests, merely masks the operation of the “Home Office,” which “does not speak normatively at all, but a sharper, brusquer, unfamiliar language full of consonants and commands.”¹¹ Thus, like “merit,” existing concepts of truth and morality are seen as part and parcel of systems of oppression.

We will refer to this stance as “radical constructivism,” since it views these fundamental concepts as socially constructed aspects of systems of power. This viewpoint should be contrasted with more moderate forms of social constructivism, such as the view that categories defining social groups (such as homosexuals) are socially constructed. These moderate views do not challenge our entire structure of thought and are not the subject of this discussion.¹² The position taken by Delgado, MacKinnon, and Culp (and to some extent by Kennedy) cuts considerably deeper to the bone of existing conceptual schemes. These broad philosophical implications

8. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 54 (1987). As she explains: “Objectivity is the epistemological stance of which objectification is the social process That is, to look at the world objectively is to objectify it.” *Id.* at 50. For a discussion of this mode of feminist epistemology, see Martha Nussbaum, *Feminists and Philosophy*, N.Y. REV. OF BOOKS, Oct. 20, 1994, at 59. For further discussion of this point, see *infra* text accompanying notes 63-66.

9. Richard Delgado, *Norms and Normal Science: Toward A Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 951 (1991) [hereinafter Delgado, *Norms and Normal Science*].

10. *Id.* at 961.

11. *Id.* at 962. Similarly, Pierre Schlag, a critical legal scholar, points out the role of values as merely strategic methods to advance other goals in advertising, and argues that the same is true in law:

It would be useful, then, to begin understanding value-talk in American legal thought as a mode of advertising—advertising for the institutions, devices, and techniques of “law.” One would then understand that “values” are related to these institutions, devices, and techniques of law in the same ambiguous ways as in any other kind of commercial advertising. From this perspective, the project of participating in legal thought to advance moral or political “values” would be on the same order (and just as promising) as trying to advance moral or political values by securing employment with an advertising firm. In short, it would be a category mistake—a particularly profound category mistake.

Pierre Schlag, *Values*, 6 YALE J.L. & HUMAN. 219, 227 (1994). For a critique of the Delgado/Schlag attack on normativity, see Martha C. Nussbaum, *Valuing Values: A Case for Reasoned Commitment*, 6 YALE J.L. & HUMAN. 197 (1994).

12. This more moderate form of constructivism is associated with legal scholars such as William Eskridge and Martha Minow. See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994).

prompt us to write about a topic that, considered narrowly, might seem to involve only an intramural dispute over academic standards.

The views of radical constructivists have not gone unopposed. Pragmatists such as Posner argue that current conceptions of objectivity, knowledge, and merit may be flawed but are necessary starting points in analysis. As he puts it, “[t]hose who believe that ‘reality’ is constructed rather than found are prone to forget that not every social construction is arbitrary.”¹³ Although anti-dogmatic and refusing to accept even the most entrenched beliefs as final truths,¹⁴ pragmatism also has a common sense vein that keeps it from veering into radical constructivism and utopianism.¹⁵ While open to uses of metaphor, rhetoric, and even imaginative but false ideas in advancing inquiry, pragmatists do not abandon conventional values of truth and merit:

But to acknowledge that mistakes, emotive utterances, and literal falsehoods (which may be imaginative or emotional “truths”) can have social utility is not to deny that truth and falsity can and ordinarily must be distinguished. It is not to endorse sloppy or tendentious scholarship, an “anything goes” attitude toward claims and assertions, or, what is closely related, the belief that, like everything else, science and mathematics are “just rhetoric.”¹⁶

The pragmatist, then, “recognizes the importance of logic and clear thinking,” and does not embrace “epistemological or moral skepticism, or scientific or moral relativism.”¹⁷

We join this debate in support of Posner’s position, but we do so only indirectly, by arguing that the logical implications of radical constructivism are disturbingly anti-Semitic.¹⁸ In a sense, our argument might itself be considered an exercise in Critical Race Theory, since it assesses a viewpoint (radical constructivism) from the perspective of a historically oppressed group.

In a nutshell, our argument is as follows. Radical constructivists contend that standards of merit are socially constructed to maintain the power of dominant groups.¹⁹ In other words, “merit” has no meaning, except as a way for those in power to perpetuate the existing hierarchy. In explaining

13. RICHARD A. POSNER, *OVERCOMING LAW* 291 (1995).

14. *Id.* at 6.

15. *Id.* at 295.

16. *Id.* at 10.

17. *Id.*

18. Posner does remark in passing that Kennedy’s comments about “‘the possibility that the assimilated person is ‘neither fish nor fowl!’” is insensitive to Jews. Posner, *supra* note 3, at 1158 (quoting Kennedy, *Cultural Pluralist*, *supra* note 2, at 741). Kennedy removed that comment when the article was republished in his book. Compare Kennedy, *Cultural Pluralist*, *supra* note 2, at 741 with KENNEDY, *SEXY DRESSING*, *supra* note 2, at 66. In a recent book, Posner also comments briefly on anti-Semitism in the Afrocentrist movement. POSNER, *supra* note 13, at 377-80.

19. On social constructivism generally, see Eskridge, *supra* note 12; Susan H. Williams, *Feminist Legal Epistemology*, 8 *BERKELEY WOMEN’S L.J.* 63, 64-75 (1993). For a critique of how radical

why some minorities have been less successful than whites, these writers repudiate genuine merit as even a partial explanation of the current distribution of social goods. They are then left in a quandary, unable to explain the success of other minority groups that have actually surpassed the dominant majority. If the accomplishments of these “model minorities”—Jews, Japanese Americans, and Chinese Americans—cannot be justified as reflecting the merit of their endeavors, then some other explanation must be sought. Unfortunately, once merit is put aside, no explanation for competitive success can be anything but negative. These groups have obtained disproportionate shares of important social goods; if they have not earned their shares fairly on the merits, then they must have done so unjustly. Thus, the radical constructivist view of merit logically carries negative implications regarding groups that have surpassed the dominant majority—in particular, Jews, the group that is our primary focus.

Although radical constructivists are surely as appalled by anti-Semitism as by racism, we contend that negative stereotypes about Jews and some Asian Americans are a logical concomitant of the rejection of the concept of merit. Anti-Semitic propositions are a nearly inescapable implication of the radical constructivist critique of merit. Rejecting merit could inadvertently leave these writers closer to the rhetoric and politics of Louis Farrakhan than to those of Martin Luther King, Jr.

Before expanding on our argument, we present a few important caveats. First and most emphatically, we do not suggest that the scholars we discuss harbor anti-Semitic feelings, even unconsciously.²⁰ We seek to alert them to logical implications they will surely find unacceptable, in order to prompt them to rethink their current attachment to radical constructivism. In short, we accuse the theory, not the theorists, of anti-Semitism.²¹

Second, our defense of the concept of merit is a limited one. We do not contend that the current concept of merit is perfect, nor do we deny that discrimination against some groups has denied them their due rewards. Belief in merit is not incompatible with acknowledging that societal standards can be applied in a discriminatory manner. It is also consistent with an understanding that some groups may not have been given a fair chance to acquire necessary skills.

constructivism has been applied to the physical sciences, see PAUL R. GROSS & NORMAN LEVITT, *HIGHER SUPERSTITION: THE ACADEMIC LEFT AND ITS QUARRELS WITH SCIENCE* (1994).

20. We emphasize that we are aware of *no* information whatsoever that even hints at personal anti-Semitism on the part of *any* of these writers. Patricia Williams, a prominent critical race theorist, has made explicit her rejection of anti-Semitism. See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 126-30 (1991).

21. Indeed, we have located at least one Jewish writer (and we are sure there are others) who subscribes to the radical position that “the American ideal of meritocracy is a sham.” Josh Henkin, *The Meretriciousness of Merit: Or, Why Jewish Males Oughtn't Be So Smug*, *TRUKUN*, Jan.-Feb. 1989, at 53, 54.

Third, this is not simply a rehash of the old argument that "some groups succeeded, so why can't you?"²² We are not arguing against discrimination as a cause of social inequality. The point is not that some minority groups rather than others have managed to overcome discrimination, but that they have somehow succeeded beyond the supposedly dominant majority. This fact is hard to reconcile with the radical constructivist view that standards of merit are simply tools used by the dominant majority to maintain its position.

In the first part of this essay, we will try to document our account of the radical constructivist view of merit. We hope that this documentation will overcome any doubts that serious scholars have taken as radical a position as we indicate. Where possible we will present direct quotations rather than our own interpretations.²³ In the second part of the essay, we work through the anti-Semitic implications of the constructivist critique of merit. Finally, we briefly consider alternative theories of merit.

I

THE CRITIQUE OF MERIT

The meritocratic ideal is that positions in society should be based on the abilities and achievements of the individual rather than on characteristics such as family background, race, religion, or wealth. According to this ideal, merit must be objective in the sense of being definable without reference to those personal characteristics.²⁴ In a society that uses merit as a standard for professional success, everyone should have an equal right to compete for desirable occupations. John Rawls has described the underlying concept of justice as one of careers "open to talents," a concept first adopted by egalitarians who rejected previous aristocratic understandings of human worth.²⁵

Under this conventional view, the ultimate conception of merit is colorblind. Its advocates believe that people are treated unjustly and discriminated against "when their merit is assessed according to their status rather

22. See D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 *Geo. L.J.* 437, 487 (1993) (claiming that this argument stems from the notion that blacks are inherently inferior).

23. Some readers may suggest that the statements we quote are merely hyperbolic rhetoric. We do not find this a persuasive defense. In our view, scholars who claim to have radical ideas should be taken at their word, rather than having their theories domesticated into more palatable form. Cf. Frances Olsen, *Feminist Theory in Grand Style*, 89 *COLUM. L. REV.* 1147, 1151 (1989) (challenging popular "misunderstandings" of CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE & LAW* (1987)). In any event, if radical constructivists are merely indulging in rhetoric, they should be made aware that this particular form of rhetoric is fraught with danger.

24. For more extensive explorations of the concept of merit, see ROBERT KLITGAARD, *CHOOSING ELITES* (1985); Richard H. Fallon, Jr., *To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination*, 60 *B.U. L. REV.* 815 (1980).

25. JOHN RAWLS, *A THEORY OF JUSTICE* 66 (1971). The replacement of the aristocratic concept of merit was of course one of the achievements of the Enlightenment.

than according to the value of their traits or products.²⁶ Thus, under this conception of merit, racial discrimination “is irrational and unjust because it denies the individual what is due him or her under the society’s agreed standards of merit.”²⁷

Alliegiance to the meritocratic ideal does not preclude support for race-based policies such as affirmative action.²⁸ Randall Kennedy, a firm proponent of affirmative action,²⁹ is also one of the most outspoken recent defenders of the traditional conception of merit.³⁰ Kennedy sharply distinguishes affirmative action from decisions based purely on merit:

I simply do not want race-conscious decisionmaking to be naturalized into our general pattern of academic evaluation. I do not want race-conscious decisionmaking to lose its status as a deviant mode of judging people or the work they produce. I do not want race-conscious decisionmaking to be assimilated into our conception of meritocracy.³¹

Thus, for advocates of a merit standard, even where race is a legitimate factor (as in affirmative action programs), consideration of race remains a regrettable if necessary deviation from the ideal of a color-blind meritocratic system. Other scholars, including some who are considered members of various critical movements, have also defended the general concept of merit.³²

This conventional view of merit has recently come under attack from legal scholars who not only question the validity of existing standards but doubt whether there can ever be objective or substantive standards of merit. This critical stance rejects the possibility that one person could *actually* be a “better *x*” than another: any statement of the form “*A* is better than *B*” is

26. Kennedy, *Cultural Pluralist*, *supra* note 2, at 710 (describing but opposing this position); *see also* Daniel Bell, *On Meritocracy and Equality*, 29 THE PUBLIC INTEREST 29, 37 (1972) (connecting antidiscrimination concept with merit standards).

27. Kennedy, *Cultural Pluralist*, *supra* note 2, at 710 (describing but opposing this position).

28. Much of the current debate about merit has been sparked by disputes relating to race, particularly the contentious issue of affirmative action. It would be a mistake, however, to equate the debate over merit with that over affirmative action. Although the critical scholars discussed in this section all support affirmative action, they do so for different reasons and have conflicting views about the relationship between affirmative action and merit.

29. *See* Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986).

30. Although many sins have been committed against true meritocracy, Kennedy argues that the proper response is “not to scrap the meritocratic ideal” but to reaffirm it. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1807 (1989).

31. *Id.* Another notable recent defense of merit is Stephen L. Carter, *Academic Tenure and “White Male” Standards: Some Lessons from the Patent Law*, 100 YALE L.J. 2065, 2071, 2080-85 (1991) (arguing that legal scholarship should be judged by objective standards and proposing a set of such standards).

32. *See, e.g.*, Sanford Levinson and J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597, 1614 n.64 (1991) (arguing that merit standards exist in various fields, including law); *cf.* Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992) (rejecting radical constructivism generally).

only another way of saying that the dominant power structure prefers *A* to *B*. Under the constructivist view, merit can play no independent role in accounting for the relative positions of different groups in society. Rather, causation runs in the opposite direction: conceptions of merit function as a method by which the powerful reinforce their dominant position. What purport to be neutral standards of merit are simply tools of social subordination.

The rhetoric of radical constructivism is widespread among critical theorists. Duncan Kennedy, for example, has expressed “a pervasive skepticism” about current societal standards: “[W]e just don’t believe that it is real ‘merit’ that institutions measure, anywhere in the system”³³ Note that the observation extends well beyond law schools to encompass all social institutions. Kennedy believes that “[j]udgments of merit are inevitably culturally and ideologically contingent.”³⁴ According to Kennedy, currently dominant groups have the power to create the traditions within which they make judgments of merit, and these traditions are obviously “culturally and ideologically specific products.”³⁵ For example, a conventional law review article on antitrust can only be judged good “as the product of a white, ideologically moderate group identity.”³⁶ Thus there can be no objective standard of merit applicable to all groups within the society. Kennedy’s argument is significantly different from the more moderate position (taken by many theorists, critical or not) that our current definitions of merit are incomplete and perhaps biased.

To be sure, Kennedy does not push this view to its logical extreme. He apparently believes that limited judgments regarding merit sometimes can be made even across various groups and paradigms.³⁷ Moreover, despite language speaking more broadly about social institutions, his primary focus is on legal scholarship—indeed, in the final paragraph of the article he expresses some concerns about the potential social consequences of extending his view too far.³⁸ Yet, as we have seen, at times his rhetoric is much broader.

Moreover, his attempted qualifications may have limited efficacy. At some level, his position remains profoundly relativistic, as shown in the

33. Kennedy, *Cultural Pluralism*, *supra* note 2, at 708. For similar views by other critical legal scholars, see Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 324, 382-85 (1988) (arguing that dominant classes use their cultural capital to perpetuate standards that legitimate domination by those classes); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 803, 806-07 (arguing that supposedly objective standards are created by white culture).

34. Kennedy, *Cultural Pluralism*, *supra* note 2, at 733.

35. *Id.*

36. *Id.* at 755.

37. *Id.* at 732.

38. Imagining the application of his proposal across the board, according to Kennedy himself, would destroy much of its appeal and “might lead to all kinds of disastrous unintended side-effects.” *Id.* at 757.

following passage: “There are no meta-criteria of merit that determine which among culturally and ideologically specific research traditions or scholarly paradigms is ‘better’ or ‘truer.’ Judgments of merit are inevitably culturally and ideologically contingent because they are inevitably paradigm-dependent.”³⁹ Recall that Kennedy’s specific subject is law review literature. But legal scholarship is not a domain of its own. It brings to bear the intellectual tools available in our society to the consideration of an important class of social issues—the evaluation of legal rules and institutions. If we cannot judge between competing paradigms, then we are apparently left with no way of resolving disputes about these issues through reason. Kennedy’s position would suggest, for example, that the libertarian and feminist perspectives on surrogate motherhood are simply two alternative approaches, equally valid within their own perspective, with no way of adjudicating the dispute between them. If the paradigms sponsored by different ideological and social groups cannot be comparatively evaluated, then the dominance of any paradigm can only be due to the power of its group sponsor. As a practical matter, despite Kennedy’s obvious reservations about fully embracing this thesis, in his view merit seems to reduce to an exercise of group power on behalf of its favored paradigm.

Others have been less hesitant to embrace radical constructivism. Critical Race Theory adopts a radical repudiation of merit, endorsing the notion that standards of merit inevitably embody merely the prejudices of the dominant group. Critical Race Theory thus rejects the validity of current merit standards as applied to minorities.⁴⁰ While purporting to be neutral, current standards of merit are in reality merely tests for whiteness. “Cultural bias,” we are told by John Calmore, “sets standards for performance in terms of the tendencies, skills, or attributes of white America, and it is against these standards that all other groups are measured.”⁴¹ Or, as Alex Johnson puts it, current standards are a “gate built by a white male hegemony that requires a password in the white man’s voice for passage.”⁴²

39. *Id.* at 733.

40. See Richard Delgado, *Brewer’s Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 1, 8-9 (1991) (stating that most Critical Race scholars question objectivity of merit standards) [hereinafter Delgado, *Brewer’s Plea*]; see also John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2160-61 (1992) (stating that Critical Race Theory challenges “the universality of white experience/judgment as the authoritative standard” to be applied to people of color).

41. Calmore, *supra* note 40, at 2219. Calmore characterizes this as a facet of “cultural racism.” He continues that a related aspect of cultural racism is “the practice of dominant society giving more value and status to areas in which white people excel or find interest than to those areas in which people of color have excelled or demonstrated aptitude or interest.” *Id.*

42. Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2052 (1991). Earlier in the same article, Johnson writes approvingly of the black nationalist view of “integration as domination through the imposition of white values and norms—universalist meritocratic standards, for example—that privilege whites and maintain the subordination of Blacks and other people of color.” *Id.* at 2031; see also *id.* at 2052 n.189 (arguing that the current meritocratic system devalues contributions of scholars of color); *id.* at 2017-18 (criticizing meritocratic standards). In a puzzling footnote to his

Richard Delgado, one of the leaders of Critical Race Theory, suggests that standards of merit are merely preferences for favored groups. “[M]erit is that which I . . . use to judge you, the Other. The criteria I use sound suspiciously like a description of me and the place where I stand.”⁴³ Refusing to frame the issue of minority participation and representation in terms of merit standards,⁴⁴ Delgado argues that such standards are “like white people’s affirmative action. . . . A way of keeping their own deficiencies neatly hidden while assuring only people like them get in.”⁴⁵ Instead of affirmative action for law school admissions, he favors “an overhaul of the admissions process and a rethinking of the criteria that make a person a deserving law student and future lawyer.”⁴⁶ The appropriate transformation of standards will lead to “a proportionate number of minorities, whites, and women gaining admission.”⁴⁷ For Delgado, seemingly, the question is not whether standards are valid but whether they are fair, with fairness being defined as proportional group achievement. Any standard that produces disproportionate success for a particular group is at best “affirmative action” for the members of that group, usually implemented by the group for its own benefit.

Patricia Williams, another prominent critical race theorist, also rejects the possibility of objective standards of merit. In her view, “[s]tandards are nothing more than structured preferences.”⁴⁸ Standards should simply be

criticism of meritocratic standards, Johnson specifically addresses the standards for evaluating scholarship, and says that this evaluation “is not about ‘truth’ at all. At best, it is about a form of consensus among scholars, entirely independent of ‘truth’ notions, about what is good that is.” *Id.* at 2017 n.43. Despite the obscurity of the last clause, Johnson’s footnote does seem intended as an endorsement of radical constructivism.

43. Delgado, *Brewer’s Plea*, *supra* note 40, at 9.

44. Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 Mich. L. Rev. 1222, 1224 (1991) (“Our acquiescence in treating [the issue of minority representation] as ‘a question of standards’ is absurd and self-defeating when you consider that we took no part in creating those standards and their fairness is one of the very things we want to call into question.”).

45. Richard Delgado, *Rodrigo’s Chronicle*, 101 YALE L.J. 1357, 1364 (1992).

46. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 572 (1984).

47. *Id.* Some of Delgado’s writings may be interpreted to criticize only existing standards rather than to deny that the concept of merit can have any substance. For example, he says that advocates of Critical Race Theory “envision racial justice quite differently. In their vision, persons of color would not need to resemble successful whites to fit in, but would achieve success without sacrificing what is distinctive about themselves.” Delgado, *Brewer’s Plea*, *supra* note 40, at 12 n.58. Instead of minorities meeting current standards of merit, Critical Race Theory envisions the abandonment of those standards in favor of ones more favorable to people of color. *Id.*; *see also id.* at 9 n.43 (suggesting alternative standards).

Nevertheless, we feel justified in describing Critical Race Theory as a whole as endorsing the more radical position of rejecting merit entirely. The work of other critical race theorists is less ambiguous, as we describe in the text. Also, as noted in the text, Delgado himself wavers: he suggests that standards are arbitrary and that the only standards he would endorse are those that lead to numerically proportional results.

48. WILLIAMS, *supra* note 20, at 103; *see also id.* at 99 (arguing that standards are only “mind funnels”).

restructured “for rather than against—to like rather than dislike—the participation of black people.”⁴⁹ She continues:

“Quotas,” “preference,” “reverse discrimination,” “experienced,” and “qualified” are con words, shiny mirror words that work to dazzle the eye with their analogic evocation of other times, other contexts, multiple histories. As a society, we have yet to look carefully beneath them to see where the seeds of prejudice are truly hidden.⁵⁰

Note that “qualified” and “experienced”—two key concepts of merit—are among these “con words” that only serve to disguise racism. In Williams’ view, the conventional idea of merit seems to be little more than a sham; current standards are not merely arbitrary but ultimately founded on prejudice.

Critical race theorists also contend that current concepts of merit are invalid even as applied to whites. For example, Derrick Bell rejects the standards used to evaluate employment and educational qualifications.⁵¹ Those credentials, Bell argues, “are often irrelevant or of little importance and therefore serve mainly as barriers to most minorities and a great many whites as well.”⁵² He contends that whites at the lower end of the socio-economic scale should support affirmative action⁵³ because affirmative action plans “remove artificial qualification barriers and thus further their interests as well as those of blacks.”⁵⁴ For Bell, then, standards are designed to serve the interests, not of whites generally, but of those subgroups of whites who in fact are the most successful under the standards.

At its most extreme, Critical Race Theory views not only standards of merit but also achievement itself as inherently group-based, thus completely repudiating the concept of individual merit. According to John Calmore:

[A]n emphasis on our distinctiveness is not easily accommodated within the normal arrangements and practices. How people of color adapt to this situation gives rise to conflicts in orientation, as we

49. *Id.* at 103.

50. *Id.*

51. Derrick A. Bell, Jr., Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3, 8 (1979) [hereinafter Bell, *Minority Admissions*] (“[T]here is impressive evidence that grades and test scores cannot predict success in the practice of law or medicine.”); see also *id.* at 17 (contending that when evaluating faculty applicants law professors naturally rely on arbitrary and biased criteria such as grades and test scores because they themselves excelled in those areas). In Bell’s view, “the chosen solution—simply recognizing minority exceptions to traditional admissions standards based on grades and test scores—has served to validate and reinforce traditional policies while enveloping minority applicants in a cloud of suspected incompetency.” *Id.* at 8.

52. Derrick Bell, *Xerces and the Affirmative Action Mystique*, 57 GEO. WASH. L. REV. 1595, 1605 (1989) [hereinafter Bell, *Xerces*]; see also DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 6 (1992) (arguing that discrimination in the form of supposedly neutral standards is more oppressive than the blatant racial bias of the pre-Brown era).

53. See Bell, *Xerces*, *supra* note 52, at 1605; see also Bell, *Minority Admissions*, *supra* note 51, at 7-8 (arguing that the race issue is used to distract lower class whites from their own situation).

54. Bell, *Xerces*, *supra* note 52, at 1605. See also Bell, *Minority Admissions*, *supra* note 51, at 14.

must emphasize whether we are more directed by assimilation or autonomy, *by individual self-fulfillment or collective responsibility*, by group accommodation or group resistance. Critical race scholars adopt in each case the latter orientation.⁵⁵

For this reason, Calmore is concerned about the risk that black intellectuals will “buy into” a “profoundly individualistic orientation” by accepting a “color-blind academic world.” “Too often,” he continues, “people of color assume the voice of a distinct *individual*.”⁵⁶ By the same token, Calmore attacks integrationists who seek incorporation for their group into the larger society, “obtaining for its members the greatest possibilities for their individual self-development.”⁵⁷ Although this forthright attack on individualism is not expressed by all critical race theorists, it does seem to be a logical development of the critique of merit. For if merit is merely an empty field on which groups battle for power, the real credit for success should go to the group rather than to its individual soldiers, and striving for individual success jeopardizes the group’s solidarity and discipline.⁵⁸

Radical constructivism thus differs substantially from mainstream arguments in favor of affirmative action, which usually accept the general validity of existing standards, at least as applied to whites, but advocate separate consideration for people of color. Constructivism suggests that racial problems could be readily solved if the necessary social resolve to change standards existed. The implication is that African Americans and other people of color (as well as white women) could quickly attain economic and academic equality once society eliminates the arbitrary standards that limit their access to desirable positions.

Just as Critical Race Theory conceives of merit as maintaining white dominance, radical feminism views merit as perpetuating gender hierarchies. According to radical feminists, existing social standards are inherently geared to males.⁵⁹ As Catharine MacKinnon puts it, the current

55. Calmore, *supra* note 40, at 2187 (emphasis added) (footnote omitted).

56. *Id.* at 2195 (emphasis in original).

57. *Id.* at 2226 (footnote omitted).

58. Cf. Robert S. Chang, *Toward An Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1322 (1993) (“[I]t is only through solidarity that we will one day be free to express our diversity.”); Peller, *supra* note 33, at 834 (describing the black nationalist concern that individual success within the black middle class may undermine the black community).

59. For example, consider the following statement:

More fundamentally unfair is the inherent bias in the concept of merit itself. This is a result of what Andrea Dworkin calls the power of naming; “[t]his power of naming enables men to define experience, to articulate boundaries and values, to designate to each thing its realm and qualities, to determine what can and cannot be expressed, to control perception itself.” Merit is defined by white men to reward what white men become. Merit, as we know it, explicitly values particular experiences and abilities—the ones developed by white upper class men—and therefore implicitly devalues others. They define the content of the standard according to capacities their situation finds valuable and name it “excellence.” Meritocracy calls those who conform to this standard “equal.” Those who are different, it names “unqualified.” The relative worth of particular experiences is not my issue; the ability of

standards simply reflect “what white men value about themselves,”⁶⁰ constituting an “affirmative action plan” for men.⁶¹ Like critical race theorists, then, radical feminists believe that merit is simply a weapon used to empower dominant groups while subordinating others, and that to succeed is merely to be preferred arbitrarily because of one’s group affiliation. Consequently, women should not be required either to conform or to ask for accommodation of the standards to their needs; the standards themselves must be jettisoned.⁶²

The attack on merit is an integral component of a broader philosophical position. As Gary Peller points out, the attack on merit is grounded in the “critique of objectivity and liberal notions of knowledge pressed by radical feminists and critical race theorists.”⁶³ Others have also noted the affinities between some trends in modern philosophy on the one hand and radical feminist or multicultural criticism on the other.⁶⁴ It is commonplace among radical feminists to characterize knowledge as socially constructed, in what they term a repudiation of the ideals of individualism, objectivism, and rationalism propounded by traditional scholars.⁶⁵ For example, in critiquing traditional law school pedagogy, Linda Hirshman decries the current

white men to control the determination of their relative worth is. The content of the notion of merit, in and of itself, excludes and devalues women and people of color. The distribution of opportunities on that basis necessarily excludes and devalues them also.

Diana M. Poole, *On Merit*, 1 LAW & INEQ. J. 155, 157 (1983) (citation omitted).

60. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1291 (1991); see also *id.* at 1289-90 (arguing that after the recognition in *Brown v. Board of Education* that black children are the same as white children, “[b]eing the same as the dominant group remained the equality test” justifying disparate treatment for anyone who is different).

61. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 36 (1987).

62. See Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice*, 77 CORNELL L. REV. 1398 (1992) (arguing that the “reasonable woman” standard requires women to conform to stereotypes and images constructed largely by men); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1313-14 (1987) (defining gender equality as acceptance, not accommodation, of women’s differences); Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV. 1135, 1150 (1990) (criticizing men’s definitions of women and definitions that describe women in terms of men); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 4 (1988) (arguing that development of a true feminist jurisprudence requires rejection of male-oriented mainstream jurisprudence).

63. Peller, *supra* note 7, at 339.

64. See, e.g., STEVEN CONNOR, *POSTMODERNIST CULTURE: AN INTRODUCTION TO THEORIES OF THE CONTEMPORARY* 186-89, 230-33 (1989); DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* 42, 47-48 (1989).

65. See, e.g., Williams, *supra* note 19 at 71. Williams provides a sympathetic introduction to social constructivism and its relationship with feminism. *Id.* at 64-75. For non-legal accounts of rationality and knowledge as socially constructed (and male), see, e.g., ELIZABETH KAMARCK MINNICH, *TRANSFORMING KNOWLEDGE* (1990); Joyce Trehilcot, *Dyke Methods: or Principles for the Discovery/Creation of the Withstanding*, HYPATIA, Summer 1988, at 1.

“medieval orthodoxy about what counts as knowledge” because it “enshrine[s] a private order of male dominance.”⁶⁶

In addition to their philosophical perspectives, these critical theorists also have political reasons for repudiating merit. Rejecting the idea of merit is a useful way to explain differing success rates between groups without raising hard questions. If success is influenced by merit, racial differentials must be attributable to nature, nurture, or discrimination (or some combination of these). Either the less successful groups are born with fewer of the traits that lead to “good” performance, or their upbringing or environment discourages the development of those traits, or they possess the same traits but are denied equal recognition and reward.

None of these alternate explanations suits the political agenda of critical theorists. As does virtually everyone else, critical theorists deny that people of color are simply less gifted by nature.⁶⁷ Critical race theorists also reject the possibility that some aspects of particular minority cultures might somehow incline their children against the traits that encourage success.⁶⁸

Discrimination is the most promising explanation of differing success rates, but it does not fully satisfy the needs of critical theorists for several reasons. First, many critical theorists focus their attention on the hiring of university professors,⁶⁹ where current hiring policies undermine claims of facial discrimination against people of color.⁷⁰ Maintaining that “merit” is itself racially biased circumvents this problem. Second, to the extent that the black middle class has succeeded as discrimination has diminished,

66. Linda R. Hirshman, *Foreword: The Waning of the Middle Ages*, 69 CHI.-KENT L. REV. 293, 297-98 (1993).

67. The occasional eccentric suggestion that African Americans (or other minority groups) are intellectually inferior usually meets with a firestorm of criticism. See, e.g., Charles Lane, *The Tainted Sources of “The Bell Curve”*, N.Y. REV. OF BOOKS, Dec. 1, 1994 at 14; NEW REPUBLIC, Oct. 31, 1994 (symposium on RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994)).

68. There is some evidence that black ghetto culture may do so. See GERALD D. JAYNES & ROBIN M. WILLIAMS, JR., EDs., *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* 372 (1989) (discussing how black student peer culture may discourage academic success); John J. O’Connor, *Television View: The Curse of Incessant Cursing*, N.Y. TIMES, July 31, 1994, § 2, at 1 (arguing that black pop culture encourages the use of language that is detrimental to success in the American mainstream).

69. See, e.g., Delgado, *supra* note 46 at 572; Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CALIF. L. REV. 893 (1994); Charles R. Lawrence III, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 20 U.S.F. L. REV. 429 (1986).

70. A recent report by the American Association of Law Schools reports the following facts about minority hiring:

1. Between one-fifth and one-quarter of all new hires were minorities.
2. Minority candidates who participated in the faculty recruiting conference were much more likely (20% as opposed to 13%) to obtain teaching jobs. One minority professor is ultimately hired for every 1.9 minority candidates at the recruiting conference, but only one white for every 3.4 white candidates.
3. Even larger percentages of minority law teachers have been recruited outside of the AALS process.

Richard A. White, *Statistical Report on the Gender and Minority Composition of New Law Teachers and AALS Faculty Appointments Register Candidates*, 44 J. LEGAL EDUC. 424, 429-30 (1994).

while the black underclass has nevertheless fallen further behind,⁷¹ the argument that current discrimination is a primary cause of differential success rates between blacks and whites rings hollow. Such a claim fails to explain the recent growth of the black underclass at all, and it suggests that what African Americans—and by extension other disadvantaged groups—need is to continue battling discrimination, to stay on the course that Thurgood Marshall proposed and nine white men adopted in 1954.

Finding all the possible answers unsatisfactory, radical constructivists change the question. Instead of asking whether all races are judged by the same standards and have the same opportunities, they argue that the unequal success rates are *per se* proof of unjust treatment. Rejecting the idea of merit simultaneously avoids questions about the potential causes of differential success rates and allows radical constructivists to treat those differential rates as sufficient justification for remedial action.

The challenge to societal standards of merit is not limited, however, to Critical Legal Studies, radical feminism, or Critical Race Theory. We find especially evocative an essay about Felix Frankfurter by the distinguished legal historian G. Edward White.⁷² According to White, Frankfurter idealized the Harvard Law School of his youth as a pure meritocracy: “What mattered,” said Frankfurter, “was excellence in your profession to which your father or your face was equally irrelevant.” The law school was a place where “[a]ll this big talk about ‘leadership’ and character, and all the other things that are nonascertainable, but usually are high-falutin’ expressions for personal likes and dislikes, or class, or color, or religious partialities or antipathies—they were all out.”⁷³ The “great thing” about the law school was “that Skull & Bones, Hasty Pudding, wealth, family fortune, skin, creed—nothing particularly mattered, except scholarship and character objectively ascertained.”⁷⁴

White expresses serious reservations about Frankfurter’s meritocratic views. Frankfurter, who played an influential role in staffing New Deal agencies, made it a project to bring into government young men whom he considered particularly bright.⁷⁵ Applying constructivist analysis, White questions the merit standards used by Frankfurter in his placement activities:

Each of the premises on which the 1930s placement networks were based—the idea of meritocracy, the assumption that merit could be

71. See, e.g., JAYNES & WILLIAMS, *supra* note 68, at 274-77; CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY 1950-1980*, at 140 (1984) (presenting graphs of income and employment).

72. G. EDWARD WHITE, *Felix Frankfurter, the Old Boy Network, and the New Deal: The Placement of Elite Lawyers in Public Service in the 1930's*, in *INTERVENTION AND DETACHMENT: ESSAYS IN LEGAL HISTORY AND JURISPRUDENCE* 149 (1994).

73. *Id.* at 154.

74. *Id.* at 155.

75. *Id.* at 165.

objectively determined, the correlation between performance in law school and competence as a lawyer, and the belief that individuals with higher grades were “better” and would therefore “make a difference” in the performance of the institutions they joined—appears to be vulnerable to the claim of latent cultural bias. . . . [T]hose who emerge in positions of power within the system will have demonstrated [these] qualities, and by insisting on the “importance” of such qualities those persons justify their own success.⁷⁶

White’s comment on the hiring standards for New Deal posts closely resembles the radical constructivists’ attack on hiring standards for teaching positions.

In light of this critique, it is somewhat jarring to recall that the beneficiaries of the placement network were disproportionately Jewish.⁷⁷ Frankfurter’s placement activities have one aura if he was in fact hiring the most talented lawyers, who simply happened to be Jewish. But if this meritocratic ground is invalid, as White suggests, Frankfurter’s conduct looks disturbingly like special favoritism for members of his own ethnic group.⁷⁸

The critique of merit indeed takes on an odd and uncomfortable visage in the light of the Jewish case. Consider law school faculties. As Posner observed in his response to Duncan Kennedy, “if any group is over-represented in law schools, it is not WASPs, but Jews.”⁷⁹ By 1970, Robert Burt reports, “25 percent of the faculties in American law schools were Jews, while among ‘elite’ law schools Jews constituted 38 percent of the faculties.”⁸⁰ If the purported merit bases for selection are invalid, one must wonder just how to account for figures that are so high above the proportion of Jews in the general population.⁸¹ If these positions have not been fairly won on their merits, what is one to make of this unequal distribution of employment opportunities?

If “faculties distribute political resources (jobs) through a process that is political in fact, if not in name,”⁸² it is hard to countenance the award of 25%-40% of those jobs to a group that is less than three percent of the

76. *Id.* at 167.

77. See PETER H. IRONS, *THE NEW DEAL LAWYERS* 6 (1982) (observing that Jews and Catholics were especially well-represented in New Deal agencies).

78. The same criticism could be made of Louis Brandeis, who worked to find faculty positions for Jewish lawyers. See ROBERT A. BURT, *TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND* 64-65 (1988).

79. Posner, *supra* note 3, at 1158.

80. BURT, *supra* note 78, at 64; accord CHARLES E. SILBERMAN, *A CERTAIN PEOPLE: AMERICAN JEWS AND THEIR LIVES TODAY* 99 (1985). An unpublished survey of the top 100 law schools indicates that in late 1993, 27% of the faculty at those schools was Jewish. James Lindgren, “Measuring Diversity.” By comparison, Jews constitute less than 3% of the population of the United States. See Barry Kosmin & Jeff Scheckner, *Jewish Population in the United States, 1989*, in *AMERICAN JEWISH YEARBOOK* 1990, at 278, 281 (David Singer and Ruth R. Seldin eds., 1990).

81. Nor is disproportionate Jewish achievement limited to law schools. See *infra* text accompanying notes 86, 91-92.

82. Kennedy, *Cultural Pluralist*, *supra* note 2, at 732.

general population. Or consider the assertion that merit standards are affirmative action for the dominant group, a method of “keeping their own deficiencies neatly hidden while assuring only people like them get in.”⁸³ The intended reference was to “white people,” but given the figures on law faculties, it is clear that at “elite” schools one might as well be in fact referring to Jews, which would give the statement a somewhat chilling overtone. Or, if merit standards are only “structured preferences,” and could just as well be restructured “to like rather than dislike” other groups,⁸⁴ one must wonder how they came to be structured to “like” Jews better than Gentiles.

This difficulty stems from the theory of standards shared by all of the critics discussed above. Under this theory, the standards of merit embraced by society cannot be considered neutral or objective or even the product of historical happenstance; rather, they are primarily designed to support the power of dominant groups. Thus, a group’s success cannot be justified on the basis of any presumed excellence in the performance of its members. As applied to so-called “model minorities” like Jews or some groups of Asian Americans, however, this creates a paradox, for these groups seem to have succeeded in important social arenas beyond the average achievements of the dominant majority of white Gentiles. In the next section, we will consider possible methods of avoiding this paradox, and we conclude that none of them is remotely acceptable. We then suggest that the basic premise of the radical constructivists should be reexamined. Perhaps there is something to the idea of merit after all.

II

ANTI-SEMITISM AND THE CRITIQUE OF MERIT

Since merit can be difficult to identify or even to define—especially in a field as fluid as law⁸⁵—radical constructivists appear to have hit on an almost invulnerable strategy for explaining the relative lack of success of some minority groups and for demanding radical remedial steps. There are, however, two problems with their theory: Jews and native-born Asian Americans. By almost every measure of success, both groups succeed at far higher rates than white Gentile Americans. In 1970, Jewish family income was 172% of the average American income, Japanese-American family income was 132% of the average, and Chinese-American family income was 112% of the average.⁸⁶ By 1980, native-born Chinese Americans were

83. See *supra* text accompanying note 45.

84. See *supra* text accompanying note 49.

85. For a variety of viewpoints on legal scholarship, see, e.g., *A Symposium on Legal Scholarship*, 63 U. COLO. L. REV. 521 (1992); Symposium, *Legal Scholarship: Its Nature and Purposes*, 90 YALE L.J. 955 (1981); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

86. THOMAS SOWELL, *ETHNIC AMERICA: A HISTORY* 5 (1981) (original figures derived from 1970 census data); see also *ESSAYS AND DATA ON AMERICAN ETHNIC GROUPS* 257-58 (Thomas Sowell ed. 1978); Sidney Goldstein, *American Jewry, 1970: A Demographic Profile*, in *AMERICAN JEWISH*

earning 150% of the non-Hispanic white average, with Japanese- and Korean-American families not far behind the Chinese Americans.⁸⁷ As of that year, unemployment rates for Chinese, Japanese, and Korean Americans were approximately half that of the general population.⁸⁸ Poverty rates are also significantly lower for some Asian American groups.⁸⁹ More recent data similarly reveal that Jewish family income remains well above the average income for Gentile families.⁹⁰

Educational attainment has accompanied this economic success. Jews and Asian Americans are disproportionately represented in higher education: In 1982, Jews obtained undergraduate degrees at nearly twice the rate of the general American population;⁹¹ in 1990, the percentage of Jews with some college education was almost twice that of the general population.⁹² Asian Americans also completed college at twice the rate of the general population.⁹³ Americans of Japanese, Chinese, and Korean ancestry comprise approximately one-fifth of the student body at some prestigious universities, even though they are less than two percent of the national population.⁹⁴ Although many universities implemented quotas to limit Jewish students and faculty from the early 1920s through at least the early 1960s,⁹⁵ by 1975 Jews "constituted 10 percent of all faculty members but

YEARBOOK 1971, at 3, 79-85 (Morris Fine & Milton Himmelfarb eds., 1971) (reporting that compared to the general population there are more Jews in high-income categories and fewer in low-income categories).

87. U.S. COMMISSION ON CIVIL RIGHTS, *THE ECONOMIC STATUS OF AMERICANS OF ASIAN DESCENT: AN EXPLORATORY INVESTIGATION* 29 (1988) [hereinafter *ECONOMIC STATUS*]; see also STANLEY LIEBERSON & MARY C. WATERS, *FROM MANY STRANDS: ETHNIC AND RACIAL GROUPS IN CONTEMPORARY AMERICA* 138-39 (1988). Even including foreign-born Asian Americans (who typically earn less than their native-born counterparts) does not eliminate the disparity entirely. *ECONOMIC STATUS*, *supra*, at 29. Moreover, the disparity is not solely the result of more family members working: these groups of native-born Asian American men and women also have higher *individual* annual and hourly earnings than non-Hispanic whites. See *id.* at 68, 90.

88. *ECONOMIC STATUS*, *supra* note 87, at 61-62.

89. U.S. GENERAL ACCOUNTING OFFICE, *ASIAN AMERICANS: A STATUS REPORT* 23 (1990) [hereinafter *STATUS REPORT*].

90. SILBERMAN, *supra* note 80, at 118 (noting that in 1984, percentage of Jewish households with incomes above \$50,000 was four times the percentage of non-Hispanic white households); see generally GERALD KREFETZ, *JEWS AND MONEY: THE MYTHS AND THE REALITY* (1982).

91. KREFETZ, *supra* note 90, at 35-36.

92. Sidney Goldstein, *Profile of American Jewry: Insights from the 1990 Jewish Population Survey*, in *AMERICAN JEWISH YEARBOOK 1992*, at 77, 110-11 (David Singer & Ruth R. Seldin eds., 1992).

93. *STATUS REPORT*, *supra* note 89, at 26.

94. HENRY ROSOVSKY, *THE UNIVERSITY: AN OWNER'S MANUAL* 67 n.12 (1990). See also *ECONOMIC STATUS*, *supra* note 87, at 55 (many groups of Asian-American men have more years of schooling than non-Hispanic white men).

95. NATHAN C. BELTH, *A PROMISE TO KEEP: A NARRATIVE OF THE AMERICAN ENCOUNTER WITH ANTI-SEMITISM* 96-110, 185-97 (1979); LEONARD DINNERSTEIN, *ANTISEMITISM IN AMERICA* 84-87 (1994); ALAN M. DERSHOWITZ, *CHUTZPAH* 66-71 (1991) (discussing Harvard's efforts at reducing Jewish matriculation in the 1920s).

20 percent of those teaching at elite universities."⁹⁶ If there is no such thing as merit, what explains the success of these two groups, both of whom, like blacks, have been victims of discrimination by white Gentile America?⁹⁷

Focusing on Jews in particular, we can identify only a few conceivable explanations unconnected with merit, all of them unacceptable both to us and to critical theorists. If merit is wholly irrelevant, the four possible explanations for Jewish success are: (1) that a Jewish conspiracy exists; (2) that Jews are parasitic on American culture; (3) that American culture is essentially Jewish; or (4) that there is no such thing as a distinct Jewish culture or identity. We will deal with each explanation in detail.⁹⁸ Without attempting to discredit or evaluate the validity of any of the explanations, we will merely note their anti-Semitic overtones. Unless there is yet another explanation besides merit for Jewish success in a Gentile world, denying the role of merit has clear anti-Semitic implications.⁹⁹ We have no doubt that radical constructivists will find each of these theories as unacceptable as we do. We hope, accordingly, that they will be led to reexamine their critique of merit.

The first theory is that Jews succeed as a consequence of a powerful and pervasive Jewish conspiracy. Some Americans believe that there is a Jewish or Zionist conspiracy, which has been posited as an explanation for everything from violence on television¹⁰⁰ to the spread of AIDS.¹⁰¹

96. SILBERMAN, *supra* note 80, at 144. Moreover, Jews tend to publish at higher rates than their colleagues: In 1975, 24% of those academics who had published twenty or more articles were Jewish. *Id.*

97. For accounts of past and present discrimination against Asian Americans, see, e.g., RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* 101-03, 479-84 (1989); Pat K. Chew, *Asian Americans: The "Reluctant" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 9-24, 54 (1994). For accounts of discrimination against Jews, see, e.g., DINNERSTEIN, *supra* note 95; ROBERT S. WISTRICH, *ANTI-SEMITISM: THE LONGEST HATRED* 114-25 (1991). Indeed, American prejudices against African Americans on the one hand and Asian Americans and Jews on the other have much in common. Asian Americans have often been included with African Americans as the subject of particular discriminatory laws and stereotypes. See, e.g., JOHN W. DOWER, *WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR* 147-80 (1986); TAKAKI, *supra*, at 100-03. Those whites who are prejudiced against Jews tend also to be prejudiced against blacks. See, e.g., GREGORY MARTIRE & RUTH CLARK, *ANTI-SEMITISM IN THE UNITED STATES: A STUDY OF PREJUDICE IN THE 1980s* 57-58 (1982); PAUL M. SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* 52-53 (1993). But as Thomas Sowell points out, "if bigotry alone was a sufficient causal explanation [for a group's poverty], Jews and Japanese would not be among the most prosperous American ethnic groups." SOWELL, *supra* note 86, at 274.

98. We will also consider some variations on these arguments, some of which are more benign but not available to radical constructivists.

99. For similar reasons, denying the role of merit has racist implications when applied to the success of Asian Americans. Although we focus primarily on anti-Semitism, we also discuss racism against Asian Americans where appropriate.

100. Blaming Jews for violence on television is an outgrowth of the belief that Jews dominate Hollywood. See ARNOLD FORSTER & BENJAMIN R. EPSTEIN, *THE NEW ANTI-SEMITISM* 109-11, 210 (1974) (describing the allegations of Truman Capote and Louis Farrakhan that Jews control the media); Bernard Weinraub, *Stereotype of Jews is Revived*, N.Y. TIMES, Nov. 7, 1994, at C11.

101. See DINNERSTEIN, *supra* note 95, at 221-22 (describing a favorable reaction among many blacks to the statement by Steve Cokely, Chicago mayoral aide, that Jewish doctors are injecting black

The existence of a powerful Jewish conspiracy would certainly explain why Jews as a group are successful even if success has nothing to do with merit. It is also, of course, one of the most ancient anti-Semitic myths. With roots dating back at least to medieval Christianity, the Jewish conspiracy theory persisted through the Reformation and into modernity.¹⁰² Martin Luther, for example, viewed Jews as a menace to Christianity and as (in the words of one Reformation historian) the "storm troops of the devil's forces."¹⁰³ Luther had little doubt about the appropriate remedy:

First, [I advise you] to set fire to their synagogues or schools and to bury and cover with dirt whatever will not burn, so that no man will ever again see a stone or cinder of them. . . .

. . . .

Second, I advise that their houses also be razed and destroyed. . . . Instead they might be lodged under a roof or in a barn, like the gypsies. . . .

Third, I advise that all their prayerbooks and Talmudic writings, in which such idolatry, lies, cursing, and blasphemy are taught, be taken from them.

Fourth, I advise that their rabbis be forbidden to teach henceforth on pain of loss of life and limb.¹⁰⁴

The Jewish conspiracy theory both feeds on and fosters anti-Semitism, portraying Jews as using devious or evil means to gain power over innocent non-Jews. It has spawned various myths, including the belief that Jews used the blood of Christian babies in the Passover seder¹⁰⁵ and that Jews caused the Black Death by poisoning wells.¹⁰⁶ It takes its most powerful

babies with AIDS virus); see also Arthur Hertzberg, *Is Anti-Semitism Dying Out?*, N.Y. REV. OF BOOKS, June 24, 1993, at 51, 52 (noting that even some middle class blacks subscribe to the AIDS myth).

102. WISTRICH, *supra* note 97, at 29-32 (describing medieval anti-Semitic myths); JOEL CARMICHAEL, *THE SATANIZING OF THE JEWS: ORIGIN AND DEVELOPMENT OF MYSTICAL ANTI-SEMITISM* 44-93 (1992). One occasionally finds hints of it even among modern American jurists. See Steven Lubet, *That's Funny, You Don't Look Like You Control the Government: The Sixth Circuit's Narrative on Jewish Power*, 45 *Hastings L. J.* 1527 (1994) (describing and criticizing Sixth Circuit attribution of Jewish influence over the Justice Department).

103. HEIKO A. OBERMAN, *THE ROOTS OF ANTISEMITISM IN THE AGE OF RENAISSANCE AND REFORMATION* 117 (James I. Porter trans., 1984).

104. MARTIN LUTHER, *On The Jews and Their Lies*, in 47 *LUTHER'S WORKS* 137, 268-69 (Franklin Sherman & Helmut T. Lehman eds., Martin H. Bertram trans., 1971). Luther's angry diatribe goes on, finally concluding that the best course is simply to banish Jews altogether. *Id.* at 272; see also CARMICHAEL, *supra* note 102, at 80-85.

105. See DINNERSTEIN, *supra* note 95, at xxii-xxiii, 28, 101 (giving examples of the prevalence of such rumors from the 12th to the 20th centuries); WISTRICH, *supra* note 97, at 31, 207, 310-11; Robert Chazan, *Medieval Anti-Semitism*, in *HISTORY AND HATE: THE DIMENSIONS OF ANTI-SEMITISM* 49, 61 (David Berger ed., 1986).

106. See, e.g., CARMICHAEL, *supra* note 102, at 74; DINNERSTEIN, *supra* note 95, at xxv; WISTRICH, *supra* note 97, at 29, 32-33; see also David Berger, *Anti-Semitism: An Overview*, in *HISTORY AND HATE: THE DIMENSIONS OF ANTI-SEMITISM*, *supra* note 105, at 3, 7 (noting belief that Jewish doctors poisoned their patients); cf. DAVID REMNICK, *LENIN'S TOMB: THE LAST DAYS OF THE SOVIET EMPIRE* 91-92, 96-97 (1993) (describing "Doctors Plot," which charged Jewish doctors with poisoning Party officials).

modern form in the fraudulent *Protocols of the Elders of Zion*, which purports to document a Jewish conspiracy to destroy the Christian world.¹⁰⁷ Although the *Protocols* have been thoroughly discredited,¹⁰⁸ and were admitted to be a forgery by their American publisher, Henry Ford, in 1927,¹⁰⁹ some Americans still believe in them.

Similar myths of an Asian conspiracy also abound. Fears of a "yellow peril," an Asian conspiracy to obliterate white civilization, were rampant in the first decades of this century.¹¹⁰ During World War II, Japanese were depicted as single-mindedly conspiring toward world conquest.¹¹¹ Even today, Japanese economic success is sometimes attributed to deviousness or a desire to dominate the world.¹¹² The *Protocols of the Elders of Zion* finds its anti-Asian counterpart in the *Tanaka Memorial*. The *Tanaka Memorial* was a document purportedly presented by Prime Minister Tanaka to Emperor Hirohito in 1927, outlining Japanese plans for world domination.¹¹³ Like the *Protocols*, it was widely accepted as genuine, although it was almost certainly fraudulent.¹¹⁴

Conspiracy theories are a powerful tool for those who wish to portray themselves as innocent victims of the successful or feared Other. Such theories have been used to justify everything from university quotas on both Jews and Asian Americans¹¹⁵ to the Holocaust¹¹⁶ and the forced relocation and internment of Japanese Americans during World War II.¹¹⁷ Conspiracy theories were also used, with tragic success, to justify increasingly harsh

This charge is strikingly similar to the current charge that Jewish doctors are injecting black babies with the AIDS virus. See *supra* note 101.

107. See, e.g., NORMAN COHN, *WARRANT FOR GENOCIDE: THE MYTH OF THE JEWISH WORLD-CONSPIRACY AND THE PROTOCOLS OF THE ELDERS OF ZION* (1966); CARMICHAEL, *supra* note 102, at 138-40; DINNERSTEIN, *supra* note 95, at 80-83 (providing the history of the publication and circulation of the *Protocols*); WISTRICH, *supra* note 97, at 253-54 (discussing the adoption of the *Protocols* into current Arab thought).

108. KREFETZ, *supra* note 90, at 48; WISTRICH, *supra* note 97, at 107.

109. BELTH, *supra* note 95, at 81-82.

110. See DOWER, *supra* note 97, at 156-64, 172-73.

111. *Id.* at 20-21, 83-84.

112. *Id.* at 313-14.

113. John J. Stephan, *The Tanaka Memorial (1927): Authentic or Spurious?*, 7 *MOD. ASIAN STUD.* 733, 733 (1973).

114. *Id.* at 739-43.

115. For discussions of university quotas against Jews, see, e.g., DINNERSTEIN, *supra* note 95, at 84-87 (quoting, at 86, Dartmouth President Ernest Hopkins: "Any college which is going to base its admissions wholly on scholastic standing will find itself with an infinitesimal proportion of anything else than Jews eventually."); DAN A. OREN, *JOINING THE CLUB: A HISTORY OF JEWS AND YALE* (1985); SILBERMAN, *supra* note 80, at 52-55; MARCIA G. SYNNOTT, *THE HALF-OPENED DOOR: DISCRIMINATION AND ADMISSIONS AT HARVARD, YALE, AND PRINCETON, 1900-1970*, at 20, 112 (1979) (stating that in 1926 Harvard began to reduce its Jewish enrollment from 25-27% to 10-16%, and that in 1942 the Committee on Admission continued to make references to "the 'quota.'"). For discussions of the growing use of quotas against Asian Americans, see, e.g., JAYJIA HSLA, *ASIAN AMERICANS IN HIGHER EDUCATION AND AT WORK*, 1 92-119 (1988); Chew, *supra* note 97, at 61-64.

116. See, e.g., CARMICHAEL, *supra* note 102, at 152-80; COHN, *supra* note 107, at 194-215.

117. See, e.g., DOWER, *supra* note 97, at 79-81; TAKAKI, *supra* note 97, at 388-405.

treatment of black slaves in order to prevent slave revolts.¹¹⁸ Radical constructivists surely abhor such conspiracy theories and agree that they have no place in academic thought.

A second conceivable explanation for disproportionately high rates of success among Jews is that they are chameleons who, with no culture of their own, take on the cultural coloration of the society around them. Indeed, they are so successful at imitating cultural norms that they outperform "authentic" members of the society. The negative aspect of this stereotype is not the purported adaptability, which could be considered a positive trait. Rather, it is the specific form of that adaptation, which is described as purely imitative with no creative component.

This negative portrayal of Jews as parasitic, unimaginative imitators who succeed on the backs of the truly deserving is typical of anti-Semitism. Historically, Jews have been portrayed as soulless parasites on the surrounding culture. In the mid-nineteenth century, French scholar Ernest Renan claimed that Jews had "no mythology, no epic, no science, no philosophy, no fiction, no plastic arts, no civic life; there is no complexity, nor nuance; an exclusive sense of uniformity."¹¹⁹ Pierre-Joseph Proudhon, an early French socialist, characterized "the Jew" as "unproductive," and "an intermediary, always fraudulent and parasitical, who operates in business as in philosophy, by forging, counterfeiting, sharp practices."¹²⁰ The composer Richard Wagner similarly portrayed Jews—especially assimilated Jews—as "the most heartless of all human beings," lacking passion, soul, music, or poetry.¹²¹ In the early twentieth century, an American anti-Semite belittled Jewish academic success as "simply another manifestation of the acquisitiveness of the race," describing Jews as "clever, acute, and industrious rather than able in the highest sense."¹²² In publications that have now become notorious, the deconstructionist Paul de Man took a similar position during World War II about the contribution of Jews to Western literature.¹²³

Jews are not the only group whose success has been linked to this character defect. Asians, especially the Japanese, have similarly been

118. See JOHN LOFTON, *INSURRECTION IN SOUTH CAROLINA: THE TURBULENT WORLD OF DENMARK VESEY* 138, 196-97 (1964); Michael K. Curtis, *The 1859 Crisis Over Hinton Helper's Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 CHI.-KENT L. REV. 1113, 1123-24, 1133-34 (1993); cf. WILLIAM W. FREEHLING, *1 THE ROAD TO DISUNION: SECESSIONISTS AT BAY 1776-1854*, at 254 (1990) (describing the imprisonment of free black sailors resulting from fears of conspiracy). See generally A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only As an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969 (1992).

119. WISTRICH, *supra* note 97, at 47. Renan also claimed that Jews lacked creativity. *Id.*

120. CARMICHAEL, *supra* note 102, at 117.

121. WISTRICH, *supra* note 97, at 56.

122. DINNERSTEIN, *supra* note 95, at 64.

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

described as imitative and without a culture of their own. In 1944, an American missionary with extensive experience in Japan wrote: "The Japanese have lost much irreparably by not having a great art, a great poetry, a great drama, to introduce to the Western world."¹²⁴ A U.S. Navy publication of the same era described even premodern Japan as a "third-hand culture," adding that the Japanese response to modernity had been "borrowing this and copying that, never inventing, but always adapting western machines, western arms, and western techniques to their own uses."¹²⁵ Portrayals of the Japanese as primarily good mimics continued after World War II,¹²⁶ and are still occasionally found today.¹²⁷ The prevalent modern American stereotype of Asian Americans as technically skilled but without leadership abilities¹²⁸ might be at least partly derived from the longstanding belief that many Asians lack cultural or creative abilities. This supposed deficiency explains the ability of both Jews and Asian Americans to abandon any independent cultural identity and assume the character of the dominant culture.¹²⁹

A third possible explanation for Jewish success, and the converse of the parasitic explanation, is that mainstream American culture and standards are in their essence not white (or Gentile) but Jewish. Jews succeed, according to this explanation, because American culture has taken on Jewish characteristics. If this theory is correct, it is little surprise that societal standards of merit are structured to "like" the participation of Jews.¹³⁰

The strong version of this theory is that Jews have somehow infiltrated American culture. Given the views of American society held by radical constructivists, this theory has strikingly anti-Semitic implications. These writers routinely portray mainstream American culture as overwhelmingly unappealing: narrow, unimaginative, intolerant, ignorant, and at least occasionally evil.¹³¹ If American culture is really Jewish culture, then Jews are

124. DOWER, *supra* note 97, at 97.

125. *Id.* at 98.

126. *Id.* at 302.

127. Although some sources suggest that the stereotype has faded, *see, e.g.*, Arthur L. Robinson, *U.S. Electronics Needs New Strategy*, SCIENCE, June 20, 1986, at 1496, 1497 (referring to Japan's "past copycat image"), other sources continue to use the same language. *See, e.g.*, *Japanese Banking: Mitsubebautiful*, THE ECONOMIST, Feb. 9, 1991 at 86, 86 (referring to "Japanese copycat banks").

128. *See* Chew, *supra* note 97, at 40.

129. A similar charge has also been made against whites: "Euro-Americans steal and co-opt vast portions of African-American culture, usually without attribution." John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 359 (1994).

130. The phrasing, but *not* the reference to Jews, is drawn from Patricia Williams. *See supra* text accompanying note 49.

131. *See* WILLIAMS, *supra* note 20, at 39-42 (describing consumer society characterized by "mass greed" and spiritual emptiness); *id.* at 219 ("We live in a society where the closest equivalent of nobility is the display of unremittingly controlled willfulness."); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 363 (1992) (arguing that American society is irredeemably racist); Delgado, *supra* note 45, at 1369 (suggesting that Western society has "arrived at a terminus"); Richard Delgado, *Zero-Based Racial*

the cause of these deficiencies in our culture and are themselves deficient and unappealing.

Like the anti-Semitic beliefs discussed above, blaming Jews for the evils of mainstream culture has a long historical pedigree. The rise of both capitalism and communism have been blamed on Jews.¹³² Marx portrayed capitalism as essentially Jewish¹³³ and predicted that Jews would disappear under socialism, which would “abolish the preconditions and thus the very possibility of huckstering” and would thereby “make the Jew impossible.”¹³⁴ In the early twentieth century, Germans and Austrians—in countries where anti-Semitism had always flourished and would soon explode—lamented the “Judaisation” of German and Austrian culture.¹³⁵ Not surprisingly, given the role of Jews in important cultural institutions such as the academy and the movie industry, the same charges have been made about American culture.¹³⁶

Attributing societal problems to despised minorities is a common technique. In the nineteenth century, Chinese immigrants were sometimes accused of threatening to destroy the American working class and its culture.¹³⁷ Blacks have been blamed for causing cultural decay by introducing Americans to everything from crime and drugs to family breakdown.¹³⁸ Like the first two explanations of Jewish success, then, this theory portrays Jews negatively and rests on an analysis common to racist arguments used against other minorities.

Suggesting that the fundamental “Jewishness” of American culture explains Jewish success also creates more questions than it answers. Considering that Jews are less than three percent of the population, how did Jewish culture become so dominant? Either Jewish culture happened to have features that were more meritorious than the majority culture or Jews insidiously remade that culture in their own image. The former explanation

Politics and an Infinity-Based Response: Will Endless Talking Cure America's Racial Ills?, 80 *Geo. L.J.* 1879, 1879-80 (1992) (arguing that racism is inherent in our culture's norms and basic concepts).

132. WISTRICH, *supra* note 97, at 53 (“Socialists condemned Jews as the embodiment of the ‘capitalist spirit’ . . . while conservatives pointed to Jews as a source of permanent unrest and revolutionary subversion in European society.”); Todd M. Endelman, *Comparative Perspectives on Modern Anti-Semitism in the West*, in *HISTORY AND HATE: THE DIMENSIONS OF ANTI-SEMITISM*, *supra* note 105, at 95, 105 (“Jews were associated with all the destructive forces of modernization—capitalism, urbanization, democratization, materialism, socialism.”); see also DINNERSTEIN, *supra* note 95, at 49-50 (discussing anti-Semitism in the Populist movement).

133. KARL MARX, *On the Jewish Question*, in *EARLY WRITINGS* 1, 35-39 (T.B. Bottomore ed. & trans., 1963).

134. *Id.* at 34.

135. WISTRICH, *supra* note 97, at 61-62; Endelman, *supra* note 132, at 96.

136. See FORSTER & EPSTEIN, *supra* note 101, at 111.

137. TAKAKI, *supra* note 97, at 103-05.

138. See, e.g., David Treadwell, *Town Troubled by Image as Drug Rehabilitation Haven: Treatment: Officials Say Influx of Black Inner-City Addicts Is Spoiling Williamsport's Honeysuckle Flavor*, *L.A. TIMES*, Aug. 9, 1992, at A1; Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 *YALE L.J.* 719, 742-43 (1992).

conflicts with the radical constructivists' denial of independent standards of merit generally and with their embrace of multiculturalism. The latter explanation collapses back into the conspiracy theory of Jewish success.

A milder version of the "Judaisation" argument is that Jewish (and Asian) culture simply happens to emphasize many of the values that are needed in modern society, such as education, initiative, enterprise, and so on. These groups are thus more likely than some other minorities to play the game successfully by the white (or Gentile) rules, and are more comfortable doing so.¹³⁹ Such a proposition does not appear to be necessarily anti-Semitic, and could conceivably explain the relative success of Jews and Asian Americans (who presumably also share the same "white" values) as compared to African Americans, whose cultural values might be more distinctive.¹⁴⁰ This benign explanation is unavailable to radical constructivists, however. To suggest that Jews, like white Gentiles, have a *different and non-oppressive* set of values or standards than people of color is already to concede that standards are not just a way of perpetuating existing hierarchies. The benign explanation suggests that standards and values are developed by cultures for a variety of reasons, not the least of which is that they appear to be adaptive to the culture's environment. This anthropological truism is a far cry from the radical constructivist view that standards primarily serve to perpetuate a particular group's power over other groups. Stripped of its benign interpretation, the Judaisation argument retains only anti-Semitic components: to the extent that Jews share the (oppressive and racist) values of powerful white Gentiles, their "hyper-acceptance" of these values only makes them even "worse" than other whites.

The final conceivable explanation for Jewish success—that such success is nothing more than a statistical anomaly—is in many ways the most damaging, because it amounts to a denial that Jews exist as a distinct or identifiable group. Under this theory, it is no more than random chance that *any* three percent of the white American population will disproportionately exhibit any particular characteristics, from financial success to alcoholism. If being Jewish is an essentially insignificant trait, then any characteristics Jews exhibit are the result of random differences among the white population. It is thus misleading to point to "Jewish" success as a phenomenon in need of explanation.

Like the other theories, besides being implausible,¹⁴¹ this purported explanation is analogous to historical forms of anti-Semitism. As early as

139. A related theory of merit is explored *infra* at the beginning of Part III.

140. In other words, this could arguably be part of the answer to a question we are specifically *not* addressing: why some groups have been more successful than others in overcoming discrimination. See *supra* text accompanying note 22. We wish to make it clear that we are not endorsing this explanation.

141. Given the large numbers involved, it actually seems incredible statistically that the observed correlation between Jewishness and success could be purely random. Another possible explanation might be that the direction of causation is reversed—being successful leads people to claim to be Jewish (or else millions of Jews who are unsuccessful choose not to identify themselves in the various surveys

the French Revolution, anti-Semitic Enlightenment thinkers urged the removal of the pervasive restrictions on Jews with the hope that Judaism would be eliminated, because Jews' only common identity derived from their oppressed status: "The Jews were not to be emancipated as a community but as *individual* human beings, the assumption being that, once oppression was removed, their distinctive group identity would disappear."¹⁴² To deny that Jews are a culturally distinct group is to ignore over 5,000 years of history, during which Jews kept their identity alive in the face of persecution, dispersal, and genocide.

It is troubling, but not unprecedented, that one of the pivotal propositions of this branch of critical theory—that merit is constructed to serve the powerful—has anti-Semitic implications. Critics of the existing order have often ended up targeting Jews, whether intentionally or not.¹⁴³ Anti-Semitism has served as "a convenient way of attacking the existing order without demanding its total overthrow and without having to offer a comprehensive alternative."¹⁴⁴ Sadly, like some of its radical predecessors through the ages,¹⁴⁵ radical constructivism is not altogether lacking the potential to fall into the grips of this, "the longest hatred."¹⁴⁶

that demonstrate Jewish success). We don't think this possibility requires extended argument. Finally, being Jewish might correlate with some other reason for success, such as living in a major city, but it is hard to believe that these additional factors can be powerful enough to explain more than a little of the large disparity between the Jewish percentage of the general population and membership in groups such as professors at "elite" academies.

142. WISTRICH, *supra* note 97, at xxi; *see also id.* at 44-45 (noting that Enlightenment thinkers were anti-Semitic). Compare the view of black nationalists that integration, by fostering complete assimilation into white society, amounted to "painless genocide." Peller, *supra* note 33, at 798.

143. In particular, African Americans, who have the greatest reason to be dissatisfied with the status quo, have often lashed out at Jews. Various studies have found blacks to be more anti-Semitic than whites. *See, e.g.,* DINNERSTEIN, *supra* note 95, at 209-10; JONATHAN KAUFMAN, *BROKEN ALLIANCE: THE TURBULENT TIMES BETWEEN BLACKS AND JEWS IN AMERICA* 273-74 (1988); MARTIRE & CLARK, *supra* note 97, at 40-43; WISTRICH, *supra* note 97, at 123; Hertzberg, *supra* note 101, at 52; *see also* HAROLD E. QUINLEY & CHARLES Y. GLOCK, *ANTI-SEMITISM IN AMERICA* 54-72 (1979) (finding that "economic anti-Semitism" was higher among blacks than among whites, and that young blacks were more anti-Semitic than middle-aged blacks); GERTRUDE J. SELZNICK & STEPHEN STEINBERG, *THE TENACITY OF PREJUDICE: ANTI-SEMITISM IN CONTEMPORARY AMERICA* 117-31 (1969) (same); SILBERMAN, *supra* note 80, at 339 (stating that younger and better-educated blacks are more anti-Semitic and that black leaders are "the most anti-Semitic of all"). For a graphic description of black anti-Semitism, *see* William G. Orner, *Jews, African-Americans, and the Crown Heights Riots: Applying Matsuda's Proposal to Restrict Racist Speech*, 73 B.U. L. REV. 897, 898-900 (1993). The anti-Semitic *Protocols of the Elders of Zion* seems to have been well received by black Muslims in the 1970s. *See, e.g.,* BELTH, *supra* note 95, at 229; FORSTER & EPSTEIN, *supra* note 101, at 209. Black anti-Semitism "not only allows them to identify with the white majority but it provides as well a socially acceptable outgroup on whom they might vent their frustrations." DINNERSTEIN, *supra* note 95, at 223. Current tensions between African Americans and Jews, two groups that were historically allies, are disheartening.

144. SHULAMIT VOLKOV, *THE RISE OF POPULAR ANTIMODERNISM IN GERMANY: THE URBAN MASTER ARTISANS, 1873-1896*, at 317 (1978).

145. *See, e.g.,* MARX, *supra* note 133, at 3-40; de Man, *supra* note 123, at 269-71.

146. The quotation is taken from the subtitle of WISTRICH, *supra* note 97.

This unsettling possible alignment of radical constructivism with the worst totalitarian regime of this century should also—upon reflection—seem less than shocking.¹⁴⁷ The core of the radical constructivist paradigm is a rejection of the Enlightenment and its emphasis on rationality and scientific explanation.¹⁴⁸ Instead, radical constructivists seek to explain the world solely as the result—deliberate or unconscious—of ideology and the pursuit of dominance. But that standard leaves little room for shared concepts of merit, morality, or anything else.¹⁴⁹ As other scholars have noted, radical constructivism “leaves no ground whatsoever for distinguishing reliable knowledge from superstition.”¹⁵⁰ As a feminist philosopher who sympathizes with what we have called radical constructivism has warned, it can readily slide into moral relativism¹⁵¹—only one step away from relying on raw power to determine truth. For if ideas are mere reflections of the exercise of power, it becomes difficult to find a basis for criticizing social arrangements. And if raw power is the test of truth, totalitarians are merely the most unabashed constructors of reality. Much as radical constructivists may dislike this conclusion, its potential is present in their conceptual apparatus.

Not every criticism of current societal standards is subject to our critique. But the radical constructivist attack on merit seeks to deconstruct merit into merely a method of group domination. The purpose is beneficent—to explain (and end) the subordinated position of certain minorities. As postmodernists should be well aware, however, texts do not always limit themselves to their authors’ purposes, nor do ideas. Having deconstructed merit into pure power, radical constructivists face an implication they will surely find wholly unpalatable—for if merit is merely group power, then Jewish success becomes the fruit of Jewish power. That way lies madness.

147. Similar charges have been levelled against deconstructionism, another postmodern doctrine. See, e.g., Letter (Charles Griswold, Jr.), *Deconstruction, The Nazis, and Paul deMan*, N.Y. REV. BOOKS, Oct. 12, 1989, at 69 (deconstructionism “encourages” Nazism); DEBORAH LIPSTADT, *DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY* 17-19 (1993) (deconstructionism makes Holocaust denial respectable). But see Vivian Crosswald Curran, *Deconstructionism, Structuralism, Antisemitism and the Law*, 36 B.C. L. REV. 1 (1994) (defending deconstructionism against these and other charges).

148. See generally GROSS & LEVITT, *supra* note 19. Cf. Curran, *supra* note 147, at 2, 4, 27 (deconstructionism and other modernist movements reject the Enlightenment paradigm).

149. For an analogous point about deconstructionist philosophers and literary critics, see Richard Eldridge, *Deconstruction and Its Alternatives*, 18 MAN & WORLD 147 (1985).

150. GROSS & LEVITT, *supra* note 19, at 45. It might be more fair to say that radical constructivists reject the very distinction in question.

151. Williams, *supra* note 19, at 87-88. Williams describes several efforts to modify constructivism in order to make it fully compatible with feminist values. She seems to view these efforts as promising but as not yet wholly successful. *Id.* at 93-104.

III THE MERITS OF "MERIT"

We hope we have shown that the radical constructivist view of merit as a virtually empty vessel into which the preferences of the powerful have been poured is untenable because it is inherently anti-Semitic. At this point, however, some readers may be thinking that we have made things too easy for ourselves. If not a straw man, radical constructivism is a view that many will find quite implausible. Perhaps critical theorists could adopt some more moderate theory about the social construction of merit which would prove more defensible.

An alternative critical theory might describe current social standards as "arbitrary" rather than inherently tainted by racism and sexism. Because certain groups were, for whatever reason, non-participants during the creation of the standard, they tend to be excluded by those standards—unless, like Jews and some Asian-American groups, the standard simply happens by chance to correspond to something in their own culture. (Alternatively, these groups might have mastered the dominant culture as a response to their subordinated status.) Many readers will find this plausible as a historic description, and we have no quarrel with that reaction. But terms such as "arbitrary" are not merely descriptive but normative, and the normative side of this picture remains troubling.

To say that standards of merit are arbitrary is to say, as Duncan Kennedy says about conflicting paradigms, that no meta-criteria exist for evaluating them or judging between them.¹⁵² If so, then reason can play no role in accepting or rejecting these standards, for there are no criteria to which reason can appeal. But this approach also makes it difficult to criticize the status quo. Critical theorists certainly want to be able to say that it is unfair for some groups to be excluded arbitrarily from social success, yet "fairness" seems to function as a "meta-criterion" here, and hence to be illegitimate under the arbitrariness view.¹⁵³

Moreover, the arbitrariness view mutes but does not eliminate potential anti-Semitic implications. Suppose some group—let us say, Gentiles—complains that current standards are providing disproportionate success to other groups, thereby depriving their own group of its share of desirable social goods. What responses are available to this complaint under the arbitrariness view? Perhaps the most straightforward response, in the absence of a fairness criterion, is that no standard is any better or any worse than any other, so that this disproportionate impact is not an argument against

152. See *supra* text accompanying note 39.

153. In the specific context of legal scholarship the paradox is more acute, for if fairness is a valid trans-paradigmatic value, then an argument about law would be more or less sound depending on its correct application of this value, and this would provide us with a way of measuring merit across different scholarly paradigms. Hence, judgments about the merits of legal scholarship would be far from arbitrary.

current standards. However, there is also no argument available *against* changing these standards to reduce the success of Jews or Asian Americans, since the choice of standards is simply one about which no argument is possible. We are then back to force as the only arbiter (other than chance), a standard that can hardly be considered advantageous to minority groups such as Jews or Asian Americans. Denying that merit plays a role in Jewish success inevitably allow that success to be taken away.¹⁵⁴

On the other hand, perhaps some fairness arguments are to be allowed. Any such test for fairness can have no relationship to the content of the standards, since the standards are assumed to be purely arbitrary. Thus, "fairness" must be completely external to the substance of the standard. One might judge fairness in procedural terms with respect to historic origin: a standard is fair if the complaining group had a fair chance to participate in its adoption. But this right to participation seems to mean little for minority groups, who will always be outvoted, since by hypothesis they have no arguments to make giving the majority reasons for adopting a different standard.

Alternatively, fairness could be defined in terms of outcomes—a standard is fair if and only if all groups achieve roughly proportionate success under that standard. But this version implies that it is *prima facie* unfair if any group, such as Jews or Asian Americans, achieves disproportionate success. While that disproportionate success may not be unfair in terms of its historic origins, it still is prospectively unfair, since it favors particular groups and cannot by hypothesis be justified (since it is purely arbitrary). Hence, anti-Semitic and racist strategies, such as quotas against Jews or Asian Americans, are an appropriate way of more fairly allocating social resources. In the end, we believe that disproportionate success cannot be accepted unless it is justifiable, and such a justification must invoke notions of merit. Viewing merit (at the level of intergroup comparisons, at least) as being arbitrary deprives successful minority groups of any way to defend their attainments.

Although the arbitrariness view is fairly frequently expressed, we doubt that it is very seriously intended. For instance, consider such standards for judging scholarship as the following: that factual assertions be documented, that arguments proceed logically, that sources be fairly interpreted, that normative claims be plausibly based. Does anyone really think that these are simply arbitrary standards, which could equally well have been abandoned for their opposites? We think not. Any serious claim has to accept these standards at some level, while possibly subjecting them to criticism. Such criticism might take the form of saying that the interpreta-

154. Glenn Loury makes a similar argument, noting that attacks on merit can be seen as analogous to attacks on affirmative action in that both constitute an assault on the "livelihood and security" of particular groups. GLENN C. LOURY, *ONE BY ONE FROM THE INSIDE OUT: ESSAYS AND REVIEWS ON RACE AND RESPONSIBILITY IN AMERICA* 86 (1995).

tion of the standards has been distorted by social factors such as racism or sexism, or that the standards need to be augmented with others, but these criticisms themselves must rely on reason in a way that precludes postulating the inherent arbitrariness of standards.

Such a critical view of standards would still leave open the possibility of arguing that particular distortions in the standards have disadvantaged particular groups. When standards were created with the complete exclusion of some groups, it is not implausible that such a showing might be made, and criticisms of particular standards must be given a serious hearing. But because there is no presumption that the standards are invalid, arbitrary, or tainted, groups can rely on the standards to justify their success except where there is some particular argument to the contrary. In particular, minority groups such as Jews and some Asian Americans would be entitled to maintain that their successes were ineritorious, until such time as someone is able to point to some specific way in which standards are improperly biased on their behalf.

It is not our purpose to offer our own theory of merit in place of radical constructivism. We are not, however, arguing that the current societal concept of merit is objectively valid in all respects, or that it is unaffected by social problems such as racism and sexism. There are other alternatives to radical constructivism besides a complacent endorsement of the status quo.

One alternative is the revision of current merit standards within the objectivist paradigm. Even for those who believe that completely objective, timeless standards of merit do exist, there can be no guarantee that we have reached a final understanding of those standards. An objective standard can be distorted by the limited vision of those in power. Moreover, our understanding of merit can change over time, and certainly has done so. Little more than one hundred years ago a law professor was a practicing lawyer who wrote comprehensive but unimaginative treatises and conducted himself like a gentleman.¹⁵⁵ Although the core concepts of teaching and scholarship have survived, there has been an evolution in the translation of these concepts into operation. That evolution probably has not reached its end; one hundred years from now our own standards of merit may seem equally in need of revision. Thus, even given a view of merit as essentially objective, one need not leap to an unqualified endorsement of current definitions. We need to be willing to expand those definitions to include the innovative and unfamiliar.

155. See Calvin Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689, 709 (1968) (stating that law professors' lectures resembled treatises); see generally ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s*, at 38 (1983) (describing the origins of the division between legal academics and practitioners); Charles R. McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 WASH. U. L.Q. 597 (1981) (tracing historical changes in American legal education).

Objectivism is not the only option for those who reject radical constructivism: pragmatism is another alternative. In contrast to critical theorists, pragmatists are willing to give existing standards the benefit of the doubt. Pragmatism values tradition as “the essential foundation for intellectual and social progress.”¹⁵⁶ Consequently, traditions and standards deserve what James Boyd White calls presumptive authority.¹⁵⁷ This prudent regard for tradition can favor incremental over radical change,¹⁵⁸ but it neither reifies tradition nor denies the importance of experimentation. Pragmatism thus seeks a balance between “the ‘funded knowledge’ of past experience [and] the open possibilities offered by future experience.”¹⁵⁹ The pragmatist presumption in favor of existing standards also resonates with the tenets of civic republicanism. A community, whether of citizens or of scholars, is held together by its allegiance to both the past and the future.¹⁶⁰

For present purposes, the philosophical differences between the objectivist and pragmatist views of merit need not concern us. Under either one, we should be receptive to but critical of challenges to current conceptions of merit. Contemporary standards should receive a rebuttable presumption of validity, and the burden ought to be on challengers to show why particular aspects of those standards ought to be eliminated, amended, or expanded.¹⁶¹ In the academic context, any changes must be justified according to the overriding purposes of scholarship: to pursue truth and to expand the boundaries of human knowledge. The intellectual community as a whole must be open to such challenges but must “exercise due care and must make [its] assessment on scholarly grounds.”¹⁶² Only then can we avoid the twin perils of an unthinking adherence to tradition and an unreflective overeagerness for change.

CONCLUSION

We hope that those critical theorists who have embraced radical constructivism will take this essay as both constructive criticism and an invita-

156. Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1344 (1988).

157. James B. White, *Introduction: Is Cultural Criticism Possible?*, 84 MICH. L. REV. 1373, 1382 (1986).

158. See generally Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1602-10 (1985).

159. Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the 21st Century*, U. ILL. L. REV. (forthcoming 1994).

160. See generally Farber, *supra* note 159, at 35-37; Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 162-65 (1995).

161. For a similar argument that proponents of adding new disciplines to the university have the burden of justification, see Judith J. Thomson, *Ideology and Faculty Selection*, in *FREEDOM AND TENURE IN THE ACADEMY* 155, 157-65 (William W. Van Alstyne ed., 1993).

162. *Id.* at 163. In particular, Thomson contends that judging the validity of an idea on the basis of its author's race or gender would violate this principle. *Id.* at 162.

tion. It is meant to caution them about the unintended implications of their theory of merit, and to invite them to join rather than to abandon a dialogue about the proper definition and application of societal standards of merit, and of how racism and sexism may have distorted those standards.¹⁶³

The appropriate response to the proposition that different cultures (and different eras) have different standards of merit is to enter into a broad-ranging inquiry about which standards are most defensible for our own society: in other words, to discuss what *should* count as merit and why.¹⁶⁴ It is that discussion we are inviting radical constructivists to join. Our reading of their scholarship is that they have so far eschewed such a discussion as essentially meaningless.¹⁶⁵ Thus, they are perilously close to reducing decisions about merit to sheer exercises of power.

In the best tradition of critical theory, we close with a story.¹⁶⁶ Whether or not this story clarifies our ideas, it may at least help explain why we felt impelled to write about this unpleasant topic, and why we are particularly concerned about the implications of subordinating merit to power. This story took place at a labor camp called Plaszow. A prisoner, an architectural engineer named Diana Reiter, argued that the foundation of a new barracks needed to be torn out and replaced. The new commander of the camp considered it a "first principle that you never listened to a Jewish specialist," so he ordered her shot on the spot. "[T]he shooting of this Diana Reiter, the cancelling of her Western European diploma, had this practical value . . . that if Miss Diana Reiter could not save herself with all her professional skill, the only chance of the others was prompt and anonymous labor."¹⁶⁷ In hell, it seems, all reality is socially constructed, and merit does not exist.

163. Of all the misreadings of this essay that we would like to avoid, one of the worst would be that we view minority problems as "their own fault." We do adopt a presumption in favor of societal standards of merit, and this does at least present the possibility that elements of some subcultures are less conducive to achievement. But this presumption does not blind us from recognizing the reality of widespread discrimination.

164. For a brief example of how to conduct such an intercultural comparison, see THOMAS SOWELL, *RACE AND CULTURE: A WORLD VIEW* 5 (1994) (why "Arabic" numerals, actually invented in India, are better than Roman numerals, invented by Europeans).

165. See *supra* text accompanying notes 40-66. This reading is also supported by the unwillingness of some radical constructivists to propose or describe any standards of merit of their own. See Richard Delgado, *Legal Scholarship: Insiders, Outsiders, Editors*, 63 U. COLO. L. REV. 717, 722-23 (1992) (rejecting call for standards for evaluating the scholarship of critical race theorists).

166. See generally Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971 (1991); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

167. THOMAS KENEALLY, *SCHINDLER'S LIST* 167-69 (1982).