

# White Men Can't Jump: Critical Epistemologies, Embodiment, and the Praxis of Legal Scholarship

Peter Halewood<sup>†</sup>

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<sup>†</sup> Assistant Professor, Albany Law School of Union University. I wish to thank Patricia Williams, Stephanie Wildman, Peter Strauss, Michael Halewood, Neil Gotanda, Martha Fineman, Harold Edgar, and Bob Chang for helpful comments and suggestions. Special thanks to Donna Young for extensive comments, encouragement, and many useful conversations. Thanks also to Lisa Codispoti, Kamayo Smith, and my editors at the *Yale Journal of Law and Feminism* for editorial work. Portions of this Article were presented at the Crit Networks Conference at Georgetown University Law Center, March 10, 1995, as part of a panel entitled "The Social Construction of Whiteness." I am grateful for the support of the Julius Silver Fellowship in Law, Science and Technology at the Columbia Law School, the Law Foundation of British Columbia, and an Albany Law School summer research grant. This Article is written in partial fulfillment of the requirements for the degree of Doctor of the Science of Law in the Faculty of Law, Columbia University.

Dehumanization . . . marks not only those whose humanity has been stolen, but also . . . those who have stolen it . . . . The oppressors, who oppress, exploit, and rape by virtue of their power, cannot find in this power the strength to liberate either the oppressed or themselves. Only power that springs from the weakness of the oppressed will be sufficiently strong to free both. Any attempt to “soften” the power of the oppressor in deference to the weakness of the oppressed almost always manifests itself in the form of false generosity . . . . Who are better prepared than the oppressed to understand the terrible significance of an oppressive society?<sup>1</sup>

### I. INTRODUCTION

Where we are positioned in society, and how we think of and live in our bodies, are questions we do not usually connect to the (both everyday and scholarly) claims we make about social and legal problems. “The body” and “knowledge” have traditionally been understood as unrelated categories. However, recent interdisciplinary work in philosophy and law emphasizes “positionality,” and calls into question the abstract, disembodied quality of conventional Western theories of knowledge (epistemologies) which ground the Western conception of law. Western epistemology, its critics say, has artificially bracketed off the material particulars of experience and identity, including the spatial particularity of one’s bodily experience, in determining what counts in making and defending claims about society and about law’s role in maintaining or changing social order. Abstraction, universality, and reason, rather than embodied experience, govern the validity of truth claims. In turn, much contemporary critical legal theory calls into question the liberal jurisprudence which derives from conventional Western epistemology and ethics. Critics say that law’s objectivity and principled determinacy have been defined so as to deny the range of experience and self-understanding common to the oppressed. For example, the range of criteria defining a valid rights-claim under liberal jurisprudence—rule governance, rationality, universalizability—are values associated (within the Western tradition) with masculinity. Femininity is associated in the same tradition with subjectivity, particularity, and the body. The immediacy and subjectivity of embodied feminine experience has been bracketed off from epistemology<sup>2</sup> and in turn from liberal jurisprudence.

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1. PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 28-29 (Myra B. Ramos trans., 1988) (1970).

2. See, e.g., Judith E. Grbich, *The Body in Legal Theory*, in *AT THE BOUNDARIES OF LAW* 60 (Martha A. Fineman & Nancy S. Thomadsen eds., 1991). As the editors explain, Grbich says “women’s experience [and standpoint are] currently interpreted as simulated male experience, the female body portrayed as a simulated male body.” In other words, body = commodity = standpoint.

In another Article, I explore the relation of this *jurisprudential* bracketing to the commodification of the body by biotechnology and gender practice.<sup>3</sup> In this Article, I will examine the narrower, prior issue of the *epistemological* bracketing of embodiment. Commodification is simultaneously the experience and the result of these two bracketings combined. For example, women experience commodification when their bodies are used for commercial surrogacy; simultaneously, the uniqueness of the embodied female experience of pregnancy is denied by legal discourse governing custody disputes between surrogates and the contracting “parents.” In order to comprehend the injustice of commodification (although there are some instances where it is not unjust), epistemology and jurisprudence must be able to grasp the centrality of embodiment and of the concrete experience of oppression. It is this that the critiques of conventional epistemology aim to promote. I argue that the experience of commodification conditions one’s epistemological standpoint. Thus embodiment and commodification constitute a distinct epistemological standpoint that law must validate. I suggest that the epistemological gap between the standpoints of privileged abstraction and oppressed embodiment can be partially bridged by focusing on forms of oppression and embodied experience that are common to men and women, to whites and people of color.

These critiques of disembodied epistemology have prompted a concern about how and by whom legal scholarship that focuses on subordination—for example scholarship relating to the law of gender and race equality—is produced. This is some of the most important scholarship in which legal academics engage. The critiques, and the corresponding pressure for diversity in law schools, call into question the legitimacy of scholarship<sup>4</sup> concerning subordination. This scholarship is often conducted by white male<sup>5</sup> legal

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3. Peter H. Halewood, *Postmodern Commodification: Gender, Property, and the Technological Body*, 80 IOWA L. REV. (forthcoming 1995).

4. To date, most critical literature relates to the production of scholarship rather than to the practice of teaching. I cannot account for the absence of critiques of white male *teaching* in the pages of law reviews, but it seems to me that the epistemological arguments critical of white male capacity to produce scholarship about law and oppression apply equally to white male elaboration of that scholarship in the classroom. To argue that teaching is somehow different from scholarship in this respect would be to posit an unlikely separation of theory and practice, in this case between the internal theory (scholarship) and practice (teaching) of the academy. Teaching, surely, does some of the work of producing scholarship. For an insightful comment on race issues in law school teaching, see Kimberlé W. Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT’L BLACK L.J. 1 (1989) (analyzing the myth of “perspectivelessness” in the law classroom and the twin objectifying and subjectifying effects this has on minority students); see also Ann E. Freedman, *Feminist Legal Method in Action: Challenging Racism, Sexism and Homophobia in Law School*, 24 GA. L. REV. 849 (1990).

5. By “white male” I intend a short-hand signifier for straight, white, male, middle-class, middle-aged, able-bodied privilege. Addressing discrimination based on sexual orientation, disability, and class in the legal scholarship poses epistemological difficulties related to those I identify in connection with anti-racist and anti-sexist scholarship. Therefore there is an inevitable reductionism in addressing only racism and sexism as scholarly problems, but I think it is a simplification necessary for purposes of this Article.

This reductionism points to another difficulty. Though throughout I refer to white-maleness, I do not wish to “essentialize” white-maleness, inadvertently granting it a controlling interpretive authority. White-maleness is as constructed, elusive, self-transforming, and conflicted as any other form of identity, including that of white women or of men and women of color. bell hooks makes a similar point, criticizing white theorists who focus on the essentialism of claims made by oppressed groups while ignoring the essentialism

scholars. These scholars often employ the disembodied, abstract rationality that I have mentioned. This prompts several related questions that I address in this Article. Can a white male scholar adequately address in his scholarship forms of oppression which he does not and cannot experience?<sup>6</sup> Is a white male scholar situated (personally and “epistemologically,” as the debate goes) so as to be able to *really* understand, unpack, and contribute constructively to scholarly debate on oppression and law?<sup>7</sup> Is the presence in law reviews of his scholarship on oppression, with its implication of superior understanding, legitimate? *Should* he engage in scholarship on oppression? How does his white-maleness inform his scholarship? Is he likely to overlook in his scholarship ways in which law is implicated in oppression? Can he restructure his scholarship so as to ally himself with the aims of diversity and empowerment? I believe that these questions have been mischaracterized as reflecting a purely political agenda to advance the “outsider” scholarship of women and minorities by criticizing “insider” scholarship. In fact, they reflect a set of sound philosophical (that is, epistemological) propositions about the

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of dominance. See BELL HOOKS, *Essentialism and Experience*, in *TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM* 77 (1994).

6. Experience and embodiment are closely related, though not identical. Embodiment refers to being in the concrete world, experiencing concrete (and physical) relations with the material world, and having the theoretical perspective on reality of a thing with a body—this is the experience of embodiment as it relates to knowledge. Many white male scholars clearly have not yet acknowledged the legitimacy of questioning the relation of experience to knowledge. See, for example, Mary I. Coombs' fine article, *Non-Sexist Teaching Techniques in Substantive Law Courses*, 14 S. ILL. U. L.J. 507, 523 (1990).

Some new critical literature flags the issue of the social construction of whiteness and the possibility of deconstructing it. Whiteness codes for (largely unself-conscious) privilege, power, and expectation. See generally RUTH FRANKENBURG, *WHITE WOMEN, RACE MATTER: THE SOCIAL CONSTRUCTION OF WHITENESS* (1993); DAVID ROEDIGER, *TOWARD THE ABOLITION OF WHITENESS* (1994); T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991); Barbara Flagg, *“Was Blind But Now I See”*: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Neil Gotanda, *A Critique of “Our Constitution is Colorblind”*, 44 STAN. L. REV. 1 (1989); Cheryl Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707 (1993); Martha R. Mahoney, *Whiteness and Women*, in *Practice and Theory: A Reply To Catharine MacKinnon*, 5 YALE J.L. & FEMINISM 217 (1993); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 953; Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstractions*, 32 WM. & MARY L. REV. 1 (1990); L. Mun Wong, *Di(s)-secting and Dis(s)-closing “Whiteness”*: *Two Tales About Psychology*, 4 FEMINISM & PSYCHOL. 133 (1994).

It is important to note that the relation of experience and identity has had real consequences in the academy as evidenced, for example, by the student boycott of white civil rights attorney Jack Greenberg's Civil Rights course at Harvard Law School in 1983. See Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1756-57 (1990). See also Kennedy's response to Richard Delgado's notion that white male scholars lack racial “standing” to engage in race relations law scholarship. *Id.* at 1788-89.

7. This question has been examined in the context of feminism in *MEN IN FEMINISM* (Alice Jardine & Paul Smith eds., 1987) (male feminist scholarship is problematic), which was answered by *ENGENDERING MEN: THE QUESTION OF MALE FEMINIST CRITICISM* (Joseph A. Boone & Michael Cadden eds., 1990) (male feminist scholarship is possible if conducted from position of empathy, e.g., from gay experience). In the race context, see Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1248 n.15 (1993) (“[W]hites can engage in critical race theory if they have the requisite level of empathy, an empathy that may find its source in some other type of oppression that they suffer.”). A not-so-funny parody of the problem can be found in Arthur Austin, *Scaff Law School Debates Whether a Male Can Teach A Course in Feminist Jurisprudence*, 18 J. LEGAL PROF. 203 (1993).

relation of scholarly knowledge to embodied experience and social reality.

I, a white and male legal academic, have encountered and reflected upon these questions in my research on problems of race, law, and gender, and while teaching feminist legal theory in several different areas of the law.<sup>8</sup> In this Article, I draw in part upon my experience in scholarship and teaching to illustrate some of the problems that accompany scholarship on subordination issues, and to theorize a new or modified mode of white male scholarship that goes some way toward meeting the legitimate philosophical objections raised against white male scholarship on subordination as it is currently practiced.

These objections concern the relation between overtly political legal problems (commonly sex and race discrimination), and the sex and racial identity of the legal scholar inquiring into them (commonly male and white). The debate is informed in part by recent feminist philosophical and critical race theory literature,<sup>9</sup> both legal and nonlegal. Much of this literature might be characterized as postmodern because it rejects conventional objectivist models of truth and of a fixed human agency. Some of it explicitly<sup>10</sup> or implicitly<sup>11</sup> argues that the white male *epistemological perspective* is fixed by the elevated position of white men in the social hierarchy, a position achieved in part by having successfully privileged abstraction and disembodiment in Western

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8. I have become aware of the problems of white male scholarship through a sustained effort to learn about law and subordination issues and to integrate them in my scholarship and teaching. I have relied heavily on Donna Young for help in this process.

9. I do not mean to suggest that the feminist and critical race theory literatures are separate and distinct; they overlap, of course. Indeed, the comprehensiveness of each in addressing various forms of oppression is among their chief virtues. See Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 974 (1991); see generally the work of Kimberlé Crenshaw, bell hooks, Mari Matsuda, and Patricia Williams. On "intersectionality," the dual social identity of women of color, see Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; see also, Donna Young & Katherine Liao, *The Treatment of Race at Arbitration*, in LABOUR ARBITRATION YEARBOOK 57 (William Kaplan et al. eds., 1992); THEORIZING BLACK FEMINISMS: THE VISIONARY PRAGMATISM OF BLACK WOMEN (Stanlie James & Abena Busia eds., 1993).

10. See, e.g., Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 497 (1984) [hereinafter Delgado, *Imperial Scholar*]; Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992) [hereinafter Delgado, *Imperial Scholar Revisited*]; Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS 515, 534-38 (1982). In general, the Critical Race Theory critique of the Critical Legal Studies critique of rights (also known as "the critique of the critique") relies on an argument about epistemological situatedness, i.e., that progressive white male tenured academics at elite law schools probably think rights are reified and alienating because they can afford to think so, never having had to struggle for those rights or the respect they entail. By "anti-racist" literature, I mean for the most part Critical Race Theory literature. While Critical Race Theory is much broader than my adjective "anti-racist" suggests (involving, e.g., a critique of liberalism), it is the anti-racist element of the Critical Race Theory critique which relates to my thesis in this Article. See, for example, the list of ten identifiable Critical Race Theory themes in Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461, 462-63 (1993). Law teaching has an undeniably political history of course. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* (1983); Paul D. Carrington, *Butterfly Effects: The Possibilities of Law Teaching in a Democracy*, 41 DUKE L.J. 741 (1992).

11. See, e.g., SANDRA HARDING, *THE SCIENCE QUESTION IN FEMINISM* (1986) [hereinafter HARDING, *SCIENCE QUESTION*]; SANDRA HARDING, *WHOSE SCIENCE? WHOSE KNOWLEDGE? THINKING FROM WOMEN'S LIVES* (1991) [hereinafter HARDING, *WHOSE SCIENCE?*]; Mary E. Hawkesworth, *Knowers, Knowing, Known: Feminist Theory and Claims of Truth*, 14 SIGNS 533 (1989).

rationality, epistemology, and jurisprudence. Therefore, the argument goes, the epistemological<sup>12</sup> accuracy of white male scholarship on oppression is uncertain, and perhaps white men should relinquish<sup>13</sup> or radically modify such scholarship. Part of this concern is that white male scholars may appropriate and profit professionally from perspectives lived and articulated by others. For the most part, white male legal scholars can safely write and say things critical of the social order that minority and female legal scholars cannot.<sup>14</sup> Part of the concern is that white men simply “don’t get it” on issues of subordination, and consequently cannot adequately address subordination in their scholarship.

My intended audiences are two. First, I wish to engage, both constructively and supportively, those feminist critics and critical race theorists whose critiques of mainstream scholarship are grounded in the assertion that white men cannot and do not write about subordination with an adequate appreciation of the issues. Such critics might argue that, in an epistemological world populated by multiple forms of consciousness, “white men can’t jump.”<sup>15</sup> Second, and more centrally, I wish to convince those white male law professors who are unfamiliar with—or unpersuaded by—the critical literature to take its arguments seriously.<sup>16</sup> It is they who wield power and enjoy privilege in legal academia, and whose scholarship is most questionable—and questioned—in view of this critical literature.

I hope to demonstrate that progressive, committed, white male law teachers should engage in scholarship investigating the relation of law to social and political subordination, provided that they do so in ways that respond to

12. See, e.g., Susan H. Williams, *Legal Education, Feminist Epistemology, and the Socratic Method*, 45 STAN. L. REV. 1571 (1993) (arguing that the Socratic method evidences an extremely conventional objectivist epistemology, and suggests a feminist reconstruction of Socratic method as creating rather than transmitting knowledge).

13. “The time has come for white liberal authors . . . to redirect their efforts and to encourage their colleagues to do so . . . . As these scholars *stand aside*, nature will take its course and the gap will quickly be filled by innovative and talented minority writers . . . .” Delgado, *Imperial Scholar*, *supra* note 10, at 577 (emphasis added).

14. This Article serves as an example. Because I am white and male, the Article is more likely to be accepted (or ignored) by colleagues as a scholarly application of scholarly ideas than it would be if written by a black female professor. A black female author of this piece would probably encounter more skepticism about the method, claims, and motives of the article and would probably be viewed, at least by some, as being oversensitive and making trouble for her mostly white and male colleagues.

15. WHITE MEN CAN’T JUMP (Twentieth Century Fox 1992). I use the phrase to describe the phenomenon of minority female multiple consciousness and the unique forms of knowledge it is said to produce (as identified by Mari Matsuda, Robin Barnes, and Patricia Williams) and to white men’s inability to “jump” back and forth between consciousnesses in this way. According to this view, we white men are stuck on a one-way, fast-track epistemological objectivism, and we lack the special insight into subordination that multiple consciousness is said to provide. See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864 (1990); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 7 (1989); Patricia J. Williams, *Response to Mari Matsuda*, 11 WOMEN’S RTS. L. REP. 11 (1989).

16. I do not mean that they should necessarily be in full agreement with it, but that they should meaningfully engage it. See, e.g., Daniel A. Farber and Suzanna Sherry, *Telling Stories Out of School*, 45 STAN. L. REV. 807, 807 (1993) (“We agree with the storytellers that taking the movement seriously requires engaging its ideas . . .”).

feminist and minority critiques of scholarship, and provided that in doing so they do not preempt or displace scholars who are white women or people of color.<sup>17</sup> I think that while specific forms of subordinated experience are not at hand to white male scholars on which to base their scholarship, nonetheless one usually has some fragment of such experience from which to build bridges to other groups' experiences of subordination. Furthermore, I think that the perspective of subordinated groups is likewise inherently partial<sup>18</sup>—the experiences of white women, for example, do not mirror those of women of color. Consequently, the best scholars can hope for is to work together and to combine perspectives, each contributing to an improved picture of the social whole.

My primary point, however, is that in view of the feminist and critical race theory epistemological critique, the position of white male scholars in legal academia has been radically altered in ways that demand attention and response in our scholarship. Rather than approaching the subject of law and subordination as neutral, theoretical experts or as political vanguardists, white male legal academics must recognize the legitimacy—even the superiority—of certain “outsider” perspectives on these issues, and assume the role of secondary contributors to the development of scholarship in these areas. Simultaneously, we should redirect the focus of our scholarship to ourselves—to white-maleness—in an effort to discover the myriad ways in which white-maleness has encoded the racialized, gendered privilege and power which white men enjoy and expect in our society. By thus inserting ourselves and our privilege into the scholarly equation, the normative thrust of our scholarship could then be to reconstruct positive, nondiscriminatory forms of white-maleness rather than to dispassionately study the oppression of others.

By “epistemology,” I mean the theory of knowledge one applies in making scholarly or philosophical claims about the nature of reality, whether legal, social, or political reality, or an amalgam of these. In this Article, I am

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17. An alternative strategy that progressive white male scholars could adopt in recognition of their position of privilege, as Delgado suggests, is to defer to outsiders and yield them institutional/intellectual space. Delgado, *Imperial Scholar*, *supra* note 10, at 577.

There is evidence that the “pool problem” (the alleged difficulty of finding qualified minority and female faculty candidates) is exaggerated. See Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988); Delgado, *Imperial Scholar*, *supra* note 10; Richard Delgado & Derrick Bell, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349 (1989) [hereinafter *Bell-Delgado Survey*]. If this is so, then, apart from whether white men are *epistemologically situated* to teach about subordination, perhaps they *should* stand back, creating space for others who belong to social groups which, due to historical social and economic injustice, occupy subordinate social positions. This, however, is a political-ethical question different from the epistemological question which I focus on in this paper.

It should be noted that straight, white men do have *some* experiential knowledge of oppression, albeit knowledge usually derived from the position of subordinator rather than subordinated. Of course, straight white men can—and many do—experience *class* subordination or physical disability.

18. See, e.g., Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1777-82 (1990) (discussing the problems that beset the development of critical consciousness from “false” consciousness).

concerned specifically with the claims one makes about law's relation to oppression. Conventional Western epistemology has posited an objectivist or representational relationship between the knower and reality; reality, it was claimed, could be mapped objectively onto our consciousness. Knowledge properly conceived must be abstract and perspectiveless; the knower must be a disembodied knower. From post-structuralist and linguistic critiques of conventional epistemology in the 1960s and 1970s<sup>19</sup> have emerged new, postmodern or pragmatic<sup>20</sup> feminist and critical race theory critiques of epistemology. These reject the objectivist, representational aspects of epistemology and posit in their place an embodied, contextualized, and experiential theory of knowledge. Knowledge is narrative. Perspectivelessness is now seen as an ideological move;<sup>21</sup> knowledge properly conceived is (and can only be) concrete and perspectival. Our knowledge of oppression is augmented by including the perspective of embodiment and the subjective narratives of the oppressed.

I begin with a critical discussion of white male "good intention" as a basis for scholarly inquiry into oppression. In Section II, I explore the general theory of scholarly diversity which has produced the crisis of legitimacy for white male scholarship. In Section III, I examine arguments about standpoint and embodied, experiential epistemology made by some feminist and critical race theorists that form the basis of the concern about the legitimacy of white male scholarship. In Section IV, I explore the relation of intention and empathy to progressive scholarship in this new epistemological setting, and suggest a theoretical framework to bridge the gap between the white male standpoint of disembodiment and the subordinated standpoint of embodiment. Finally, I explore ways in which white male scholarship on surrogacy and gender/race commodification might employ my theoretical prescriptions.<sup>22</sup>

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19. Such critiques are represented in the work of French philosopher and social theorist Michel Foucault, for example. *See, e.g.*, MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1977); MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (1978).

20. Pragmatism has lately become quite important in the humanities and in law. *See, e.g.*, Symposium, *Renaissance of the Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990); Peter H. Halewood, *Performance and Pragmatism in Constitutional Interpretation*, 3 CAN. J.L. & JURIS. 91 (1990).

21. *See, e.g.*, Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 806; MacKinnon, *supra* note 10, at 534-38; Matsuda, *supra* note 18, at 1763-73.

22. I do not directly address the implications of this analysis for "apolitical" parts of the legal curriculum, e.g., the commercial law curriculum, beyond suggesting that many of the same arguments probably apply there. We probably conceive of these subjects as apolitical and nonsensitive because they have been so thoroughly allied with the white male (neutral, doctrinal) epistemological perspective. If Critical Trusts Theory and Critical Securities Studies implicate these areas of law in racial and gender oppression, then some of the same epistemological difficulties relating to the race and sex of those producing scholarship in these areas will arise.

Because the new critical scholarship demands recognition of the subordination embedded in the entire legal curriculum, even white male scholarship conventionally understood as "politically neutral," such as that on corporations or commercial paper, is subject to the epistemological critique. Consequently, the epistemic correctives I am suggesting might apply to white male legal scholarship across the board. *See generally* Coombs, *supra* note 6, on teaching substantive law courses (rather than perspective courses) in a non-sexist fashion. Some critical examinations of conventional subjects are, Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511 (1991); Mary Irene Coombs, *Crime*

## II. EMBODIMENT, INTENTION, AND THE DILEMMA OF SUBORDINATION

The debate over diversity<sup>23</sup> raises concerns about the sensitivity, responsibility, and accountability of legal academics to students, to colleagues, to the diverse communities from which they come, and to legal issues themselves. The increasing diversity in law schools more sharply marks the distance between the sex and racial identity of scholars working on oppression (often white men), and the subject of that scholarship. The problems this distance creates for the enterprise of legal scholarship on oppression is a subject not explicitly dealt with in existing legal literature. I will call the crisis of legitimacy of white male legal scholarship on oppression the “epistemological dilemma of subordination.” I try here to deconstruct the dilemma and to theorize a reconstructed approach to white male legal scholarship based on the premise that the problem is epistemological and not simply a problem of attitude or intention.<sup>24</sup>

The basis of the dilemma is that legal academics, for the most part white and male, are producing scholarship which addresses the relation of law to the spectrum of social, political, and economic subordinations to which these white male academics are not themselves subject.<sup>25</sup> This distance between the

*in the Stacks, or A Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEGAL EDUC. 117 (1988); Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985); Carl Tobias, *Gender Issues and the Prosser, Wade and Schwartz Torts Casebook*, 18 GOLDEN GATE U. L. REV. 495 (1988).

23. The emphasis on “diversity” originates with the *Bakke* decision. Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (declaring race-based university admissions quotas invalid). Diversity refers generally to the proposition that the faculty and student bodies of universities should substantially represent the various groups which compose society, i.e., groups defined by race, sex, disability, sexual orientation, etc. I do not mean to suggest that the problem of white male scholarship results from diversity having been achieved or even seriously pursued by law schools. Rather, I want to point out that diversity has become a potent political issue in law schools. See, e.g., Derrick Bell, *Diversity and Academic Freedom*, 43 J. LEGAL EDUC. 371 (1993); Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547 (1993).

24. I do not pretend that such a theory can be derived from a position of gender and race neutrality; I acknowledge my own white male identity, perspective, and privilege. The methodological prescriptions I am urging in this article require that I, as a white male legal academic, examine my own motives for writing this article: Is it for tenure? Profit? Merely trend-hopping? Or is it a constructive contribution to a diverse scholarship and an important debate? It is probably a mixture of these. I am encouraged by scholars of color bell hooks, Mari Matsuda, and Robert Chang, who have argued that there is room for legitimate white male contribution to these sorts of debates over voice, perspective, and subordination, in part for the value of defining the “perpetrator’s” perspective, and for purposes of alliance building. For an analysis of male perspective on male sexual violence and law, see Michael Halewood, *Men, Sex and Power*, 48 U. TORONTO FAC. L. REV. 329 (1990).

25. I refer specifically to sexism and racism, though scholarship about other forms of discrimination is also implicated in the critique. Legal scholars engaged in research on these other forms of discrimination—while not themselves gay, lesbian, or disabled, for example—face the same epistemological difficulties. It must also be noted that some of these same concerns apply *within* the feminist and antiracist movement, e.g., concern that white feminists do not grasp the experience of women of color and are not appropriately placed to speak for them. See, e.g., Christine Stansell, *White Feminists and Black Realities: The Politics of Authenticity*, in RACE-ING JUSTICE, EN-GENDERING POWER 251 (Toni Morrison ed., 1992). The importance of naming explicitly one’s perspective on oppression is discussed in Katharine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 848 (1990) (citing ELIZABETH SPELMAN, *INESSENTIAL WOMAN* 186 (1988)).

scholar and the subject is experiential and consequently epistemic.<sup>26</sup> Because of this epistemic distance, it is sometimes said that white male scholars cannot responsibly or accurately produce scholarship about these subjects. Ultimately, this is an argument about a white male scholar's lack of membership in and personal accountability to the communities whose subordination he hopes to address in his scholarship. White men can choose whether or not to be accountable to the oppressed communities they study. Black women, on the other hand, do not have this choice: they *are* accountable. While these arguments are persuasive, I think that a limited, contingent accountability can be *earned* by a white male scholar with sufficient dedication. However, he must observe the cautions about the diminished stature of his scholarship implicit in the feminist/critical race theory critique of epistemology.<sup>27</sup>

Because the distance between white male scholars and oppression is experiential and epistemic, empathy<sup>28</sup> and good intentions<sup>29</sup> on the part of such scholars are not sufficient to bridge it. The problem is ultimately not one of malice or failure of empathy, but rather that certain epistemological perspectives on oppression are not inherently open to white male scholars. Attitude, intention, and empathy are subjective, alterable characteristics which certainly contribute to a scholar's ability to comprehend oppression, but one's epistemological perspective—the human categories of one's experience—is fixed. This is a much more significant limitation on one's capacity to understand oppression. One must take seriously the contention that white male legal academics are improperly positioned to write about subordination because

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26. This perspective is elaborated in my discussion of epistemology and white male perspective which follows. See also Halewood, *supra* note 20; Halewood, *supra* note 3; Peter H. Halewood, *Trends in American Critical Legal Thought*, 25 U. BRIT. COLUM. L. REV. 105 (1991).

27. It is important to note here that all law, in one sense, involves subordination and the use of social power, and that the study of law is always dedicated to learning the mechanisms, rules, and procedures of that subordination. This point touches on the thorny issue of the purpose of legal scholarship. One objection to the politicized account of scholarship I am providing is that scholarship should not aim to raise the political awareness of lawyers and judges. Instead, it should aim to provide lawyers and judges with a critical understanding of law, with the most effective and accurate arsenal of techniques for arguing for or against a particular application of social power as professionals. This is a tough objection, but one which ultimately answers itself: critical understanding of even this professional sort cannot come about without engaging the very epistemological issues of voice and diversity which I am attempting to articulate.

28. See, e.g., Sharon Elizabeth Rush, *Understanding Diversity*, 42 FLA. L. REV. 1 (1990).

[A]lthough men, as a group, cannot know the pain women experience as women in "their" world, just as whites, as a group, cannot know the pain people of color experience in "our" world, that does not mean that men cannot "empathize" with women or that whites cannot empathize with people of color.

*Id.* at 23-24.

29. See generally Richard F. Devlin, *Legal Education as Political Consciousness-Raising or Paving the Road to Hell*, 39 J. LEGAL EDUC. 213 (1989). Didi Herman, a former student of Devlin's, responds briefly in, *Legal Education, Feminism, and the "Well-Intentioned" Man: A Response to Richard Devlin*, 40 J. LEGAL EDUC. 257 (1990). The intentions argument is made by some women too. See Coombs, *supra* note 6, at 508 ("Biology is not destiny . . . [and not] a barrier to good behavior."); see also James M. O'Fallon & Cheyney C. Ryan, *Finding a Voice, Giving an Ear: Reflections of Masters/Slaves, Men/Women*, 24 GA. L. REV. 883, 893 (1990) (To learn, to open oneself to the subordinated Other, is to listen with respect to the Other's experience, not adopt a standpoint of detachment. "[J]ust wanting to respond in this manner is not enough. *Good intentions alone cannot dissolve the institutionalized deafness that constitutes ideology.*" (emphasis added)).

their epistemological perspective on subordination is inferior to the epistemological perspectives of white women and men and women of color.

To illustrate the problem, I will relate my experience teaching feminist legal theory in a first year Legal Perspectives class. The class was a typical introduction to legal reasoning, theory, and history. We had spent the first several weeks of class discussing without incident H.L.A. Hart, positivist and sociological jurisprudence. The slight majority of the class of fifteen were women, several of whom were usually talkative in class, while other women were less so. Many of the men in the class were, in conformity to stereotype, somewhat louder and more aggressive than most of the women.

When we turned to the issue of feminist legal theory, I introduced Catharine MacKinnon's work on pornography and her "dominance theory," specifically in relation to the ill-fated Minneapolis anti-pornography ordinance which she and Andrea Dworkin wrote. It became apparent in the first hour that most of the women did not self-identify as feminists (they would refer, for example, to "what a feminist would say if . . .") and, like most of the men, were unfamiliar with basic feminist arguments and literature, legal or non-legal. Some of the men were apparently looking, perhaps with different motivation, for what I had hoped to find: a spirited defense of the feminist position from some of the women in the class. It was not forthcoming, that week or the next. Men continued to dominate the discussion. Of course, my own lecturing was a part of this domination. Although I lectured in the hope of drawing out some of the women, it was a pattern with which I felt increasingly uncomfortable.

Growing frustrated with the class, I asked several of the women during a casual conversation after class how it was that they were so unfamiliar with, and apparently untaken by, feminist ideas. Their responses were non-committal. Later I received a note from one of the women saying that she thought the material was interesting (the ritual nod to the professor's authority), but that having it presented by a man as an abstract topic to be "covered" in a couple of classes, before an audience including not altogether sympathetic men, may not have been the best approach. She also hinted that her lack of familiarity with feminist theory did not mean that she was unresponsive to feminism, and that my raising the question with the women about their relation to feminism may not have been fair given the gender dynamics of the classroom.

This story does not reflect an epiphany about the white male role in scholarship and teaching; it is just an account of some of the dynamics of responsibility and perspective that can be played out in a diverse classroom. Several observations can be made about this series of events. First, there is little doubt that many women, though certainly not *any* and *every* woman, could have taught this section of the class with better results from the women students. Second, I probably overzealously adopted my role as Socratic

teacher, the “reluctant omnipotent,”<sup>30</sup> refusing to hear female voices (even refusing to hear female silence). My approach to teaching the material was abstract, theoretical, and probably alienating for the women, of whom I expected a similarly abstract and theoretical performance in class. Feminist literature on legal pedagogy suggests that feminist issues are not experienced abstractly by women, and teaching must be tailored to reflect that reality. I did not create an atmosphere of safety in the classroom that would have allowed and encouraged the women to freely participate and contribute.<sup>31</sup> Based on conventional models of epistemology and teaching, I had been attempting to *teach* feminist legal theory to these women in an abstract fashion that probably was not compelling to them given their *experience* of gender relations. Third, to use Kimberlé Crenshaw’s terms, I had both “objectified” them by asking them to comment objectively on themselves as objects of feminist theory, and “subjectified” them by expecting them to give me “the women’s perspective” in class and by asking them to “testify” as to their relation to feminism after class. There were many possible reasons for their lack of familiarity with feminist theory and issues: a conservative undergraduate curriculum that included no feminist courses; discouragement by negative social images of feminism and feminists; fear of being identified as and labeled a feminist (the Montreal massacre,<sup>32</sup> for example, has amply demonstrated that this identification is not only socially, but possibly physically dangerous). What that pedagogical situation really demanded was for me to create classroom conditions which would encourage the students themselves to *reveal* their experiences and *perform* a raising of our collective consciousness on gender equality. How are these concerns and aims, occasioned by the epistemological position of white male scholars, to be addressed in our scholarship?

The issue of whether white men should or can effectively write about oppression has been treated in scholarly legal literature as a remedial matter of encouraging “good behavior” in male scholars,<sup>33</sup> as a matter of a scholar’s alignment with progressive or reactionary politics,<sup>34</sup> or as a matter of convincing male scholars to change their “habits of thought” in an exercise of good will.<sup>35</sup> This literature addresses a scholar’s intentions, attitudes, or

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30. Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem-Crits Go to Law School”*, 38 J. LEGAL EDUC. 61, 77 (1988).

31. There is clearly no consensus on how to do this, but it was interesting to note a gender difference in approach to politicized teaching at the Legal Education and Legal Consciousness panel at the AALS Annual Meeting (January 9, 1994) (audio cassette on file with the AALS). Frances Lee Ansley suggested a “stretching” pedagogy where students’ own experiences are stretched, not ruptured, to engage in critical consciousness. She has her students write and analyze “reflection papers.” Duncan Kennedy, by contrast, uses ideological hypotheticals to get his students “at each other’s throats” (author’s recollection).

32. The Montreal massacre was the murder of fourteen female students by an avowed anti-feminist at the Engineering School of the University of Montreal in 1989.

33. Coombs, *supra* note 6, at 508, 522.

34. Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 1990).

35. See Peter M. Shane, *Why Are So Many People So Unhappy?: Habits of Thought and Resistance to Diversity in Legal Education*, 75 IOWA L. REV. 1033 (1990). Shane indicates that these habits of thought

politics rather than the epistemological positioning of white male scholars in relation to the forms of subordination they seek to study. These accounts do not, however, explain the enduring crisis of legitimacy around white male scholarship. The fundamental structuring of our experience, our ways of knowing, *cannot* be changed no matter how good our intentions. The critical literature demonstrates that white male academics must defer to others' epistemology, others' accounts of subordination. This approach means being skeptical about the idea that white males can transform their habits of thought, and thus transform themselves. However, it is the only manner in which white male academics can fully recognize the dignity and autonomy of other groups' perspectives.

Richard Devlin questions the legitimacy of male involvement in feminism in the following way: "[C]an or should a man, even if he is profeminist, attempt to raise concerns that are of particular relevance to women? Does he experience enough, can he know enough to carry through the project without harming those he hopes to encourage and support?"<sup>36</sup> Devlin focuses on the problems which accompany feminist "consciousness-raising" in law teaching (for professors of either sex) as they arose in a legal writing course that he taught. In the piece, he reveals his perplexity at his students' varied reactions of hostility, panic, or indifference to his chosen teaching material (an exercise requiring the writing of a defense or prosecution brief for a hypothetical rape case), but it is as a collateral matter that he touches on the legitimacy of his own (male) teaching of the subject. He closes with the sobering suggestion that "it may not be possible to construct a progressive legal education that does not intensify the pain that already saturates contemporary legal pedagogy."<sup>37</sup>

Devlin may have mistaken his students' anger for pain, passing over the possibility that both his maleness and the male manner in which he taught the material probably contributed to the failure of the course.<sup>38</sup> These problems in turn stem from his epistemological situation as a male teacher trying to teach issues of gender subordination in a diverse classroom: he was just plain *unable* to foresee the friction and harm his approach would cause. This setting presents formidable problems of translation to be resolved in order to achieve communication and trust notwithstanding one's good intentions, as Devlin himself notes. His article is a powerful as a chronicle of what can go

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are not necessarily gender or race dependent but that white men may have a vested interest in perpetuating them. *Id.* at 1033 n.1. He also indicates that these habits may be changed. *Id.* at 1035. I agree that these modes of thought extend across race and gender lines, but I think that white males may have more than just a vested interest in these modes; I think they can also be characterized as having an *epistemological* commitment to them.

36. Devlin, *supra* note 29, at 228.

37. *Id.* at 229.

38. See Herman, *supra* note 29. Herman argues that Devlin's course failed because of Devlin's intellectual arrogance, thinking he knew more about feminism than his female students and imposing it on them without being sufficiently prepared or familiar with it. For another account of well-intentioned teaching gone awry, see David Simon Sokolow, *From Kurosawa to (Duncan) Kennedy: The Lessons of Rashomon for Current Legal Education*, 1991 WIS. L. REV. 969.

catastrophically wrong with well-intentioned white male scholarship on these issues.

It seems to me, however, that if white male academics accept the feminist and critical race theory epistemological argument, they can learn about the perspectives of the oppressed from the oppressed themselves—the white male’s privileged role in the formation of oppressed perspectives can be acknowledged—and in turn apply these perspectives on oppression to their scholarship in ways which improve its accuracy and usefulness.<sup>39</sup>

This claim should not be mistaken for a defense of existing white male legal scholarship on oppression. And while it may seem like the same point about well-intentioned liberal scholarship made another way, I think it differs in crucial ways from an argument about intention. Many progressive men seem to think that the entire matter is answered by attitude or intention: that once they have adopted a feminist or anti-racist “stance” and proceed with good intention, then their analysis—correct and objective—simply flows from their intentions. Such an argument is fundamentally flawed, both as an analytic point of departure and as a basis for conducting scholarship. I think that a very different approach must be taken. Adopting a “bottom-up” rather than the conventional “top-down”<sup>40</sup> epistemological analysis means that white male scholars must engage in scholarship on oppression by “looking to the bottom”<sup>41</sup>—learning, by careful and respectful study, a perspective on the particular form of subordination one wishes to study from those who actually live that perspective rather than attempting to master it in the abstract. This means adopting a whole new theory of the relation of experience to knowledge, and rejecting the notion of “authoritative” interpretation. It means rejecting conventional models of mastery and expertise for something more partial. Above all it means restructuring one’s understanding of objectivity, recognizing both the partiality of one’s own perspective and the authenticity of the plurality of perspectives “from below.” This transformation entails adopting a different view of one’s scholarly role; one should strive to become less the prevailing neutral expert (Kingsfield) or master theoretician (Kennedy)<sup>42</sup> than an interpretivist, promoting the exploration of *someone else’s* (duly attributed) perspective and insights in one’s scholarship. Of course the progressive white male legal scholar may also serve the purpose of “lending” legitimacy to

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39. Such a process is suggested by the title of a recent article, Derrick Bell & Erin Edmonds, *Students as Teachers, Teachers as Learners*, 91 MICH. L. REV. 2025 (1993).

40. Crenshaw, *supra* note 9, at 151, 166-67.

41. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

[T]hose who have experienced discrimination speak with a special voice to which we should listen. *Looking to the bottom*—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.

*Id.* (emphasis added).

42. Catherine W. Hantzis, *Kingsfield and Kennedy: Reappraising the Male Models of Law School Teaching*, 38 J. LEGAL EDUC. 155 (1988).

subordinated perspectives where systemic racism and sexism otherwise might deny that legitimacy.<sup>43</sup>

### III. TOWARD A SITUATED SCHOLARSHIP: PERSPECTIVAL PLURALISM

I want to outline further the relation between embodied experience and scholarship which prompts the concern about the epistemological legitimacy of white male legal scholarship. The question arises: must we have a representative of each social group engaging in scholarship in order to fairly represent that group's interests or can others accurately articulate and represent its interests?

To understand the question, one must look at the arguments commonly advanced for faculty diversity in law schools. One is a fairness argument, which holds that faculty positions in law schools are positions of power and political significance, and that democratic theory mandates that the allocation of positions be related fairly to the racial and gender composition of society. This argument essentially promotes nondiscrimination in faculty hiring, though it also promotes participatory self-government, and the availability of role models for all students from marginalized or underrepresented groups.<sup>44</sup> The theory is that members of a group whose political interests are at stake should have their participation in society's conversation concerning those interests guaranteed. In participating, members of these groups achieve a higher degree of autonomy and self-definition.<sup>45</sup>

This fairness argument resembles an application to the legal academy of the "representation reinforcing" theory of judicial review.<sup>46</sup> It is an argument that nondiscrimination entitlements should be applied in such a way as to remove obstacles to democratic participation, and that people should have representation in institutions that have power over their lives.<sup>47</sup> It is believed that distributive justice is served by this approach within the confines of the legal academy, and that the overall intellectual quality of the legal academy is improved.

A second argument, more important for my analysis, is an epistemological argument. It is based on the premise that knowledge is neither universal nor

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43. This loan of legitimacy must not be defended uncritically by white male scholars, but must itself be examined and acknowledged as part of one's scholarly role.

44. On "compensatory justice" versus role-modeling, see Anita Allen, *On Being A Role Model*, 6 BERKELEY WOMEN'S L.J. 22, 33 (1990-91). Role-modeling is actually a third and separate justification for diversity.

45. This dynamic is part of the concern of Richard F. Devlin, *Towards An/other Legal Education: Some Critical and Tentative Proposals to Confront the Racism of Modern Legal Education*, 38 U. NEW BRUNSWICK L.J. 89 (1989) (arguing for affirmative action admissions for First Nations students in Canada). The importance of community deliberation and self-government is also (re)emphasized by neo-Aristotelian democratic theorists like Charles Taylor. See, TAYLOR, *infra* note 94.

46. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 87 (1980).

47. Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 713.

categorical but situated, embodied, and plurivocal.<sup>48</sup> Improving our knowledge of the forms and causes of oppression depends upon inclusion of subordinated discourse, untold stories. Members of subordinated groups necessarily bring to scholarly conversation<sup>49</sup> fresh, ordinarily silenced voices, which may improve that conversation.<sup>50</sup> It is sometimes argued that conventional epistemology must own up to the exclusion and subordination of “outsider” discourses, which make the coherence of the story told by conventional epistemology possible. The aim is not to include outsider voices in scholarship in order to *perfect* a knowledge still understood as universal and monolithic, but rather to create intellectual space in our scholarship for competing truths, coexisting and contradictory, vying for dominance and demanding an audience.

One implication of the epistemological argument for scholarly diversity is that we should develop alternate forms of legal scholarship, perhaps something as obvious as a new emphasis on community legal issues and clinical practice, or on law for the disadvantaged. A stronger claim can also be made: inclusion of marginalized voices could accomplish a transformation or reconstruction of the existing, dominant epistemological position in the mainstream legal academy. Duncan Kennedy, for example, has argued that law professors are engaged in the production of ideology. Kennedy argues that disadvantaged groups must gain access to the means of that production so as to produce their own competing ideologies.<sup>51</sup> Collapsing knowledge into power, such advocates of diversity argue that they can fundamentally alter both knowledge and power by democratizing their sources and applications.

An obvious way in which this democratization might be accomplished (and this is where it gets especially sticky for white male legal scholars) is the

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48. Although one may perhaps still claim a local “objectivity” in Donna Haraway’s sense of the term. See DONNA J. HARAWAY, *Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective*, in SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE 183 (1991).

49. Diversity may also bring to legal academia the idea that conversation rather than competition is a desirable format for critical inquiry. Several feminist and critical race scholars have argued for a more supportive, conversational pedagogy to replace the “Socratic” method. See, e.g., Crenshaw, *supra* note 4; Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or the Fem-Crits Go to Law School*, 38 J. LEGAL EDUC. 61, 67 (1988) (arguing that feminist teachers must challenge traditional notions of classroom authority by “sharing leadership in the classroom, replacing competition with an atmosphere of trust and cooperation, integrating affective and intellectual learning, and by using personal experience as a valid source of knowledge”).

50. Advocates of diversity are frequently accused of making “essentialist” claims. That is, they are criticized for making claims that all people of color or all women have a shared and unique perspective on social relations simply by virtue of being people of color and/or women. Interesting critiques of essentialism can be found in Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Joan Chalmers Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296. See my discussion of race and gender essentialism *infra* note 77.

On diversity as a factor contributing to academic freedom and excellence, see Bell, *supra* note 23. Bell’s point is made when one considers that a fine article like Cheryl I. Harris’ *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993), might not have appeared in the Harvard Law Review twenty years ago when there was less pressure from the movement for diversity.

51. Kennedy, *supra* note 34.

implementation of new methods of critical inquiry. For example, "storytelling"<sup>52</sup> and consciousness raising<sup>53</sup> with respect to experiences of oppression are central to the methods of feminist and critical race theory. Narrating an individual experience or the historical experiences of the social group to which you belong can be a powerful critical and scholarly tool.<sup>54</sup> These new experiential, embodied modes of conducting scholarship sharpen the questions about legitimacy and white male legal scholarship on oppression. What can whites write about the experiences of people of color, men about women, etc., when these experiences will never be truly theirs? Can whites write only about their own experiences vis-à-vis people of color, men vis-à-vis women, straights vis-à-vis gays and lesbians, etc.? Must a scholar embody *all* forms of oppression (for example, based on sexual orientation, race, sex, etc.) in order to legitimately address oppression as a scholarly topic, or is it sufficient to have experienced one form of oppression from which one can build bridges to knowledge of other forms?<sup>55</sup>

Narrative scholarship rooted in a scholar's concrete experience (of embodiment, or of race or sex discrimination, for example) might transform some of the entrenched conservative "habits of thought" (oppositional

52. Much critical race theory and feminist writing has been done in narrative form in an attempt to rehabilitate the subjective and experiential voice. See, e.g., NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW (David R. Papke ed., 1991); Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683 (1992); *Pedagogy of Narrative: A Symposium*, 40 J. LEGAL EDUC. 1 (1990); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989).

For a recent attempt at constructing standards of evaluation for storytelling scholarship, see Daniel Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993). Richard Delgado responds in *On Telling Stories In School: A Response to Farber and Sherry*, 46 VAND. L. REV. 665 (1993). Also, on standards, see Abrams, *supra* note 9; Jane B. Baron, *The Many Promises of Storytelling in Law*, 23 RUTGERS L.J. 79 (1991) (book review). I do not engage the evaluation debate on substantive grounds in this paper. My point is that narrative feminist and critical race theory critiques have become a part of accepted scholarly legal discourse and must be taken seriously by scholars, whether one agrees with them or not.

53. Bartlett, *supra* note 25, at 843-67.

54. See DERRICK BELL, *AND WE ARE NOT SAVED* (1987); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355 (1989); Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986); Kathleen A. Lahey, ". . . Until Women Themselves Have Told All That They Have To Tell . . .", 23 OSGOOD HALL L.J. 519 (1985); Patricia J. Williams, *On Being the Object of Property*, 14 SIGNS 5 (1988).

It must be noted that some of the early claims of the transformative power of storytelling are now being qualified even by some of storytelling's most devoted practitioners. See generally Abrams, *supra* note 9; Baron, *supra* note 52; Farber & Sherry, *supra* note 52; Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411 (1993); Richard Delgado, Law and Narrative Panel, AALS Annual Meeting (January 8, 1994) (audio cassette on file with AALS).

Of course narrative works for the establishment too, and that makes it a double-edged sword. See, e.g., MICKEY KAUS, *THE END OF EQUALITY* 176 (1992) ("How did Ronald Reagan get elected governor and then president? By telling anecdotes about welfare."); Farber & Sherry, *supra* note 52, at 840 n.159 ("Indeed President Reagan was often accused of 'government by anecdote'").

55. See generally Abrams, *supra* note 9; Baron, *supra* note 52; Jerome McCristal Culp, Jr., *You Can Take Them to Water But You Can't Make Them Drink: Black Legal Scholarship and White Legal Scholars*, 1992 U. ILL. L. REV. 1021; Farber & Sherry, *supra* note 52 (arguing that stories only translate for mainstream scholars if related to an aspect of insider experience with the result that narrative per se is not always transformative); Symposium, *Race Consciousness and Legal Scholarship*, 1992 U. ILL. L. REV. 1021.

categories, abstractions, mechanistic individualism, and the imperial mindset)<sup>56</sup> which have been used to render unintelligible those speaking from the margins. It is not clear that this is an obstacle that white male scholars can surmount. If white male scholars have no experience of oppression, then our opportunities to rely on oppression narratives in our scholarship are sharply curtailed. Whether one may introduce *others'* concrete experience through "affinity" with that experience, building perhaps on one's own less dramatic experience of discrimination, is an open question and one on which the enterprise of white male scholarship turns. Whether there is room for both kinds of attempts in our scholarship, those from concrete experience and those from affinity with that experience, involves making some kind of argument for epistemological pluralism.

Both arguments for diversity, the nondiscrimination argument and the epistemology argument sketched in the previous Section, rely problematically on a liberal theory of interest-group pluralism. This theory holds that subordinated voices, perspectives, and experiences may co-exist constructively with those of the dominant group in legal scholarship, and that something is gained simply by virtue of their inclusion. But pluralism is, in principle, neutral as to voice; beyond simple inclusion of outsider perspectives, it does not ask the more difficult questions about who can responsibly study and interpret the experience of subordination.<sup>57</sup> Mari Matsuda sees in this issue the "patronage dilemma": outsider scholars run the dual risk of being either dismissed or, once included, of having their voices appropriated by dominant group scholars.<sup>58</sup>

It is likely that the introduction of a small number of marginalized voices will be tolerated only because they are unlikely to unseat the dominant group or fundamentally challenge its perspective. The dominant group remains unwilling to admit different groups in numbers sufficient to facilitate real

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56. Shane, *supra* note 35, at 1040. The habits of thought Shane analyzes are used by members of the dominant group (white men) to filter claims made about discrimination or subordination by people whose voices and experiences do not define the intellectual/political/social norm so that these claims become literally *incredible*, that is, they do not fit with the experiences and understandings of the dominant group.

57. The commitment to pluralism poses other problems for faculty hiring, notably those of tokenism and unfair application of the merit principle. Standards applied to faculty hiring, like any standards, are clearly culturally and ideologically bounded, and can operate to exclude people. A number of questions arise: What constitutes achievement relevant to faculty hiring? Why are members of subordinated groups who do meet the standard nonetheless frequently passed over? Are quotas a workable response? Does a simple strategy of inclusion leave the standards defined by, and appropriate to, the dominant group intact? What is clear is that the debate over appropriate standards should not be conducted in the absence of those most likely to be affected by them.

Tokenism is a continuing problem for diversity theory. See generally *Bell-Delgado Survey*, *supra* note 17; Chused, *supra* note 17. Many schools have recruited a token number of white women and men and women of color, and do not recruit more. This is a serious impediment to the development of an environment conducive to full and equal participation by faculty from subordinated groups.

58. Matsuda argues that these dangers can ultimately be avoided, and that scholars from disadvantaged groups must resist assimilation and academic complacency. See Mari J. Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1 (1988).

change.<sup>59</sup> And the voices of the new groups may be appropriated by members of the old—the bandwagon problem.

The broad goals of faculty diversity—numerical representation, the availability of role models, and the production of an alternative ideology and epistemology—remain only partially achieved. None of these aims is likely to be significantly advanced during the current contraction of law faculty hiring. The commitment to pluralism must be examined, and the problems of perspective and identity which it overlooks taken seriously. This task imposes a greater obligation on progressive white male legal scholars to engage in scholarship “looking to the bottom,” and makes the question of how they may do that more pressing. I now turn to a more precise discussion of the claims made about epistemological perspective by feminist theory and critical race theory in relation to legal scholarship.

#### IV. FEMINIST STANDPOINT EPISTEMOLOGY, CRITICAL RACE THEORY, AND EMBODIMENT

One of the modes of critical inquiry which make white male scholarship problematic is the “standpoint epistemologies”<sup>60</sup> approach described by feminist philosophers. Sandra Harding, for example, claims that no position

59. Marina Angel explains that

If only one woman is tenured and she is a “Queen Bee,” then she is unlikely to be an advocate for tenuring other women. If she has a feminist consciousness, her opinions can be easily dismissed. If one of each exists, they cancel each other out. A critical mass of more than four.

Marina Angel, *Women in Legal Education: What it's Like to be Part of a Perpetual First Wave or the Case of the Disappearing Woman*, 61 TEMP. L. REV. 799, 829-30 (1988).

Tokenism also compounds ordinary teaching problems for those members of subordinated groups who manage to be hired; their obligations beyond teaching and research, for example, community responsibilities, counselling students, and committees, are widely reported in the surveys to be more onerous for them than for white male colleagues and to have a crippling effect on faculty performance and promotion. Mentoring by senior faculty is less likely to be available or offered. Support mechanisms to compensate for these disadvantages are often not available. Deborah Jones Merritt suggests that women faculty, particularly women of color, are disproportionately shunted into unrewarding or unpopular teaching assignments. Deborah Jones Merritt & Barbara F. Reskin, *Hidden Bias of Law School Faculties*, *Legal Times*, August 31, 1992, at 20. The non-tenure-track legal writing instructorship is, according to one survey, increasingly female, undervalued, and lacking in job security. Chused, *supra* note 17. Some schools resist even tokenism; one school canvassed in Chused's 1988 survey had not hired even one woman, several in 1994 had not hired a single minority professor, and as of 1994 Harvard Law School had still not voted tenure to any black women.

The empirical surveys are sobering: under-represented groups are not fairly hired, supported, or promoted in law schools. The statistics suggest that the supposed twin problems of a small applicant pool and a scarcity of jobs do not explain the differentials. Chused, *supra* note 17; *Bell-Delgado Survey*, *supra* note 17.

60. Sandra Harding has written extensively about this subject. See HARDING, *SCIENCE QUESTION*, *supra* note 11, at 136-62; HARDING, *WHOSE SCIENCE?*, *supra* note 11; see also Sandra Harding, *Feminism, Science, and the Anti-Enlightenment Critiques*, in *FEMINISM/POSTMODERNISM* (Linda Nicholson ed., 1990). For more recent work, see Harding, *Re-Thinking Standpoint Epistemology: What is “Strong Objectivity”?*, in *FEMINIST EPISTEMOLOGIES* (Linda Alcoff & Elizabeth Potter eds., 1994). Harding is concerned primarily with developing a feminist scientific objectivity, but her views have been widely applied in social science and the humanities. See also, JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX”* (1993); HARAWAY, *supra* note 48, at 183; NANCY C. M. HARTSOCK, *MONEY, SEX, AND POWER: TOWARD A FEMINIST HISTORICAL MATERIALISM* 231-47 (1983).

of epistemological universality is possible; she argues that knowing cannot be done abstractly or absolutely, but only from a multiplicity of embodied, partial perspectives. Her more controversial claim, conceptually distinct from the first claim, is that knowledge of the mechanisms of subordination can best be gained from below, that is, by those occupying a subjugated social location, by those who *embody* subjugation.

The theory is that those in the dominant social position produce—can *only* produce—distorted explanations of social relations, particularly of subordination. This is because the dominant group's knowledge of subordination is not direct, but instead abstract and disembodied, mediated by privilege and benefit. The social experience of the subjugated, by virtue of being in direct, unmediated relation to subordination, facilitates less distorted explanations of subordination.<sup>61</sup> Carrie Menkel-Meadow similarly argues that women have a more recent memory of the bottom of hierarchy than do men, and that “experience of domination does sensitize one to the pain of others.”<sup>62</sup> Margaret Radin argues that “the commitment to perspectivism finds its concrete payoff in the perspective of feminism and in the perspectives of oppressed people generally.”<sup>63</sup> This position problematizes white male scholarship.<sup>64</sup>

Harding and others argue that epistemologies are not universal ways of validating knowledge claims, but rather are “justificatory strategies” for empirical claims. Feminist standpoint epistemologies are attempts to justify feminist empirical claims about biases or distortions inherent in the dominant perspective. There is a fine distinction between the justificatory and the universalizing positions posited by feminist standpoint, but it is a distinction which theorists like Harding and Donna Haraway would like to preserve. On the one hand, they wish to promote “successor science” projects, that is, feminist science capable of making truth-claims of the same order as “male” post-Enlightenment science. On the other hand, they argue that such universal truths are reductive and incompatible with their own perspectival,

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61. This position is quite complex. Harding notes that its objectifying tendency of offering “one true story” of social relations, and its location of epistemological validity in the experience of the subject, contradict the insights of feminist postmodernism. HARDING, *SCIENCE QUESTION*, *supra* note 11, at 136-62. Feminist postmodernism eschews an ultimate objectivity, preferring relativism, and argues that the subject is constructed, an artifact in which ultimate meaning cannot be located. *See also*, FEMINISM AS CRITIQUE (Seyla Benhabib & Drucilla Cornell eds., 1987); ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 370 (1983) (discussing how subordinated position may yield “less distorted ways of understanding the world”); Linda Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 *SIGNS* 405 (1988); Deborah L. Rhode, *Feminist Critical Theories*, 42 *STAN. L. REV.* 617 (1990).

62. Menkel-Meadow, *supra* note 30, at 82 (footnote omitted). On “the epistemology of exclusion,” see Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 *U. MIAMI L. REV.* 29, 43-48 (1987).

63. Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 *S. CAL. L. REV.* 1699, 1720 (1990).

64. Of course, it is not certain that this problem applies to *all* white men in *all* situations. Human rights scholarship by Elie Wiesel, for example, would probably not pose the same difficulties of epistemological position as the same scholarship if I had authored it. Again, one must also avoid the tendency to essentialize white maleness. *See supra* note 5.

epistemological model of embodiment. They also wish, however, to maintain the transformative account offered by postmodern feminism; that is, that the Enlightenment model of science (predictive, controlling and objectifying) can be replaced by subjectifying and emancipatory methods of knowing. The best approximation of this which can be offered with the tools now available to us, such writers argue, is a local objectivity—a science sensitive to perspective and social position. It is not relativist, but committed to making claims of only local and not universal objectivity.<sup>65</sup>

It is in this sense that feminist theory claims for subordinated groups a privileged epistemological position which poses a problem for white male scholarship. Clearly, from this perspective, a historically “male” epistemology which universalizes, that is, seeks knowledge without acknowledging the knower’s embodiment or social position, is distorted. Indeed, standing conventional epistemology on its head, feminist theory claims that patriarchal epistemology necessarily lacks objectivity, that it is “always already” cut off from the possibility of objectivity because of male privilege and male disembodiment. It is self-evidently problematic for a white male academic to attempt to engage in dispassionate scholarly inquiry into subordination and law. Dispassion is itself the problem. It is the result of a disembodied epistemological perspective. As Nancy Hartsock has argued, “power relations are less visible to those who are in a position to dominate others.”<sup>66</sup> Feminist standpoint epistemologies posit the female experience of embodiment as the foundation of valid social explanation, with narrative as its method. Because neither direct experience of gender subordination nor female embodiment is available to male scholars<sup>67</sup>, interpreting gender subordination from the white male experience is not possible. A coherent argument can be made, proceeding from this epistemological position, that male interpretation of gender subordination is always second-hand, uninformed, and illegitimate.<sup>68</sup>

65. See HARAWAY, *supra* note 48, at 187-93.

66. Nancy C. M. Hartsock, *Foucault on Power: A Theory for Women?*, in FEMINISM/POSTMODERNISM, *supra* note 60, at 157. Among others, Richard Delgado has made similar arguments. Delgado, *Imperial Scholar*, *supra* note 10, at 497. This is, of course, a controversial claim: the subordinated may *not* have a good grasp of the subtle structures by which the subordinating maintain dominance. They may, however, have a superior understanding of being dominated. These are not the same thing, and the difference should be noted. See Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2233 (1992) (arguing that both the perspective of the master and the slave must be understood).

67. Clearly men do have an opportunity to *observe* (or even participate in) gender subordination in our relationships with mothers, sisters, partners, etc., but we can never internalize the actual *experience* of gender subordination in the same way. For men are, directly or indirectly, *beneficiaries* of gender subordination. Benefit to the observer surely distorts one’s knowledge of the phenomenon.

68. There is some debate among theorists about the relationship of men of color to this process; some argue that their experience of racial subordination is ontologically similar to gender subordination and puts them in a position to comprehend gender subordination. Others say that this argument is reductive, and that the privilege of patriarchy extends across racial boundaries. See generally HARDING, SCIENCE QUESTION, *supra* note 11, at 163-96 (comparing African and feminine world views). See also Kimberlé W. Crenshaw, *Whose Story Is It Anyway? Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, EN-GENDERING POWER 402 (Toni Morrison ed., 1992) (discussing location of black women at the intersection of the paradigms of gender and race domination).

Critical race scholarship<sup>69</sup> makes similar claims about the epistemological advantage of people of color in explaining racial subordination. Kimberlé Crenshaw has argued for the epistemological primacy of an embodied, “bottom-up” minority standpoint.<sup>70</sup> Richard Delgado has argued that whites are inferior observers of social subordination, “[unable] to share the values, desires and perspectives of the population whose rights are under consideration,” and that whites suffer from an essential “failure of empathy,” an insurmountable schism between interpretation and experience that commitment alone cannot repair.<sup>71</sup> Mari Matsuda writes that “the victims of racial oppression have distinct normative insights” and that “those who are oppressed in the present world can speak most eloquently of another one.”<sup>72</sup> Derrick Bell has argued that “race can [be an important positive qualification] in filling a teaching position intended to interpret . . . the impact of racial discrimination on the law and lawyering.”<sup>73</sup>

Critical race theory then, like feminist theory, can ground the claim that those members of subordinated groups who achieve “critical consciousness”<sup>74</sup> can best teach and write about their subordination because only they embody and experience it and therefore truly understand it. Other intellectual movements have put forward a stronger claim, known as a claim of “identity politics,”<sup>75</sup> that all members of the group possess this privileged perspective. Relying on a dubious essentialism, identity politics seeks to universalize the perspective based on group identity, to attribute a common perspective on subordination to all members of a group that share a history of subordination. The notion of a feminist standpoint too, as articulated by feminist scholars like Catharine MacKinnon and Sandra Harding, may posit an essentialism of gender, making the same sort of universal explanatory claims about social relations that feminist theory has criticized in patriarchal thinking.<sup>76</sup>

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69. A recent example of critical race theory scholarship is MARI MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993) (essays advocating the regulation of hate speech, grounded in the particular experiences of minority authors). See also, *CRITICAL RACE THEORY READER* (Richard Delgado ed., 1995); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) (critique expressed through the subjective experience of a black woman law professor); Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

70. Crenshaw, *supra* note 9, at 151, 166-7.

71. Delgado, *Imperial Scholar*, *supra* note 10, at 4.

72. Matsuda, *supra* note 41, at 326, 346.

73. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1746 (1989) (citing Derrick Bell, *A Question of Credentials*, HARV. L. REC., Sept. 17, 1982, at 14).

74. Matsuda, *supra* note 18, at 1777-82 (discussing the problems that beset the development of critical consciousness from “false” consciousness among oppressed groups.)

75. For a discussion of identity politics, see, e.g., Kimberlé W. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

76. Catharine MacKinnon, while not a standpoint theorist per se, does argue convincingly that there is one common female experience: oppression. Catharine A. MacKinnon, *From Practice to Theory, or What Is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13 (1991). Martha Minow warns against this tendency in *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 49-53 (1988). Angela Harris criticizes Catharine MacKinnon for gender essentialism (taking gender as the linear explanation for oppression, to the exclusion of race) in Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*,

Both feminist standpoint epistemologies and critical race theory experiential epistemologies have been criticized for positing gender or race essentialism.<sup>77</sup> Deborah Rhode, for example, is critical of essentialist theories of feminism like MacKinnon's for their failure to account for the diversity of women's perspectives without privileging one of them.<sup>78</sup> This is the "false consciousness" problem: how does one account for the incommensurability of women's views on gender oppression? The idea of a "women's point of view," indeed the idea of "woman" itself, reduces and essentializes women's differences. Ironically, Woman, in standpoint theories, replaces Man as the fixed transcendental subject. On the other hand, the alternative posed by a postmodern feminism that posits a relativist, socially constructed theory of knowledge, while initially attractive because it allows a critique of universal forms of patriarchal knowledge, provides no sure way to document women's oppression.<sup>79</sup> Rhode favors a middle ground of practical reasoning, experiential analysis, and narrative style, where knowledge is premised on embodiment and built from the ground up.<sup>80</sup> Woman as subject is continually exposed to critical reappraisal and transformation.

Katharine Bartlett sketches a similar modification of standpoint theory. Likewise critical of the essentializing effects of standpoint feminism and the disabling relativism of postmodern feminism, Bartlett suggests the middle ground of "positionality."<sup>81</sup> The goal is truth from below, but a truth that is necessarily situated and partial. Thus men and women have different truths, different experiences of embodiment, neither of which is total or final.<sup>82</sup>

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42 STAN. L. REV. 581, 590-601 (1990). For another critical look at MacKinnon's essentialism, see Marlee Kline, *Race, Racism and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115, 134-44 (1989); Katharine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 873-74 (1990).

77. A critique of essentialism in critical race theory can be found in Randall L. Kennedy's *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (critiquing of what Kennedy calls critical race theory's claim of a privileged minority perspective or "racial distinctiveness" in producing scholarship); on gender essentialism, see Harris, *supra* note 76; and Kline, *supra* note 76. Responses critical of Randall Kennedy by various critical race theory scholars are in *Colloquy*, 103 HARV. L. REV. 1844 (1990). See also Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296 (1991) (defending most critical race theory from Kennedy's charge).

Some have argued in response that the notion of voice does not entail essentialism; rather, as Mari Matsuda says the claim is often the more limited one that "outsider perspectives" should be included, that "other" voices coming from other experiences improves the conversation. Matsuda, *supra* note 58, at 6-10. See also Robin Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864, 1865 (1990) ("by making [minority] perspectives explicit, we do not claim a privileged status for our experience. Instead we offer an essential rejoinder to the 'false universalism' prevalent in the myth of equality of opportunity"); Allan C. Hutchinson, *Identity Crisis: The Politics of Interpretation*, 26 NEW ENG. L. REV. 1173, 1213 (1992) ("The oppressed do not have intrinsic values simply by the fact of their membership in an oppressed group. What they do have is a strong political claim to be heard: victims are entitled to insist on others' attention not because they can offer virtue to a fallen world, but because they are experts on their own lives").

78. Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 618-24 (1990).

79. *Id.* at 620.

80. *Id.* at 621.

81. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 872-7 (1990).

82. *Id.* at 880-81.

Knowledge requires self-discipline, self-criticism, and effort to extend one's perspective, "stretching [one's] imagination to [identify and] understand the perspectives of others," permitting "the appreciation of plural truths."<sup>83</sup>

These modifications by Rhode and Bartlett appear to me to alter only marginally the notion of "local objectivity" described by Donna Haraway and Sandra Harding. Haraway is quite explicit that her goal is to tread the middle ground between objectivism and relativism.<sup>84</sup> However, Bartlett further claims that positionality reveals "human commonality" and builds a foundation for further shared knowledge.<sup>85</sup> This rather sanguine vision of commonality is coupled with Bartlett's view—compelled by her commitment to positionality—that men and women embody different truths, neither of which is final. I think that both her vision and her view are deficient in ways that are central to a feminist theory of oppression. With no privileged epistemological perspective on oppression, she can provide no definitive account of patriarchal oppression of women. The commonality she posits would, I fear, only erase the specificity of women's oppression.

For what I take to be similar reasons, Mari Matsuda wants to maintain, at least for strategic purposes, an emphasis on group identity and shared perspective on oppression.<sup>86</sup> This is the kind of account offered by standpoint feminism. Anti-essentialist critiques of standpoint and critical race theory are theoretically attractive, but risk deconstructing group identity until subordination no longer exists.<sup>87</sup> There is real epistemological value in perspectives of the oppressed. The embodied experience of oppression is real, and offers explanatory power. Matsuda cautions, however, that the perspectives of the oppressed are not a sure source of wisdom; the "false consciousness" of oppressed groups is a real problem: "subordination can obscure as well as illuminate self-knowledge."<sup>88</sup> She argues that consciousness-raising can foster critical consciousness of oppression which provides an essential critique of domination inaccessible to the mainstream perspective.

Matsuda has also written, however, that one should not adopt "hierarchies of pain" or "superiorities of difference" that grant license to study issues of

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83. *Id.* at 882, 884.

84. HARAWAY, *supra* note 48, at 191.

85. Bartlett, *supra* note 76, at 886. Bartlett claims that positionality judges realities by internal rather than external criteria, and thus escapes both essentialism and relativism. She approvingly quotes Charles Taylor, defining social truths as "those . . . which on critical reflection . . . make the best sense of our lives." *Id.* at 884 (quoting CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 57 (1989)). The problem for feminism, which I do not think she confronts in her account, is who the "we" is who are defining what is "best."

86. Matsuda, *supra* note 18. Matsuda here is suggesting "strategic essentialism", a phrase popularized by social and literary theorist Gayatri Spivak. It is important to note that though the category "woman" and "African American" are socially constructed, they nonetheless carry very concrete consequences, like discrimination, violence, and hatred.

87. *Id.* at 1775. See also, Matsuda, *supra* note 15.

88. Matsuda, *supra* note 18, at 1777.

subordination only to people of color or white women. She suggests that it is better to have white (presumably sometimes white and male) colleagues writing sympathetically about oppression than to have no one do it, where no member of a subordinate "outsider" group is available.<sup>89</sup> This is obviously only a partial solution, but identity politics does not offer a better one, as the critiques of gender and race essentialism demonstrate.<sup>90</sup>

Affinity, rather than identity, may be a more reliable axis along which to organize a coalition.<sup>91</sup> Affinity signifies one's identification with the dominant political concerns of a marginalized group, and sensitivity to the historical and political fact of that marginalization. Affinity, with this meaning, does not attach merely by virtue of group membership and may indeed be cultivated by white male fellow travelers. White male affinity, however, clearly occupies a lower rung on the epistemological ladder than does female or minority experience of social subordination.

#### V. BRIDGING STANDPOINT: EMBRACING EMBODIMENT

If one takes seriously, as one must, the feminist and critical race theory critiques, the question which arises for white male scholarship is one of epistemology rather than of scholarly attitude. Is it possible to bridge the differences between the dominant standpoint of disembodiment and the subordinate standpoint of embodiment? Would such bridging allow someone working from the "distorted" dominant perspective to interpret the "more accurate" subordinated perspective? How does a white male scholar strengthen and develop his affinity with these subordinated perspectives?

I think that such a bridge can be built. The legitimacy of white male scholarship, however, must be tested by the approval of the groups whose subordination one is interpreting in one's scholarship. If these groups voice objections to such scholarship, in particular instances or in general, then the white male scholar must reconsider whether he may legitimately proceed. This is the direct implication of validating perspectival, embodied epistemology; the subordinated groups whose perspectives are being defined have the last word on legitimacy. A scholar cannot proceed in the face of objection by the subjects of the scholarly inquiry and still maintain the accountability that is central to the new approach of honoring epistemological perspective. There will be, of course, a wide range of opinions within subordinated groups about what is or is not legitimate. To some extent, one must rely on a subjective assessment as to which of the group voices appears to be itself "legitimate," that is, an authentic, committed voice for the interests of the group in question.<sup>92</sup>

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89. Matsuda, *supra* note 58, at 13.

90. See Harris, *supra* note 76; Kennedy, *supra* note 77; Kline, *supra* note 76.

91. Donna Haraway, *A Manifesto for Cyborgs*, in *FEMINISM/POSTMODERNISM*, *supra* note 60, at 197.

92. I am reluctant to suggest a subjective assessment of a group's legitimacy because of the risk of relying on white male, liberal sensibilities where those sensibilities may be most conflicted. This difficulty

One way to bridge standpoint is to engage in experiential, collaborative scholarship; to reconstruct our conversation about education so that one is engaging in scholarship for the empowerment of others. For example, the white male scholar can analyze sexual assault in criminal law scholarship in a way that validates and is sympathetic to women's experience. A white male, pro-feminist scholar in this setting is challenged to de-center his own scholarly authority. He must defer to the perspective of those who experience subordination, "sharing leadership in the classroom, replacing competition with an atmosphere of trust and cooperation, integrating affective and intellectual learning, and . . . using personal experience as a valid source of knowledge"<sup>93</sup> to challenge the traditional conventions of authoritative interpretation in scholarship. De-centering one's authority in scholarship could mean citing primarily feminist materials, deferring to women as the experts on matters within their experience, and having women's experience dictate the structure of one's inquiry. The white male scholar could promote consciousness of the ways in which sexual assault law has buttressed white male interests (interests shared by the professor) and critique that relation of law to white male self-interest.

Of course, the de-centering of one's authority requires much more than listening to others. De-centering requires not only changing research methods and sources, but also deferring to others' epistemological authority. White male legal scholars could use the insights of the philosophy of social science to create "a sociology that does not transform those it studies into objects but preserves in its analytic procedures the presence of the subject as actor and experienter."<sup>94</sup> This description neatly summarizes the central principle of interpretivist social science: preserving the subjectivity of those groups being studied is essential to the accuracy of the science. In scholarship interpreting law and subordination, this suggests that the conventional, disembodied abstraction of scholarly neutrality may be methodologically unsound.

An alternative is to construct a scholarship which is *for* rather than *about* these subordinated groups, one which does not locate authoritative accounts in the inquirer.<sup>95</sup> Dorothy Smith argues that if the inquirer and the subjects

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is the focus of another paper. It is important to note, however, that this is a tough problem: the "real interests" of a subordinated group will rarely be determinable even within the group. This of course raises the problem of essentialism again. See Abrams, *supra* note 9, at 1031-36 (the test is whether a narrative advances interests of the group as a whole, e.g., women, African-Americans, etc., a criterion which is obviously difficult to evaluate); Matsuda, *supra* note 18, at 1776.

93. Menkel-Meadow, *supra* note 30, at 80. These four principles, although discussed in general by Menkel-Meadow as basic feminist teaching techniques, can be employed by white male academics as well. It is possible, however, that attempts to surrender scholarly authority will meet with resistance—students have been conditioned to expect authoritative behavior of professors, and also may not find the professor's deference credible.

94. HARDING, SCIENCE QUESTION, *supra* note 11, at 155 (citing Dorothy Smith). Various recent works in interpretivist social science make a similar point about the objectifying tendency of positivist human sciences. E.g., CHARLES TAYLOR, PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS (1985).

95. HARDING, SCIENCE QUESTION, *supra* note 11, at 157.

of inquiry are located in the same epistemological plane (the inquirer is simultaneously explaining her own condition, experience, and embodiment), then questions about the absolutism versus the relativism of the account cannot be posed because inquirer and subjects share the same “subjugated social location.”<sup>96</sup> The source of objectivity for this kind of account is the final authority of the subject’s experience, which experience the inquirer is attempting to explain or interpret.<sup>97</sup> These methodological cautions, in Harding’s view, “question the assumption of traditional empiricism that the identity of the observer is irrelevant to the ‘goodness’ of the research” and imply that “women *as a social group* are more likely than men *as a social group* to select problems for inquiry that do not distort human social experience.”<sup>98</sup>

While these positions appear to call for an embrace of identity politics (the position, articulated in the previous Section, that only members of the groups whose oppression is the subject of inquiry may legitimately and accurately interpret that group experience), I think that this need not strictly follow. Identity politics relies on unsustainable assumptions about the universality of perspectives. White male legal scholars must cultivate an affinity for the concerns and agendas of these groups, by committed reading and study of their points of view, and by surrendering the arrogance of the theoretical inquirer. We must learn from and about the perspectives of subordinated groups, trying to use them (without appropriating them) as a basis for critique of our own perspectives. (Empathy and commitment are not, however, sufficient for this methodological conversion because they are always accompanied, according to Delgado and others, by what may be insurmountable problems of interpretation and perspective.)<sup>99</sup> The success of this enterprise is not certain. The uncertainty is compounded by the problem that it is wearying for women always to be “educating” men and for people of color always to be educating white people.

Paulo Freire adopts a dialogical model of critical or resistance pedagogy that is useful in thinking about this dialectical process. One must see that there is a “student/teacher contradiction,” that education is best when structured as dialogue, its aim the practice of freedom, and the awakening of critical consciousness from the “culture of silence.”<sup>100</sup> Susan Williams similarly argues that legal pedagogy must be restructured as dialogue, that Socratic method must be reconstructed by feminists to resemble less a transmission belt of knowledge from professor to student than a critical conversation between student and teacher wherein knowledge is *created* rather than conferred.<sup>101</sup>

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96. *Id.* at 157-58.

97. *Id.*

98. *Id.* at 162.

99. Delgado, *Imperial Scholar*, *supra* note 10, at 567-68.

100. FREIRE, *supra* note 1, at 57.

101. Williams, *supra* note 12, at 1574-76.

The methodological premise of this approach is a commitment to “listening to the Other,” not receiving the feminist or critical race theory voice as so much “information” from a standpoint of detachment, but rather respecting the Other’s engaged experience.<sup>102</sup> In a provocative article, James O’Fallon and Cheyney Ryan posit a male failure to engage in Hegelian listening, that is, male “ideological deafness”, as the obstacle to true diversity: “what men listen to, when and if they listen to these [feminist] concerns, is itself a discourse that places the problem of listening at its core.”<sup>103</sup>

A similar point is made by Bruce Feldthusen, who says that the problem is frequently not one of open hostility, but rather the exercise of the male “right not to know” about feminism.<sup>104</sup> O’Fallon and Ryan argue that the Hegelian master/slave dialectic reflects precisely the division of perspective that I am calling an epistemological division between dominant and subordinate groups. The master, they contend, “by his deafness is denied the special insight that the slave possesses. . . . [T]he slave is best positioned to understand the sort of beings we are.”<sup>105</sup> Social position and embodiment conditions one’s epistemological position, and consequently one’s position on how (or even if) law is implicated in oppression. This rather obvious explanation of embodiment and “situatedness” has largely fallen on deaf ears. The acknowledgment of the partiality of one’s perspective is frightening to white male academics.

Thus, it is not only the failure to listen to other voices or to validate other epistemological perspectives that has raised questions about the legitimacy of white male scholarship. It is also that conventional epistemology has subtly become entrenched as ideology. The “facts” of social applications of power as they appear to white male inquirers tend to become the truths upon which academic careers are staked, reputations established, and about which one can become defensive. This is common enough. Where the dominant “take” on an issue of subordination is challenged by a feminist or minority critique, the critique is often dismissed as oversensitive, exaggerated, or inaccurate. Insider academics, like privileged white men elsewhere in society, have a lot to lose in the conflict over epistemological legitimacy, and the struggle to maintain one’s hegemony is both vital and ideological. This combination of epistemological and ideological privilege must be actively and continuously acknowledged and combatted by white male scholars if their scholarly interpretations of law and subordination are to acquire legitimacy.

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102. O’Fallon & Ryan, *supra* note 29.

103. *Id.* at 883-907.

104. Bruce Feldthusen, *The Gender Wars: “Where the Boys Are”*, 4 CAN. J. WOMEN & L. 66, 73 (1990).

105. O’Fallon & Ryan, *supra* note 29, at 883-907.

## VI. EPISTEMOLOGIES APPLIED: TOWARD AN EMBODIED SCHOLARSHIP

The discussion above points out the complexities of scholarly legal inquiry in view of inevitable epistemological, material, and ideological situatedness. Recognizing the value of situatedness, rather than dismissing it as a form of bias, is essential to an embodied reconstruction of legal scholarship which will make scholarship normative and compelling. I turn now to an analysis of commercial surrogate motherhood in view of those complexities. Because of the immediacy and centrality of embodiment to the practice and experience of surrogacy, surrogacy offers opportunities for scholars to apply what I am calling an epistemology of embodiment.

Much has been written on surrogacy as an application of biotechnology which challenges conventional understandings of equality and the family.<sup>106</sup> Surrogacy also challenges conventional notions of embodiment. Indeed, the law has responded to surrogacy by jurisprudentially bracketing off the surrogate mother's embodiment<sup>107</sup>—her factual experience of pregnancy—from the legal facts relevant to deciding disputes over custody arising from surrogacy arrangements. For example, even where the so-called surrogate is pregnant with her own fertilized ovum, she is defined not as the "biological" mother but as the "surrogate" mother, thus juridically denying the biological and experiential fact that she is the mother.

Surrogacy raises issues of embodiment along multiple axes. For example, when the surrogate mother is a woman of color and the contracting parents are white, the intersectionality<sup>108</sup> of race, class, and gender makes the equality analysis more complicated. Where, for example, the surrogate is African American but both egg and sperm are from a white couple, making her neither genetically nor even racially connected to the fetus she carries, novel and important moral, legal, and political issues arise.<sup>109</sup> The basic

106. See, e.g., *FEMINIST PERSPECTIVES IN MEDICAL ETHICS* (Helen B. Holmes & Laura M. Purdy eds., 1992); MARTHA A. FIELD, *SURROGATE MOTHERHOOD* (1988); Richard J. Arneson, *Commodification and Commercial Surrogacy*, 21 *PHIL. & PUB. AFF.* 132 (1992); Margaret Jane Radin, *Market-Inalienability*, 100 *HARV. L. REV.* 1849 (1987).

107. In the classic case of surrogacy, i.e., where a woman's egg is fertilized by sperm which is provided by a contracting male party, the woman who carries the fetus to term is not technically a "surrogate": it is the contracting female party who is truly the surrogate mother. The woman who will carry the fetus to term is the biological mother. "When the egg is donated by one woman and incubated in another . . . the term *surrogate mother* is more appropriate." FIELD, *supra* note 106, at 36. For the sake of convenience, I will employ the term surrogate as it is commonly used in the legal literature.

108. See generally Crenshaw, *supra* note 9; Cathy Scarborough, *Conceptualizing Black Women's Employment Experiences*, 98 *YALE L.J.* 1457 (1989); Peggie R. Smith, *Separate Identities: Black Women, Work, and Title VII*, 14 *HARV. WOMEN'S L.J.* 21 (1991); Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 *CAL. L. REV.* 775 (1991).

109. For example, will white couples attempt to control the behavior of the African-American surrogate because of stereotyped fears about the irresponsibility of African-American mothers? Because of economic deprivation, will African-American women be more vulnerable than white women to coerced participation in surrogacy contracts? Does the fact that an African-American surrogate carries a white fetus make it easier to view her as merely a disembodied "fetal container"? See Isabel Karpin, *Legislating the Female Body: Reproductive Technology and the Reconstructed Woman*, 3 *COLUM. J. GENDER & L.* 325,

theoretical point made about intersectionality is that women of color are subjected to discrimination along intersecting trajectories of race and gender and that this intersection is not recognized by anti-discrimination law because of its conventional top-down perspective, which has produced an analysis based on *either* race or gender that does not recognize the dual identity of women of color. But the fact of this dual identity is a fact of embodiment: this duality is the lived concrete existence of women of color.

A liberal legal theory might argue that commercial surrogacy represents nothing more than a legitimate, marketable property interest in one's reproductive capacity. That is clearly a disembodied analysis, for it does not recognize that in surrogacy arrangements it will *always* be a female body and female reproductive capacity that is being purchased, often by the elevated earning power of a middle-class, white couple. Following this logic, many feminist theorists have argued that surrogacy will always effect a degradation of women by commodifying their bodies and identities. For this reason, Margaret Radin has argued that reproductive capacity should be market-inalienable personal property—meaning that a woman's reproductive capacity is her property, but not property she is allowed to sell.<sup>110</sup> Such regulation would protect the authenticity of female personhood.

In the famous Baby M case, Mary Beth Whitehead, a working class white woman, contracted as a surrogate mother to bear a child conceived from her ovum fertilized by the sperm of the husband in the middle class contracting couple. After giving birth, Whitehead decided to break the contract and keep the child. The New Jersey Superior Court held that the contract was not illusory and that Whitehead was bound by its terms.<sup>111</sup>

The liberal analysis of this problem assumes the classic free-contract abstraction and agnosticism about the concrete details of the parties' experiences. The "father" was a consumer; Whitehead was a child "producer" in a mutually beneficial contract. The surrogate's relation to her pregnancy was analyzed in strangely market-oriented terms, denying the unique relationship of the surrogate to the fetus *inside her body*. If the analysis focuses on her embodied relationship with the fetus rather than on the cold, hard legal facts of contractual transfer, the surrogate could be said to have a property interest in the experience of pregnancy greater than the rights assigned between the parties under contract. If one focuses on embodiment as an index of legality here, the transfer of Whitehead's reproductive capacity is no longer neutral. It is deeply significant to an analysis of equality and exploitation that in surrogacy it is always a woman's body at stake—never a man's. This obvious fact curiously disappears in a liberal, sex-neutral contract analysis. Here the

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335 (1992).

110. Radin, *supra* note 106.

111. *In re Baby "M"*, 217 N.J. Super. 313, 525 A.2d 1128 (1987), *aff'd in part and rev'd in part*, 109 N.J. 396, 537 A.2d 1227.

normativity of law does conceptual violence to Whitehead's narrative<sup>112</sup> about what happened to her, removing her dignity and erasing her history. She did not rationally contract away a disembodied intellectual service—she was simply an unfortunate attempt by a middle class couple to remove from her one of the most intimate forms of physical integrity and experience of embodiment.

Yet this is not the whole story of the commodification of women in surrogacy. Regina Austin<sup>113</sup> and Joan Williams have argued that commodification is not always a bad thing for women or people of color. Indeed, Carol Rose has said that “women have not had enough commodification.”<sup>114</sup> Anti-commodification rhetoric in the family context has meant the allocation of money to men: fear of commodifying women has prevented courts from granting the wife a larger share of the husband's property following divorce. This is the result of “anti-commodification anxiety.” “anti-commodification rhetoric polices the borders of traditional family allocation of resources.”<sup>115</sup>

How could the commodification of women's bodies in commercial surrogacy be studied and interpreted by a white male legal scholar in a manner which takes into account the methodological cautions about epistemological standpoint? Do the feminist standpoint epistemologies *preclude* me, a white man, from accurately analyzing and interpreting commodification of women's bodies, or do they merely indicate that I must approach the topic with deference to women's experience? The task is to demonstrate how law erases the experience of subordinated groups, and to retrieve that experience and its relation to law in our scholarship.<sup>116</sup> How can a white male interpret gender commodification given the stated problem of epistemological perspective, and how can one avoid appropriating or erasing the voices of women in doing it?

Several points suggest themselves here. First, the white male scholar must acknowledge that surrogacy touches issues intimate to women's bodies, and respect his scholarly obligation to treat with dignity those affected by his analysis—here, primarily women. Second, and most importantly, I must openly acknowledge my own white male perspective as part of the project (since being white and male often is interpreted as having no perspective), and acknowledge that this is often the perspective of the powerful and privileged party in surrogacy commodification. It is important to acknowledge that as a white man, I am implicated in this discussion (certainly in the pejorative sense

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112. On the rhetorical violence of the law, see Anthony V. Alfieri, *The Ethics of Violence: Necessity, Excess, and Opposition*, 94 COLUM. L. REV. 1721, 1749 (1994) (book review) (saying of a client, “[I] cannot invoke the normative or material content of her world.”).

113. Regina Austin, *“A Nation of Thieves”: Securing Black People's Right to Shop and to Sell in White America*, 1994 UTAH L. REV. 147 (pointing out failure of some merchants to accept blacks' money, and challenging the logic of anti-commodification rhetoric).

114. Regina Austin, Carol Rose, and Joan Williams, panel on commodification at the AALS Annual Meeting (January 5, 1995) (author's recollection; audio cassette on file with the AALS).

115. *Id.*

116. For some interesting ideas about race in the law curriculum, see Ansley, *supra* note 22 (race is central to American law and should be integrated in core subjects).

indicated by Austin, Rose, and Williams' critique of the under-commodified family)<sup>117</sup> and therefore should not pretend to a position of detachment and objectivity in my analysis. In this way, I remove myself from an attempt to explain or define, recognizing that I am not on the same epistemological plane as the subordinated group (women) which is the subject of scholarly inquiry. It is also important to point out the racial exploitation that some of the surrogacy cases evidence, that is, that some of the contracting parties have been white women contracting for the services of African-American women surrogates.

Third, I should not claim expertise, or claim to have intellectually mastered the theory of commodification or the analysis of surrogacy (though one must do one's best, of course, to be thoroughly familiar with both the issues and the legal literature on commodification). Rather, I should attempt to explore the insights of women scholars insofar as their embodied experience privileges their insight into the problems of surrogacy that are not evident to me (for example, the issue of exploitation of women in family law by under-commodification). I must become thoroughly familiar with the sociology and mechanics of surrogacy. Uninformed scholarship is potentially threatening to those women among the scholarly audience who may identify with the surrogate.

Most importantly, the scholar must first thoroughly learn about the commodification under examination. The white male scholar must acknowledge that he cannot intuit this perspective.<sup>118</sup> However, perspectival epistemology does not mean that the subordinate perspective cannot be learned by a member of the dominant group,<sup>119</sup> here the white male scholar himself, who may in turn incorporate it in his scholarship. One should try to build bridges from male experiences of commodification of the male body, for example, in the context of organ donation, or perhaps in fashion, exercise and fitness, the fetishization of the slim, muscular male body. Though male and female experiences of commodification are dissimilar, male experiences of embodiment might nonetheless give men the basis of an understanding of commodification of their own bodies from which to extrapolate an empathetic scholarly interpretation of surrogacy and consequent problems of commodification of the female body by biotechnology and contract law.

Fourth, collaborative scholarship is especially appropriate to such forms

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117. Austin, Rose, Williams, *supra* note 114.

118. Shane, *supra* note 35, at 1052 (arguing that the experiences and self-concepts of subordinated groups are not ordinarily intuited by dominant group members, but that they may be understood if explained).

119. See Matsuda, *supra* note 15, at 9. Matsuda suggests that these perspectives are available not only to subordinated peoples, but to white men as well:

The multiple consciousness I urge lawyers to attain is . . . a deliberate choice to see the world from the standpoint of the oppressed. That world is accessible to all of us . . . . These details are accessible to all of us, of all genders and colors. We can choose to know the lives of others by reading studying, listening, and venturing into different places.

*Id.*

of inquiry: surrendering one's leadership role to a female colleague who is more familiar with this complex set of practices, using women's concrete experiences as a test of one's scholarly propositions, and engaging in rigorous social contextualization of one's work. The Superior Court decision in the Baby M case illustrates the pitfalls of analyzing complex material without adequate context, and with insufficient humility.<sup>120</sup>

These suggestions are part of an effort to constrain the white male scholar's role in producing legal scholarship on subordination, and to construct the scholar's accountability to those who experience that subordination. In scholarship, it is important not to experiment from a position of power with other people's experiences: the white male scholar should "[u]nderstand what feminist theory and practice are about *before* [he] embark[s] on [his] project, and remember that [he is] a student in this domain."<sup>121</sup> Taking epistemology seriously, that is, taking seriously the methodological implications of feminist and critical race theory standpoint epistemology, means that scholarship on law and subordination by white men not subject to that subordination must differ from conventional scholarship on doctrinal subjects. The scientific ideal of a masterful professional imparting proven and objective legal principles in his scholarship must yield to a new scholarly humility, one which recognizes and respects the embodied and contextual experience of members of subordinated groups.

A scholar could use the substance of the Baby M<sup>122</sup> commercial surrogacy case to produce a critical understanding of the subtleties of gender inequality, gender commodification, and the situated epistemological perspectives which frame the legal inquiry. Why was the case framed and decided as one of *contract* and not *sex*-based tortious harassment by the father? One might explore how such a decision might have been made. It might be the result of a pragmatic litigation strategy, given what is known about courts' sympathy for certain types of contract claims, and given the absence (then) of applicable statutes and regulations. Even if this is in fact pragmatic, is it a desirable way to approach such a case, given its misrepresentation of the surrogate's perception of her experience? How could such a process of misrepresentation have come about? One might suggest that, were Whitehead's lawyers (and the Superior Court judge) female, pregnancy would be a phenomenon more accessible to them than it would be to male attorneys and judges—it is at least potentially within all women's experience of embodiment. Men, by contrast, would have to work very hard to really understand the significance of pregnancy and women's bodies in what, according to liberal jurisprudential analyses of surrogacy, is a simple contractual transfer of

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120. Matsuda praises a colleague's humility in approaching "other cultures and possible truths." Matsuda, *supra* note 18, at 1770.

121. Herman, *supra* note 29, at 260.

122. *In re Baby "M"*, 217 N.J. Super. 313, 525 A.2d 1128 (1987), *aff'd in part and rev'd in part*, 109 N.J. 396, 537 A.2d 1227.

services.

But what of the *racial* aspects of surrogacy where the surrogate is African-American? Assume the plaintiff was represented by white, female, feminist attorneys—could they be expected to have better access to the “truth” of the sex discrimination suffered by an African-American woman than could male attorneys? Why? Or is there something about their experience as white women that might make them as blind as white men to racial discrimination? Might feminist attorneys downplay racial aspects of such a case in the interests of obtaining a broader precedent for all women? Do attorneys have a professional responsibility to present a case’s intersectional aspect, even if this might mean the plaintiff would lose? How could such sensitivity to the plaintiff’s experience be achieved?

Assume instead that such a plaintiff were represented by African-American male attorneys—would similar partial advantages of insight, problems and responsibilities arise? Is it possible that a white male law firm, or a firm fully diverse along sex, ethnic, and other lines, could map an appropriate litigation strategy for such a plaintiff’s case, one that would have given the plaintiff opportunity to fully articulate her experience and harm? Exploring these kinds of questions based on the case would make for a compelling scholarly inquiry into the bodily commodification involved in surrogacy. My purpose here is not to provide such an analysis of the issues surrounding surrogacy, but rather to suggest a situated reconstruction of the white male scholarly enterprise.

## VII. CONCLUSION: TAKING EMBODIMENT SERIOUSLY

Of course, the discussion of commodification and surrogacy above reveals not only the partiality of white male perspective, but also that of feminism or critical race theory as a particular place from which to make law or understand domination. On the other hand, the implicit claim that members of a dominated group may use their experience of being dominated in one sphere to sensitize themselves against dominating in another may be generalizable. Many white men have *some* experience to call on in that respect—class and economic vulnerability, sexual orientation, physical or mental disability, to name a few. Adopting a subjective epistemology of embodiment would allow white male interpretation to build bridges to others’ experiences of oppression. Of course not everyone’s experiences are the same, and cannot be, any more than experiences of sex discrimination and race discrimination are the same. The task is rather to use whatever partial experience of domination we *do* have to build bridges to other people’s partial experience in the hope that our collective picture of the truth of domination in society will be thereby improved. In this Article, I have attempted to explain why I think white male scholarship on law and domination must become much more tentative and Other-directed in view

of the inevitably partial contribution male perspective on domination can make to this collective process.

The conventional liberal argument about legal scholarship on questions of social subordination has seldom questioned the authenticity of the white male scholarly "voice," apart from questioning the intentions of individual scholars. Scholarship, as a matter of course, has not been linked to scholarly identity and the structural problems of epistemological perspective that accompany identity. Some feminist and critical race writing, I have argued, compels legal scholars to re-examine the supposed importance of intention in scholarship in view of embodiment and epistemological situatedness. Because the epistemological critiques must be taken seriously, a radical re-thinking of position is required of white male legal scholars, both in terms of one's confidence in the accuracy of one's knowledge and in terms of one's political position in the scholarly community. The legitimacy of the claims one makes in scholarship interpreting experiences of subordination that one does not share is called into question. Consequently the conventional role of law professor as "reluctant omniscient," dispassionate master of theory and principle, is also called into question.

The problem is not, however, fatal to the enterprise of white male scholarship on matters of oppression. What is clear, in view of the epistemological critique, is that a realignment of scholarly priorities is called for on the part of white male legal scholars, one that requires acknowledgment that one's epistemological perspective is only partial. White male legal scholars must acknowledge their own viewpoint and situatedness, and the viewpoint and situatedness embedded in the law. This acknowledgment can be unnerving, and the responses it requires demanding. The relentless contextualization of perspective which results from feminist and critical race theory demands effort. Effort becomes a component of truth-seeking;<sup>123</sup> one must demonstrate self-discipline in order to stretch one's "imagination to identify and understand the perspectives of others."<sup>124</sup> There must be more self-criticism, more listening, more learning from others, and an effort to earn accountability to the groups whose subordination one wishes to examine in one's scholarship. We white men must avoid appropriating the voices of those who actually experience the subordination that we wish merely to document and interpret.

Most importantly, a shift of scholarly focus is required. There is a promising new movement in legal scholarship focusing on reinterpreting and reconstructing whiteness<sup>125</sup> and maleness. Rather than focusing on the effects

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123. Bartlett, *supra* note 25, at 881 n.229.

124. *Id.* at 882.

125. See, e.g., Patricia Hill Collins, Book Review, 20 SIGNS 728 (1995).

[B]roaden[ing] the conception of Whiteness to accommodate an antiracist White culture would provide a much needed conceptual space for a White, race-cognizant politic of resistance. This space would allow race-cognizant White people access to a powerful politic of responsibility and would provide a foundation for more effective coalitions with people of color.

*Id.* at 731.

of discrimination on the oppressed, we should bring our experiential base to bear on a scholarly analysis of our own complicity and benefit in the oppression of others, and on our own racialized and gendered self-understandings which flow from that benefit. In fact, it is the white-male experience of *domination* that we white men could best study, rather than others' experiences of oppression. In so doing, white male scholarship will have transformed itself, for not only will what we are looking *at* have changed, but also where we are looking *from*.