IMMIGRATION LAW TEACHING AND SCHOLARSHIP IN THE IVORY TOWER: A RESPONSE TO *RACE MATTERS*

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I. INTRODUCTION

Why does one write? Why does one respond to another's writing? What sources does one consult and cite as influences? *In Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*,[1] Professor Kevin Johnson offers an interesting and provocative response to these and other key questions that are grounded in immigration and naturalization law scholarship—an evolving body of research and writing. In doing so, he thoughtfully makes several observations about this body of scholarship:

> [M]ainstream immigration law scholarship fails to confront squarely the reality of the influence of race. For example, immersed in doctrine, the conventional wisdom does not seriously question the distinction between "aliens" and citizens, which is the bedrock of all analysis in the immigration law field and historically has been linked to race. [He] further suggests that the addition of new theoretical lenses incorporating race holds great promise in aiding our understanding. [He] outlines how minority scholars engaging in LatCrit (Critical Latino/a) Theory, Asian American, and Critical Race Theory legal scholarship have constructed novel analytical frameworks useful for studying the racial underpinnings and impacts of immigration law. [He also analyzes] how the two separate legal discourses on immigration—an "ivory tower" perspective focusing on doctrine and race scholarship—are akin to ships passing in the night. The "imperial scholar" phenomenon identified in civil rights scholarship is alive and well in immigration law scholarship

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1. Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525.

> with a small cadre of elite, predominantly white scholars engaging each other while marginalizing the work of outsiders. At the same time, race scholars hoping to effectively challenge the ivory tower wisdom must unravel the intricacies of legal doctrine and the racial discrimination that it obscures. They must confront the traditionalists in the conventional immigration venues and initiate a true race and immigration dialogue. Although not without costs, mainstreaming the race critique of immigration law will assist in prodding scholars in the field to confront the issues and offer a better understanding of the law and its enforcement.[2]

This is a tall order, and as I and others in this issue suggest, Professor Johnson hits some balls out of the park and fouls some into the stands. As in baseball, whose metaphors I borrow here, the hits are more notable than are the misses. Only Roger Angell and a few fans remember the soaring, parabolic foul balls of Mark McGwire and Sammy Sosa— most of us remember the exciting, towering homeruns of the 1998 and 1999 pennant seasons.

The most difficult task for many in beginning a writing project is to define very clearly the audience for whom the major message is intended; that is, the crowd to whom the analysis is directed. Although I have preached to many students over the nearly thirty years I have been teaching that they have to resolve this question before putting pen to paper, a lack of resolution is often the cause of much unfocused writing, especially writing that weaves across various topics, offers confusing points of view, or never settles on an authoritative voice. Professor Johnson, however, has clear designs on the attention span of two discrete audiences, ones that glide past each other on different tectonic plates. He identifies these audiences as follows:

> First, [he hopes] to convince mainstream immigration scholars focused on legal doctrine to consider racial critiques of the law, including Critical Race Theory, Critical Latino/a Theory, and Asian American legal scholarship. Such consideration will lend power to their analyses and allow for a fuller understanding of immigration law. Second, [he aims] at persuading race scholars that immigration law doctrine must not be shunned but should be analyzed and explained through critical inquiry. This will not undermine their critiques but in all likelihood will bolster them and allow the scholar to unveil the racial privilege encoded in immigration law doctrine.[3]

Writing this response piece is a welcome opportunity for me for several reasons. First, like most immigration law teachers, I feel beleaguered at the moment, both in keeping up with the massive sea changes in the field and in trying to convey these major revisions to my students, practitioners who attend my CLE presentations, and the many public

2. *Id.* at 527 (footnote omitted).
3. *Id.*

groups I address in my ongoing service capacity. This is not a field where old notes remain sufficient. Rather, I regularly review dozens of research resources, journals, newsletters, commercial reporters, and listservs (particularly the estimable IMMPROF)[4] to prepare for my introductory immigration law and policy class and for the advanced business and immigration law course, where we do not consider refugee or family law issues but concentrate on immigration law as the transnational regulation of labor and employment.

Second, I alternate my immigration scholarship with my writing and study in my other academic field, higher education law and finance. I always have higher education ideas in mind and have a long-term research agenda in the field, so I can plug in at any time and place along its continuum. This method has served me well, and my work in the world of higher education law and finance includes an ongoing casebook project[5] (with a forthcoming third edition, a biennial supplement, forthcoming teachers' manual, and a web page with updates for my users and readers), law consulting (recent cases include several personnel and academic freedom matters, as well as service to a client whose case(s) went to the U.S. Supreme Court, where we won[6]), and law practice (in addition to handling several cases, I served as general counsel for four years to the American Association of University Professors (AAUP)). I also direct a major research institute on college law topics.[7] These interlocking interests have been carved out over nearly twenty-five years of study and scholarship in the area, stretching back to a Ph.D. thesis on an historical topic in higher education.[8]

My interests in immigration law are more personal and recent. In law school, I took a class from Charles Gordon, the late author of the major multivolume treatise in the field.[9] We studied from a photocopied galley sheet of the student text of his condensed desk reference, coauthored with his attorney daughter.[10] He preferred to teach the field by concentrating upon statutes and regulations, many of which he had writ-

4. IMMPROF can be subscribed to via e-mail at *Mtaylor@law.wfu.edu*.

5. *See* MICHAEL A. OLIVAS, THE LAW AND HIGHER EDUCATION: CASES AND MATERIALS ON COLLEGES IN COURT (2nd ed. 1997).

6. My client was the State of Florida, the defendant in *College Savings Bank v. Florida Prepaid*, 527 U.S. 666 (1999).

7. The UHLC Institute for Higher Education Law and Governance can be found on the Internet at <www.law.uh.edu/lawcenter/programs/center> or contacted via e-mail at *ihelg@uh.edu.*

8. *See* Michael A. Olivas, State Law and Postsecondary Coordination: The Birth of the Ohio Board of Regents (1977) (unpublished dissertation, Ohio State University). *See generally* Michael A. Olivas, *State Law and Postsecondary Coordination: The Birth of the Ohio Board of Regents*, 7 REV. HIGHER EDUC. 357 (1984) [hereinafter Olivas, *State Law*]; Michael A. Olivas, *A Legislative History of the Ohio Board of Regents, 1954–1963*, 19 CAP. U. L. REV. 79 (1990).

9. The multi-volume treatise is CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE (1988). Charles Gordon and his daughter also produced a single volume desk edition, CHARLES GORDON & GITTEL GORDON, IMMIGRATION LAW AND PROCEDURE (1995).

10. We used a photocopy of the page proofs for the first "student edition," later published in a paperback edition.

ten during his long career as INS general counsel. I do not remember reading a single immigration case or article in the course, which I took in 1980. Despite this unusual pedagogical approach, I loved the field, which appealed to many Chicano and Latino students at Georgetown; we even had Latino students from other D.C.-area law schools who took the course as transfer or transient students.

At Georgetown and elsewhere, using an adjunct to teach this field was more the norm than not. Even today, many of the persons who teach the basic course in immigration law are either part-time adjunct teachers or clinical professors who teach the course as part of their clinical-training capacity in human rights or immigration law clinics. The 1998–99 *AALS Directory of Law Teachers* lists fewer than two dozen immigration law full-time teachers who have been teaching in the field for more than ten years.[11] In that grouping, fewer than half a dozen have been teaching longer than I have. I have been teaching the subject since 1985, the year the first casebook appeared.

It is fair to say that I have not evolved the immigration law research and practice agenda to the extent that I have in my other scholarly field of interest. I have written eight books—including seven in higher education—but none in immigration law. I am ripe to carve out an agenda and methodology in the immigration law field, but I always feel as if I am running to catch up. For example, there are the aforementioned changes. There is also a veritable flood of books and dozens of articles on immigration. A February 1999 *Chronicle of Higher Education* article on immigration studies singled out nearly a dozen full-length monographs on edited volumes published since 1996.[12] Of course, the list omits many others published in the same period and since, such as the volume edited by Juan Perea[13] and analyzed by Professor Johnson.

Third, this is a field where I have personally encountered many of the issues Professor Johnson's article raises. It is funny, but I had not put my finger on some of these problems until I read his piece. In addition to the lag between the state of legislation (and regulation) and the casebooks, which can render the casebooks very difficult to use, there are the personal issues that arise in the classroom, especially the lowered stature accorded teachers of color—in my case, encountering students (or audience participants) who ascribe certain views to me because I am Mexican American. I also have encountered regional student variations at other

11. *See* ASSOCIATION OF AMERICAN LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS, 1998–99, at 1145, 1146 (1998). The volume is updated each December. In contrast, 66 full-time law faculty have taught the course fewer than six years, while 23 have done so from six to ten years. *See id.*

12. *See* D.W. Miller, *Scholars of Immigration Focus on the Children*, CHRON. HIGHER EDUC., Feb. 5, 1999, at A19.

13. *See* IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1997); *see also* Johnson, *supra* note 1, at 549-50.

law schools where I have taught as a visiting professor.[14] The sum of these experiences, some of which Professor Johnson notes or addresses, may indicate that I am a better immigration law teacher than I would otherwise be, as I am regularly reminded of my position—occupational, ethnic, and ideological—in a way I am not in my other teaching fields.

Finally, I have some thoughts on the "imperial scholar" phenomenon, described by Professor Richard Delgado[15] and elaborated upon by Professor Johnson.[16] Here, my views transcend immigration law as a field of study, as I have noted this phenomenon in the social sciences and have my own Richard Delgado-inspired story to relate.[17] Professor Johnson puts me behind the eight ball by using and naming me as an example of a senior Chicano scholar writing in the field of immigration law whose work is widely cited by one leading casebook but not the other.[18] Therefore, I approach this topic gingerly, so as not to step in Professor Matthew Finkin's *Quatsch*[19] or appear either self-aggrandizing or self-pitying.

This project tracks three points, each arising from Professor Johnson's piece. First, I address the fundamental "why write" or better, "why cite" questions, ones that Professor Johnson assumes but does not directly ask or answer. Second, I reflect upon the "imperial scholar" issues Professor Johnson raises, including my own experience with this phenomenon. Finally, I address the topic of ideological balance in immigration law teaching and scholarship, which Professor Johnson raises indirectly but which to me is the key point of his evocative essay.

II. WHY WRITE? WHY CITE?

Although he raises many interesting questions, Professor Johnson does not directly address the fundamental issues of "why do we write?" and "why do we cite?"—both implicit in his critique. After all, he chose to address scholarship rather than to emphasize teaching, litigation strategies, or service obligations. Although it is true that Professor Johnson mentions his practice of representing immigrants before he entered teaching[20]—and he has expanded upon this experience in his compelling autobiographical book, *How Did You Get to Be Mexican? A*

14. For example, while teaching immigration law as a visiting professor at the University of Wisconsin (1989–90) and the University of Iowa (1997), I found that virtually all the students, both majority and minority, felt that immigration restrictions should be relaxed. *See infra* text accompanying note 102.

15. *See* Richard Delgado, *The Imperial Scholar: Reflections upon a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 562 (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, 1349 (1992) [hereinafter Delgado, *Revisited*].

16. *See* Johnson, s*upra* note 1, at 546-52.

17. *See infra* Part III.

18. *See* Johnson, *supra* note 1, at 549 & n.122.

19. *See* Matthew W. Finkin, *QUATSCH!*, 83 MINN. L. REV. 1681, 1681 n.1 (1999) (defining "quatsch" as "nonsense" or "rubbish" or, in German slang, "rot," "crap," and "bullshit").

20. *See* Johnson, s*upra* note 1, at 528.

White/Brown Man's Search for Identity[21]—he glides over this avenue for legal change by noting in passing: "My representation of immigrants, which necessarily required formulating arguments based on legal doctrine, significantly contributed to my scholarly interest in immigration and refugee law."[22] In this project, he has focused almost exclusively upon scholarship, the most refined, elite part of law teaching and the activity that requires highly self-actualized skills, sheer relentless hard work, and a specialized, scholarly, lonely mindset.

A critical understanding of imperial scholarship, exclusionary citation analysis, or textbook selection practices must first address the epistemological assumptions of any body of knowledge: why engage in the knowledge creation and dissemination function? Even after all this time, my friends are often amused to discover that the blank page (or monitor screen) still terrifies me. I regularly despair at how hard this work is, how long it takes, and how solitary it can be—even in the few instances where I collaborate with other colleagues on an interdisciplinary piece. This is even before the gnawing feeling that one's work is typeset (by traditional means or by desktop publishing) into oblivion, cast into the void to be studiously ignored by judges, legislators, practitioners, colleagues, and deans making merit-pay decisions. I have never experienced the near-sexual ecstasy that Flaubert felt in his act of writing:

> Last Wednesday I had to get up and fetch my handkerchief; tears were streaming down my face. I had been moved by my own writing; the emotion I had conceived, the phrase that rendered it, and satisfaction of having found the phrase—all were causing me to experience the most exquisite pleasure.[23]

I aspire to more pedestrian satisfaction in my writing, and I suspect it shows. I am certain it shows here.

So why write? Two of my greatest influences—John Updike and Richard Delgado—form a bookend of reasons. Updike, whose novel *The Centaur*[24] remains a favorite work and one I reread each year, is the consummate stylist and chronicler of life in the United States. To be sure, his suburban New England life doesn't resemble that of mine (and will not resemble that of most of my readers), but I have always admired elegant, evocative writing, whomever the author. Updike has written:

> Why write? As soon ask, Why rivet? Because a number of personal accidents drift us toward the occupation of riveter, which pre-exists,

21. Kevin R. JOHNSON, HOW DID YOU GET TO BE MEXICAN? A WHITE/BROWN MAN'S SEARCH FOR IDENTITY (1999).

22. Johnson, *supra* note 1, at 528.

23. JOHN UPDIKE, *Why Write?*, *in* PICKED-UP PIECES 30 (1975) (quoting Flaubert). For additional insights into the writing impulse, see generally WHY I WRITE, THOUGHTS ON THE CRAFT OF FICTION (Will Blythe ed., 1998), a book of essays on the subject by 20 different writers.

24. *See* John UPDIKE, THE CENTAUR (1963). My favorite scene is when Updike's father teaches a class on evolution, and the entire class devolves into a bleating, barking, growling menagerie. To get the students' attention and to make the point, Updike's father forms and throws a snowball at the blackboard. *See id.* at 122.

> and, most importantly, the riveting-gun exists, and we love it. . . . The writer's strength is not his own; he is a conduit who so positions himself that the world at his back flows through to the readers on the other side of the page. To keep this conduit scoured is his laborious task; to be, in the act of writing, anonymous, the end of his quest for fame. . . . [More] and more the writer thinks of himself as an instrument, a means whereby a time and place make their mark. To become less and transmit more, to replenish energy with wisdom—some such hope, at this more than mid-point of my life, is the reason why I write.[25]

My good friend Richard Delgado, known to legal scholars as a wonderful and wonderfully provocative writer, wrote in his useful piece *How to Write a Law Review Article*:

> Why write? There are several reasons: because your colleagues are writing, because you have something to say, because you want to change the law, because it's enjoyable (at least sometimes), or because you want professional advancement and recognition. Personally, I prefer the intrinsic reasons—writing as self-expression, writing because it is satisfying. But, I also enjoy the result when something I have written has an impact—stirs people up, helps a court make the right decision. Everyone's motivation is, I think, mixed, and the mix varies from person to person and article to article.[26]

There you have it, from two of our most prolific writers (and with Richard's recent forays into *Chronicle* writing,[27] two of our most prolific fiction writers and book reviewers). People write because they have virtually no choice but to write. Ideas and thoughts pour from prolific writers. Updike sheepishly confesses that, if need be, he would write ketchup ads for a living.[28] Richard once told me that he likes to write but loves being read, and it is clear he has kicked up dust for his readers.

I write because I like to read and because I am regularly called upon to write and express my views. I carry on regular correspondence with many persons, in law and other fields, both epistolary and through exchange of manuscripts and articles, and each week's mail or e-mail brings me interesting things to read and invitations to write. Although I am cer-

25. UPDIKE, *supra* note 23, at 33, 38–39.

26. Richard Delgado, *How to Write a Law Review Article*, 20 U.S.F. L. REV. 445, 446 (1986).

27. Richard Delgado has now published dozens of fictional pieces, featuring "Rodrigo" and the "Law Professor," characters who discuss legal themes. *See, e.g.*, Richard Delgado, *Rodrigo's Book of Manners: How to Conduct a Conversation on Race—Standing, Imperial Scholarship, and Beyond*, 86 GEO. L.J. 1051 (1998). Several of these allegorical stories are collected in RICHARD DELGADO, THE RODRIGO CHRONICLES (1995). The character Rodrigo is the brother of Geneva Crenshaw, Derrick Bell's well-known fictional character. *See, e.g.*, DERRICK A. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); DERRICK A. BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992).

28. *See* John Updike, Lecture at the University of Houston (March 20, 1985); *see also* JOHN UPDIKE, *One Big Interview*, *in* PICKED-UP PIECES, *supra* note 23, at 517.

tainly not in the symposium pantheon Jean Stefancic described so well,[29] I am rounded up with the usual suspects more often these days, and this allows me to write for new audiences and undertake projects I otherwise likely would not begin. Thus, in the last few years I have been asked to respond to Derrick Bell,[30] Martha Minow,[31] Lino Graglia,[32] and Kevin Johnson[33] and to contribute to symposia on racial harassment,[34] graduate education,[35] and higher education law.[36] The *Chronicle of Higher Education* editors asked me to write about then-retiring Justice Marshall and his higher education cases;[37] of course, this particular essay is an invitational piece as well, shoehorned in between book obligations. In short, I also write because I am invited and encouraged to do so and for the academic equivalent of why George Mallory climbed Mt. Everest: because the forum was there.

I suspect this explanation is what motivates many scholars, and it is a perfectly acceptable reason for taking on the public task of personal revelation. We write to influence, to redirect, to frame, to provoke, to give more precise form to our thinking, to correct the record, and to establish the record. There is a monastic or Talmudic basis to this aspect of our profession—scholars not as scriveners simply transcribing works but rather scholars as commentators and shapers of a synoptic text. This sense of being in a tradition, in a community of scholars (today, tied by print, faxes, and e-mail), sustains me even when I do not know all the members of the group. As Updike wryly noted in an essay about being underwhelmed upon meeting his childhood hero James Thurber, meeting authors is like "light from a star that has moved on."[38] In other words, through our writing we are all so well met, even if we have never met.[39]

Professor Johnson may well feel that the need for concentrating upon the high end of the racial critique of immigration law is a self-evident

29. *See* Jean Stefancic, *The Law Review Symposium Issue: Community of Meaning or Reinscription of Hierarchy?*, 63 U. COLO. L. REV. 651, 669–73 (1992).

30. *See* Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425, 427–30, 439–41 (1990).

31. *See* Michael A. Olivas, *"Breaking the Law" on Principle: An Essay on Lawyers' Dilemmas, Unpopular Causes, and Legal Regimes*, 52 U. PITT. L. REV. 815, 815–20, 854–57 (1991).

32. *See* Michael A. Olivas, *Legal Norms in Law School Admissions: An Essay on Parallel Universes*, 42 J. LEGAL EDUC. 103 *passim* (1992) (responding to a Graglia article on the same issue).

33. *See* Michael A. Olivas, *Immigration Law Teaching and Scholarship in the Ivory Tower: A Response to* Race Matters, 2000 U. ILL. L. REV. 613 (responding to Kevin Johnson's article in the same issue).

34. *See* Michael A. Olivas, *The Political Economy of Immigration, Intellectual Property, and Racial Harassment: Case Studies of the Implementation of Legal Change on Campus*, 63 J. HIGHER EDUC. 570 (1992) (symposium on campus racial harassment).

35. *See* Michael A. Olivas, *Trout-fishing in Catfish Ponds*, *in* MINORITIES IN GRADUATE EDUCATION 46 (Jessie M. Jones et al. eds., 1992).

36. *See* Olivas, *State Law*, *supra* note 8 (symposium issue on higher education legal issues).

37. *See* Michael A. Olivas, *Mr. Justice Marshall, Dissenting*, CHRON. HIGHER EDUC., July 17, 1991, at B1–B3, *reprinted in* 20 S.U. L. REV. 21 (1993).

38. JOHN UPDIKE, *On Meeting Writers*, *in* PICKED-UP PIECES, *supra* note 23, at 7.

39. *See id*.

proposition, one where he need not take the time to lay out the full predicate for this judgment. But I do not think it self-evident and would have made it clearer why he sought to contest on this terrain rather than the other plausible sites, such as practice, politics, or regulatory policy. Surely these issues warrant our attention more than the fragile egos of some few scholars. In his favor, though, Professor Johnson is timely in addressing these gossamer issues, as white scholars have begun to turn their attention to minority critiques. Professor Finkin calls this school of radical critique "nonsensical, risible or a good deal worse;"[40] Professors Daniel Farber and Suzanna Sherry style it "a set of relatively simple ideas and slogans that help hold a group together;"[41] and Steven Gey characterizes the various radical critiques as "a motley batch of theories that constitute this season's academic *haute couture.*"[42]

Although LatCrit and Critical Race Theory—fields in which Professor Johnson is a leading practitioner and writer[43]—are engaged in cultural wars,[44] immigration law scholarship, with few exceptions (such as the work of Peter Brimelow),[45] has not become such a battlefield. Although it is certainly true that racial critiques of immigration law and more mainstream scholarship on the subject have glided past each other, largely ignoring each other's analyses, this politeness mirrors my own view of the practicing immigration bar: cooperation and sharing forms and information, rather than competing or sniping, are the norms. In other words, there is a politeness that prevails in this field of practice—one that, to some extent, characterizes its scholarship as well.

Even Peter Brimelow, an English immigrant who wants to pull up the ladder behind himself and rues that his adopted country is becoming less and less like him, relishes the discourse: "As a journalist, I adore angry letters from readers. They give you that warm, comforting feeling that somebody, somewhere, cares."[46]

Thus, Professor Johnson's call for the two streams to interact more is also a tacit call to mix it up more, in the hope that the overall field will be shaken up and improved as a result. Two recent examples of the two sides mixing it up pose cautions, however, to those who hope that such an exchange will inevitably emit more light than heat. First, the dyspeptic, ful-

40. Finkin, *supra* note 19, at 1682.

41. DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 8–9 (1997).

42. Steven G. Gey, *Why Rubbish Matters: The Neoconservative Underpinnings of Social Constructionist Theory*, 83 MINN. L. REV. 1707, 1707 (1999).

43. For example, in the edited volume THE LATINO/A CONDITION: A CRITICAL READER (Richard Delgado & Jean Stefancic eds., 1998), the editors include four of Johnson's previously published law review articles.

44. *See, e.g.*, FARBER & SHERRY, *supra* note 41; Kathryn Abrams, *How to Have a Culture War*, 65 U. CHI. L. REV. 1091 (1997).

45. *See* PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995).

46. *Id*. at 58.

minating response of Anglo scholars to critical race theorists of color has resulted in these scholars characterizing minority practitioners of CRT as anti-Semitic,[47] careerist,[48] arrogant,[49] and, in one particularly breathtaking accusation, fascist.[50] The same author who accused "radical multiculturalists" of such godlessness has also chided other legal scholars for allowing this sort of rubbish to exist. He charges others with an "abnegation of responsibility"[51] for their collective failure to debunk the Delgados,[52] Culps,[53] Calmores,[54] and (Pat) Williamses[55] of the CRT movement, finding that "the outpouring of radical multiculturalism in the legal literature has not been met with any comparable body of legal writing in reply. Farber and Sherry note the occasional dissenter; but, for the most part, the response of the traditional legal academic community has been silence."[56] These vicious responses to CRT have no counterpart in immigration law and policy scholarship, despite the amply detailed racial dimensions of the field and the demonstrably racist parentage of the nativist movement as exemplified by Peter Brimelow,[57] John Tanton,[58] and others.

A second body of critical legal literature recently emerged, took root, and was then widely attacked and eradicated. This movement, perhaps the first area where Critical Race Theory and praxis intersected, was launched in 1982 by Professor Delgado in his now-classic article in the *Harvard Civil Rights-Civil Liberties Review*, *Words That Wound: A Tort Action for Ra-*

47. *See* FARBER & SHERRY, s*upra* note 41, at 52; Daniel A. Farber & Suzanna Sherry, *Beyond All Criticism?*, 83 MINN. L. REV. 1735, 1736 (1999).

48. *See* Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40, 43.

49. *See* Gey, *supra* note 42, at 1718.

50. *See* Finkin, *supra* note 19, at 1693–1703.

51. *Id*. at 1704.

52. *See, e.g.*, sources cited *supra* notes 15 and 27.

53. *See, e.g.*, Jerome M. Culp, Jr., *Black People in White Face: Assimilation, Culture, and the* Brown *Case*, 36 WM. & MARY L. REV. 665 (1995); Jerome M. Culp, Jr., *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637 (1999).

54. *See, e.g.*, John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129 (1992); John O. Calmore, *Random Notes of an Integration Warrior—Part 2: A Critical Response to the Hegemonic "Truth" of Daniel Farber and Suzanna Sherry*, 83 MINN. L. REV. 1589 (1999).

55. *See, e.g.*, PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); Patricia J. Williams, *Through a Glass Darkly*, NATION, Jan. 12, 1998, at 9.

56. Finkin, *supra* note 19, at 1703.

57. *See* BRIMELOW, s*upra* note 45.

58. John Tanton was one of the founders of U.S. English, an English-only and nativist group that has actively opposed bilingual education and immigrant rights. Tanton caused a furor when a confidential memo he wrote was published alleging that Latinos would out-breed whites and overrun the United States, as Latinos were "homo progenitiva" and a group "that is simply more fertile." JAMES CRAWFORD, HOLD YOUR TONGUE, BILINGUALISM AND THE POLITICS OF "ENGLISH-ONLY" 150–52 (1992) (citing Tanton memo); *see also* LINDA CHAVEZ, OUT OF THE BARRIO: TOWARD A NEW POLITICS OF HISPANIC ASSIMILATION (1991); Sylvia R. Lazos-Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 442–43 (1999) (reviewing Tanton's efforts). Chavez, a Hispanic conservative, was president of Tanton's organization and resigned when the memo leaked. *See id.* at 91–92. *But see* Michael A. Olivas, *Torching Zozobra: The Problem with Linda Chavez*, 2 RECONSTRUCTION 48 (1993); Linda Chavez, 2 RECONSTRUCTION 182 (1994) (responding to Olivas); Michael A. Olivas, 2 RECONSTRUCTION 184 (1994) (responding again to Chavez).

cial Insults, Epithets, and Name Calling,[59] where he argued that the government's interest in regulating "words harmful in themselves" equaled or balanced the First Amendment rights on university campuses to utter harmful or denigrating remarks.[60] As a result of this scholarship, bolstered by young, minority early-CRT law scholars such as Patricia Williams,[61] Mari Matsuda,[62] Charles Lawrence,[63] and literally dozens more scholars of color,[64] colleges and universities began to enact hate speech codes premised upon these theories, to dust off Vietnam-era student conduct regulations, and to take campus hate crimes seriously.[65] It was the first higher education legal issue devised and inculcated by minority scholars.[66]

Then, as cases began to find these codes unconstitutional[67] and as a sharp critical backlash grew, the new codes were dismantled or rescinded, and the status quo ante was restored.[68] Even so, the period marked the first time that minority scholarship had altered the discourse and the political landscape of white campuses. The outpouring of scholarship on this topic was even larger than the considerable literature occasioned by the *Bakke*[69] case a decade earlier, which was certainly a minority issue but was largely analyzed and critiqued by majority scholars.[70] The demography of law teaching had changed a dozen years later,[71] lending to the different voices arguing for campus hate speech codes. The trickle of Latino/a, Asian, and black legal scholars into the academy inevitably has produced a sufficient

59. Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

60. *Id.* at 172–75.

61. *See supra* note 55.

62. *See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991).

63. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

64. *See* Michael A. Olivas, *Introduction*, 63 J. HIGHER EDUC. 479, 480–81 (1992) (presenting a special issue about racial harassment on university campuses); *see also* Michael A. Olivas, *Racial Harassment/Hate Speech Bibliography*, 63 J. HIGHER EDUC. 599, 599–601 (1992) (compiling a substantial list of articles by minority scholars).

65. *See* Richard Delgado, *Campus Anti-Racism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 358–60 (1991); *see also* Olivas, *supra* note 34, at 580–84.

66. *See* Olivas, *supra* note 34, at 580–84. At least it is the first since litigation leading to the *Brown v. Board of Education* decision. *See* Olivas, *supra* note 37.

67. *See* Iota Xi v. George Mason Univ., 773 F. Supp. 792, 795 (E.D. Va. 1991) (overturning speech code); UW-M Post v. Board of Regents, 774 F. Supp. 1163, 1181 (E.D. Wis. 1991) (same); Doe v. University of Michigan, 721 F. Supp. 852, 853 (E.D. Mich. 1989) (same).

68. *See* Thomas C. Grey, *Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment*, 63 J. HIGHER EDUC. 485, 491–96 (1992).

69. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

70. This point was raised by Derrick A. Bell in *In Defense of Minority Admissions Programs: A Response to Professor Graglia*, 119 U. PA. L. REV. 364 *passim* (1970).

71. *See generally* Michael A. Olivas, *The Education of Latino Lawyers: An Essay on Crop Cultivation*, 14 CHICANO-LATINO L. REV. 117 (1994) (reviewing Latino law professors); Pat K. Chew, *Asian Americans in the Legal Academy: An Empirical and Narrative Profile*, 3 ASIAN L.J. 7 (1996) (reviewing Asian law faculty); Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199 (1997) (reviewing minority law faculty).

critical stream for Professor Johnson to be able to make his well-placed call for integration in the immigration area.

I only note that in at least these two other scholarly encounters, CRT generally and hate speech regulation specifically, minority scholars did not win the culture war, though the jury is out on the fledgling CRT movement. Immigration may turn out differently and be an area where the subject's racial shadow is so long that there will not be the visceral reaction by conservative Anglo scholars.[72] As long as the immigration scholarly community acts like the immigration practice community, where support and sharing are the norm, Professor Johnson's plea for more interaction might turn out to be an important and successful clarion call.

III. IMPERIAL SCHOLARSHIP IN IMMIGRATION LAW RESEARCH

I begin this section with a painful story, one where a senior colleague of mine told me he had spoken against my candidacy for the deanship at another law school, where I had been one of three finalists heavily recruited by the search committee but fell shy of the supermajority the process required. I heard of the effect his remarks had had upon the process, as several of my colleagues had heard about his bad review and on their own initiative had called members of the search committee to offer a different recounting of my qualifications.

Having heard all this obliquely and not directly, I sent an e-mail message to my colleagues, recounting the experience and several of the accusations that had been made. I concluded my message, "if I were as dreadful as I had been made out to be, I would not have supported my candidacy either." But the truth (or my truth) was, his accusations of me as an anti-Anglo, racist, divisive person who was against institutional quality were not accurate or fair, and some of the criticisms (for example, that I was the highest-paid faculty member on my faculty) were not only provably false, but I had wished they were true. The issue was more complicated than is necessary to recount here, and I will fully settle that score some other day. But you get the picture.

After I sent out the e-mail and received about a dozen sympathetic responses—and provoked several outraged, public e-mail messages on my behalf—this man came to see me late on a Friday afternoon. Again, the details of this exchange are better suited for another venue, but he made one remark that has particular resonance here; hence the details about a publicly humiliating development that was, by far, my professional nadir. He told me the only reason I had been hired was because I was Chicano. He told me he had personally opposed my deanship candidacy at this school and at my own institution and would do so again. Among many other grievances he had harbored against me in the then-fifteen years I

72. *See supra* notes 44–47, 56–58 and accompanying text.

had been on the faculty was that my publication record, although admirable, was suspect. A library staff member had recently produced a list of faculty publications cited by other scholars, a simple citation count, where I was among the three or four top members of my fifty-member faculty. The only persons cited more often than I were people who are quite prolific and had been teaching longer. I had not thought it a big deal, as I had placed much of my efforts in book writing and a casebook, neither of which were tallied in this list of law review citations. I also write often in nonlaw-review venues (such as refereed journals), which also were not referenced. To tell the truth, I had forgotten about the study, which had been circulated recently in the lunch room during a faculty lunch talk.

But when my colleague's list of my horribles lengthened, I defensively said (and this is my point), "Well if I am so terrible, why is my work so well cited?" He paused and thrust the dagger fully into my breast, responding, "Well, you people who write in that area make it a habit of citing each other." There it was, the perfect riposte, the *coup de grâce*, and I remember sagging as the matador finished me off cleanly.

I barely recall how the rest of our one-and-a-half-hour discussion went, but I vividly remember crying that evening after going to my usual Friday late-matinee movie with my wife, a movie I do not even recall. (This, as most of my good friends will tell you, is the most telling detail of the whole story.) I cried for my own lost personal and professional opportunity, one that had seemed attractive, but I was so devastated by the experience that I withdrew from two other searches, including one where I was the sole candidate still under consideration, and I have not allowed my name to go forward to another since then, though I receive a dozen calls each hiring season.

I also cried for my colleague, a bitter, soured man who dislikes me so much that he would not even permit me to leave the faculty for other pastures. But his point about citation was one I have thought about since in other contexts and settings. To him, all minority scholars know and cite each other, building up our citation counts, rather like ordering one's own book on Amazon.com to boost the popularity of the volume in the company's records. In his hermetically sealed world, it is perfectly symmetrical and reasonable to believe both that I am not an accomplished scholar and that my citation count is high due solely to my friends' concerted efforts to boost my stature.

This experience, which has seared me for several years, is my only personal experience with citation analysis. Or it is at least my only one, except for Professor Johnson's generous argument on my behalf, where he notes that one of the leading immigration casebooks cites six of my articles, while the other does not include a single reference to my work.[73] I confess I had questioned this, but I have read and used both books, de-

73. *See* Johnson, *supra* note 1, at 549.

pending on which was the more recently updated. Professor Johnson's article and the invitation to prepare this response, however, propelled me to study the two other casebooks in the field, both written by minority authors, one by a Mexican American[74] and the other by an African American and Mexican American team.[75] There may be an equivalency problem, as the Aleinikoff, Martin, Motomura (AMM)[76] and Stephen Legomsky texts[77] have been updated more frequently and recently, but the citation patterns looked like this:

	PIATT (1994)	BOSWELL/CARASCO (2d ed. 1992)
Minority Authors	19 (24%)	19 (20%)
Majority Authors	53 (76%)	78 (80%)
Total Cites	72 (100%)	97 (100%)

Even with the equivalency problem, it is clear that both sets of authors were more cognizant and inclusive of other minority scholars in their incorporation of scholarship into these casebooks. These numbers exist despite the relative recency of minority authors in the immigration field, the relative youth of Asian and Latino faculty, and the relative paucity of minority law teachers overall, whether or not they teach immigration or write in the area. Latino Professor Juan Perea, for example, the editor of *Immigrants Out!*[78] and cited as a victim of the imperial scholar phenomenon,[79] does not teach immigration law.

I have been intrigued by the phenomenon Professor Delgado has described, and I have extended his thesis into other fields, as Professor Johnson has done in immigration. Of all the books and law review articles of which I have ever written or collaborated, the one that has generated the most comments from colleagues is one I did not actually write but one in which I was acknowledged in a footnote. The article, written by Richard Delgado, is the most extraordinary *cri de coeur* I have ever read in a law review—concededly, not your usual forum for inspired writing.

In the article, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*,[80] Professor Delgado asserts that there is a circular, elite, self-citing priesthood of white, male legal scholars who, guised in a pre-

74. *See* Bill PIATT, IMMIGRATION LAW, CASES AND MATERIALS (1994).

75. *See* RICHARD A. BOSWELL & GILBERT P. CARRASCO, IMMIGRATION AND NATIONALITY LAW (2d ed. 1992).

76. *See* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY (4th ed. 1998).

77. *See* STEPHEN LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY (2d ed. 1997).

78. IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1997).

79. *See* Johnson, *supra* note 1, at 549; *see also supra* note 11 and accompanying text. I acknowledge the count is imperfect, as I did not know the race of several authors, but I know, or know of, most of the minority authors.

80. Delgado, *Imperial Scholar*, *supra* note 15; *see also* Delgado, *Revisited*, *supra* note 15.

dominantly liberal legal tradition, have made it impossible for minorities to break into their prestigious ranks.[81] This tradition, he writes,

> consists of white scholars' systematic occupation of, and exclusion of minority scholars from, the central areas of civil rights scholarship. The mainstream writers tend to acknowledge only each other's work. It is even possible that, consciously or not, they resist entry by minority scholars into the field, perhaps counseling them, as I was counseled, to establish their reputations in other areas of law. I believe that this "scholarly tradition" exists mainly in civil rights; nonwhite scholars in other fields of law seem to confront no such tradition.[82]

In a devastating, meticulous manner, Professor Delgado reviews a representative sample of frequently cited articles on major civil rights themes in elite law reviews, finding them written exclusively by white, male authors and displaying a pattern of self-citation with remarkably few references to scholarship by black or Latino scholars.[83]

He argues that this intellectual dominance by a handful of writers is not harmless error and that this "elaborate minuet" has real consequences—for the characterization of racial issues, the fashioning of remedies, and the general hegemonic exclusion of other, more practical racial perspectives: "[T]his exclusion does matter; the tradition causes bluntings, skewings, and omissions in the literature dealing with race, racism, and American law."[84]

Richard, a close friend and colleague, shared his draft manuscript with a small circle of colleagues, and he generously acknowledged us in his first footnote.[85] In addition, he noted in a subsequent reference that I had assisted him in thinking through another point.[86] His article, which bristles with passion and remains the most exciting manuscript I have ever read in law, was published during my second year of law teaching. I was extremely flattered to have been so involved in this honorable collaboration, particularly because he tapped a vein that most minority scholars feel at some time—that our views on race are taken less seriously than those of Anglos and are assumed to be ethnocentric or self-serving.

I received nearly a dozen phone calls or notes from colleagues shortly after the article appeared. But the article and its theme have continued to reverberate. The most recent occasion was at a conference of law professors, where two colleagues mentioned the article—one chortling about how Richard had so deftly bearded the establishment and the other clucking that we had bitten the liberal hand that fed us, probably ruining the chance for other Chicanos to be hired as law professors. (To the latter

81. *See* Delgado, *Imperial Scholar*, *supra* note 15, at 563.
82. *Id.* at 566.
83. *See id.* at 562–63.
84. *Id*. at 573.
85. *See id.* at 561–62 n.1.
86. *See id.* at 564 n.15.

colleague, I whistled the old song by Gary Lewis and the Playboys, "I Won't Make That Mistake Again," adding that it was the unofficial law school theme song.)

Richard's profound observations continue to be demonstrated in many areas of scholarship besides law, including higher education research. For example, I analyzed the research citations in a special journal issue devoted to minority students,[87] and I found similar extraordinary racial patterns. Of the seven substantive articles, five were written by majority scholars; the other two were written by black sociologists.

More specifically, all of the articles teemed with references to scholarly studies, dissertations, reports by organizations, government publications, and basic reference works on minorities, minority enrollments, and race in higher education. In the five articles by majority scholars, there were 131 references citing nearly 160 authors and co-authors. Allowing for fractions (representing collaborations), minority scholars accounted for just 7.9 of the references. This number included graduate students who were junior authors and one book (written by me) that was cited in a bibliography but, oddly, not cited in the text of the article. In the two articles in the journal written by the black scholars, one cited works by twenty-three black and Hispanic scholars and the other, thirteen.

Perhaps a recount should be ordered, as I might have missed a black or a Chicano cited in an et al. reference. Nonetheless, the point remains that in a project devoted to the issue of minority students, one would have expected more, and more substantive, references to the extensive research literature by black and Latino scholars. The articles by black and Latino scholars cited by the white scholars were not even the minority authors' most authoritative works. Of the 7.9 citations, only one was a refereed article by a single author, and only two were citations of books. All the others were references to microfiche documents in the Educational Resources Information Center (ERIC) system, essays in a magazine, or references to minority graduate students who had collaborated with the white authors. Yet the two black scholars found a treasure trove of pieces across the spectrum of research resources. How could this be? How could majority scholars so unfamiliar with basic research literature be accorded a refereed forum for their views?

I don't accuse these authors—all of them friends or colleagues well known to me—of deliberately casting a blind eye to the extensive literature on minorities by minorities. Nor do I hold that members of minority groups are automatically experts on racial issues. Still, minority voices on these topics more often ring with a clarity and timbre not as easily found in white scholars' throats. Richard Delgado accounts for the situation in his characteristically generous, hopeful terms, writing in his article: "I reject conscious malevolence or crass indifference. I think the explanation lies at

87. 11 REV. HIGHER EDUC. 323 (1988).

the level of unconscious action and choice. It may be that the explanation lies in a need to remain in *control*, to make sure that legal change occurs, but not too fast."[88] He is right on target. After all, several of the authors in the special issue on minorities grew up at a time when higher education was even more racially stratified or segregated than it is today. The literature they studied (and still read, in most journals) is predominantly by Anglos, about Anglos. Most white scholars have no substantive, regular contact with minority communities except in positions of dominance. Even in highly structured situations where specific minority expertise is called for, as in postsecondary desegregation litigation and development of remedies, white scholars are the ones courts generally appoint to act as consultants and special masters.

To give a more recent example, I analyzed the important new book by William Bowen and Derek Bok, former presidents of Princeton and Harvard, entitled *The Shape of the River, Long-Term Consequences of Considering Race in College and University Admissions*.[89] The book has received extraordinary press, in part because the Mellon Foundation financed an extraordinary press tour that resulted in widespread publicity and in part because the authors wrote it to provide a "social science brief" for the defendants in important admissions litigation against the University of Michigan and the University of Washington.[90] The book even received the highest accolade possible when it figured in a *Law and Order* television episode where the black Ivy League defendant killed his mentor because he was failing his classes, and the mentor had purchased exam answers for his young protégé.[91] The book figures prominently in the cross-examination of a hostile social scientist defense witness.

The book makes an extensive brief for minority admissions in elite colleges, arguing that blacks more often than not make the grade, graduate, and become productive role models as a result of *Bakke*-approved affirmative action.[92] Interestingly, however, and in disregard of the extensive literature by black, Latino, and Asian scholars, Bowen and Bok engage in demonstrable imperial scholarship. In almost ten pages at the end of their book, they list references totaling over 220 scholars, but I count only twenty-two references to scholars of color, including one Asian and no Latinos. This is an area where there are many Asian, Latino, and black scholars who have produced hundreds of articles and dozens of books on the topics of minority admissions, attrition, and college participation. There is an entire subgenre of research on elite students of color, but neither Bo-

88. Delgado, *Imperial Scholar*, *supra* note 15, at 574.

89. WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998).

90. *See* David Segal, *Putting Affirmative Action on Trial: DC Public Interest Law Firm Scores Victories in War on Preferences*, WASH. POST, Feb. 20, 1998, at A1 (describing cases brought against universities by the Center for Individual Rights).

91. *Law and Order: Haven* (NBC television broadcast, Feb. 10, 1999).

92. *See generally* BOWEN & BOK, *supra* note 89.

wen, an economist, nor Bok, a labor lawyer, seem familiar with these works, which were directly on point for their study and are published in major, mainstream journals.[93]

As in so much of the work produced by imperial scholars, even well-intentioned ones such as Bowen and Bok, such books trigger the cycle of making it harder for minority scholars to break into print with their own works, to receive foundation grants to undertake the scholarship, or to receive press coverage if such work is produced. Majority scholars are assumed to be objective when they study minority issues; black and Latino scholars often are viewed as being incapable of objectivity. Minority scholars' research on race is widely viewed as too self-conscious, ethnocentric, or angry, while the issues they raise are deemed too peripheral, contentious, or controversial.

Worse, when white scholars become interested in minority issues, however opportunistically, they automatically establish their liberal credentials and often convert their newfound expertise into philanthropic gold, winning large grants for studies on minorities—for which they then hire blacks and Latinos as consultants. I believe foundations exacerbate the problems I have described when they fail to cultivate minority scholars to direct such projects. If this cycle continues—in the workings of editorial boards, book publishers, grant committees, academic conferences, and tenure and promotion committees—minority scholars in higher education will be reduced to academic *campesinos*, simply picking others' crops and not contributing to, or benefiting from, the intellectual means of production.

Majority scholars must begin to read minority scholarship, enlarge their chorus of research citations, and listen to minority voices. Journal editors must cast their nets wider for genuine expertise on minority topics and not merely publish the landed gentry with hired minority help. The best thing everyone could do is to work more diligently to recruit new members to the choir, so that it will be more fully rounded and resonant and not so off-key.

IV. IDEOLOGICAL BALANCE IN TEACHING IMMIGRATION LAW

Everyone develops a personal pedagogical style, including the degree of advocacy or sympathy an instructor demonstrates for a particular ideological, political, or partisan position. But evolving a position and examining that constellation of assumptions is not a theoretical nicety; it is an absolute necessity in undertaking a teaching profession. Although I

93. *See, e.g.*, Alberto F. Cabrera et al., *The Convergence Between Two Theories of College Persistence*, 63 J. HIGHER EDUC. 143 (1992); Sylvia Hurtado et al., *Latino Student Transition to College: Assessing Difficulties and Factors in Successful College Adjustment*, 37 RES. HIGHER EDUC. 135 (1996); Sylvia Hurtado, *The Institutional Climate for Talented Latino Students*, 35 RES. HIGHER EDUC. 21 (1994); Michael T. Nettles, *Success in Doctoral Programs: Experiences of Minority and White Students*, 98 AM. J. EDUC. 494 (1990).

do not struggle with it daily or let doubts paralyze me, I confess that I teach differently depending upon the context of the subject matter, degree of partisanship possible, level of student sophistication, and evolution of the field of study. Thus, when teaching immigration law, I routinely remind myself not to give short shrift to INS viewpoints on an issue; this remains a constant struggle, given government perfidy and the developing spirit of nativism sweeping the land. Most importantly, I struggle with this evolution on a conscious level. On some issues, I voice my doubts on both sides, negotiate a discussion in class to elicit polarities, and use the resultant exchanges (usually sharply divided) to gain an appreciation of the legitimate governmental role in this crucial function— the issue of constituting our political community.

I have a colleague, a more conservative Anglo who teaches immigration law at an elite eastern law school. He once told me that his major teaching concern was that his ethnic minority students could not rationally discuss limits upon immigration, legal or undocumented. Mine can and do. As a Mexican American, I am assumed by most students to be pro-immigrant, while my colleague labors under no such preconceptions. Issues of advocacy in the classroom often turn upon characteristics ascribed by students to their teachers (for example, that women teachers are feminists, favor women, and are "soft on social issues" or that professors of color are "too sensitive" on issues of race, as in Derrick Bell's now-famous case at Stanford Law School[94]), rather than upon their professors' actual views, which many of us struggle to control or, at least, not to represent as the only truth.

But I note how little I struggle with these issues of advocacy when I have taught legal ethics, even though the opportunity to proselytize is greater in this subject matter where proper behavior is extremely relativistic and uncharted. Here, due to the nonethnic context of the course material, I am not perceived as a reflexively antigovernment partisan. It is little wonder that race, gender, and sexuality provoke the most frequent faculty-student clashes. In legal ethics, I find myself attempting to spark student interest, while in immigration law I am always trying to harness it and channel student beliefs— not well understood but strongly felt— into useful discussions once the highly technical subject matter has been examined.

What I address in this part is not really the need for ideological balance in teaching immigration law; if so, I would be concerned with the opposite: how to keep students focused upon policy rather than procedures and how to encourage them to be more critical of the INS or U.S. refugee policy. This used to be less of a problem. As I have noted earlier, I try to be fair. In the past, the daily papers in Texas routinely carried

94. *See generally* Derrick A. Bell, *The Price and Pain of Racial Perspective*, *reprinted in* THE LAW AND HIGHER EDUCATION: CASES AND MATERIALS ON COLLEGES IN COURT 1122 (Michael A. Olivas ed., 2d ed. 1997) (recounting student behavior in Professor Bell's class).

pro-refugee stories, particularly after attention was drawn in 1989–90 to the mortifying, substandard housing and dreadful conditions of confinement in Texas for unaccompanied, undocumented children seeking asylum.[95] These Nicaraguan and Salvadoran children elicited much sympathy, and the national news media also regularly carried gruesome stories on Haitians fleeing poverty and political oppression.[96] Today, the international eye is upon faraway ethnic Albanians, displaced Turks, and the Middle East, so I note that my students are better focused upon policies rather than upon specific population groups.

I will sketch three "cases" from immigration law that illustrate tricky or difficult-to-teach issues, due either to intrinsic complexity or gender/ethnic complexity (what I will call "demographic complexity") or another feature that adds a degree of difficulty to the subject matter—namely horrific conditions that engender sympathy. The first is the issue of alien benefits/alien costs; the second is the uneven immigration history of the United States's treatment of Cubans and Haitians; the third is the conditions of confinement for refugee children and their rights under *Reno v. Flores*[97] and similar cases.

A. Inherent Complexity and the Case of Alien Benefits/Alien Contributions

In the AMM text, the authors take a small cut at the topic of undocumented aliens, excerpting several studies that show the approximate costs of the aliens upon the seven states home to 86% of the U.S. undocumented population, especially California (which in 1994 was estimated to be the home of 1.4 million undocumented aliens, 43% of the U.S. total and 4.6% of California's total population).[98] The casebook authors cite major findings from a nonpartisan Urban Institute study. Undocumented aliens contribute $1.9 billion dollars in state sales, property, and income taxes in those seven states; their share is far less than their population share, due to low incomes; and in California, they paid $732 million in taxes (1.7% of all taxes) but constitute 4.6% of California's population.[99]

Further, the casebook authors offer a short piece by the political scientist Wayne Cornelius, who indicates that:

> the weight of the evidence suggests that immigration per se is not the most important factor affecting wages and labor standards in these and other sectors of the U.S. economy. Far more influential

95. *See* Michael A. Olivas, *Undocumented Refugee Children: Detention, Due Process, and Disgrace*, 1 STAN. L. & POL'Y REV. 159, 159–60 (1990).

96. *See, e.g.*, LAWYERS' COMM. FOR HUMAN RIGHTS, THE DETENTION OF ASYLUM SEEKERS IN THE UNITED STATES, A CRUEL AND QUESTIONABLE POLICY (1989); Olivas, *supra* note 95, at 159–62.

97. 507 U.S. 292 (1993).

98. *See* ALEINIKOFF ET AL., *supra* note 76, at 611–15 (citing Urban Institute study).

99. *See id*. at 614.

> are technological changes affecting the labor content of products, foreign competition (the changing international factor price of labor), and the declining strength of the U.S. [l]abor movement—a decline which is largely unrelated to the growing presence of immigrant workers.[100]

Although the Cornelius snippet is a thoughtful and balanced piece from an experienced border scholar and social scientist, the casebook authors also reprint a single paragraph from a 1992 *Atlantic Monthly* article on Latinos taking jobs from native-born blacks for the proposition that "nonblack employers . . . trust Latinos [while they] fear or disdain blacks."[101]

What to make of all this, especially in a class where students either (1) do not know of this sophisticated literature or (2) do not care, as their minds are made up by their own experiences or prejudices? And it isn't always an ethnic cleavage, as many of my Chicano students come from the Rio Grande Valley, where the negative effects of undocumented alienage upon local wages, markets, and lifestyles are often quite pronounced. In contrast, when I taught immigration as a visitor at the University of Wisconsin and the University of Iowa, the students did not, on the whole, challenge the "Cornelius line" of reasoning and would not accept any displacement theories. After all, Iowa Beef Processing (IBP) actively employs Mexicans to work in the harsh meatpacking industry. In full-employment Iowa, there are no tradeoffs, at least none that are obvious to the students.[102]

The subject of undocumented aliens is an excellent place to make several points but to do so requires a lot of auxiliary work by the teacher. First, the costs/benefit studies reflect an important policy dimension of immigration policy itself (viz, the congressional debate about lawful permanent resident benefits and federal benefits to the undocumented).[103] And, as immigration law teachers, we should always try to understand—even if we cannot always carry over to our scholarship or our teaching—real-life examples of the consequences of immigration law

100. *Id*. at 619–20 (citing Wayne A. Cornelius, *Mexican Migration to the United States: Introduction*, *in* MEXICAN MIGRATION TO THE UNITED STATES: ORIGINS, CONSEQUENCES, AND POLICY OPTIONS 1, 4–8 (Wayne A. Cornelius & Jorge A. Bustamonte eds., 1989)).

101. *Id.* at 620 (citing *Atlantic Monthly* article). Many Latinos will find this statement absurd on its face.

102. Indeed, one of my UHLC students, now in practice, has been retained by IBP to help them hire 200 Mexican butchers. Apparently the work is too hard and dangerous to interest U.S. butchers.

103. *See, e.g.*, H.R. CONF. REP. NO. 96-944, at 70–72 (1980), *reprinted in* 1980 U.S.C.C.A.N. 1392, 1417–19; *see also* Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act), Pub. L. No. 104-193, § 402(a)(2), 110 Stat. 2105, 2262 (1996) (amending welfare provisions and enacting a five-year bar for federal social welfare programs to permanent residents). Some of the harshness was ameliorated by the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997). For excellent critiques of these issues, see Michael Scaperlanda, *Who Is My Neighbor?: An Essay on Immigrants, Welfare Reform, and the Constitution*, 29 CONN. L. REV. 1587, 1588–92 (1997); Stephen H. Legomsky, *Immigration, Federalism, and the Welfare State*, 42 UCLA L. REV. 1453 (1995).

as well as basic research on the effect of immigration upon the polity and community.

This comprehension is difficult, as few of us are trained in economics, particularly the voodoo economics of immigration policy. I took a stab at it in a recent article on preemption, however, and my findings were very different than those offered by the AMM sampling of authors.[104] For example, although it is true that the Urban Institute showed that undocumented workers may have paid less than their share of local taxes (sales, property, and state income taxes), a similar Los Angeles County study showed that the undocumented pay eighteen times more *federal* tax and nine times more *state* revenue than they do county taxes and fees.[105] The problem is one of tax allocation, not tax shortage. The late Julian Simon, a leading economist in this field, estimated that each immigrant contributes over $1300 more in taxes than he or she receives in benefits.[106] After all, the undocumented are ineligible (increasingly so) for most governmental benefits.[107] Aleinikoff and his colleagues cite Donald Huddle, a leading restrictionist economist, whose work has not been published in refereed journals or academic books but rather in anti-immigration organizational literature.[108] At the same time, while the authors cite lawsuits brought by aggrieved states to recover unreimbursed costs for providing services to undocumented aliens, nowhere do they note that Texas was forced to return $90 million in 1994 to the federal government in unexpended federal alien assistance funds at the same time Austin was suing for more resettlement money.[109]

By now you may be saying to yourself: this is not a case necessitating statistical expertise; it is a case of sovereignty or states' rights or even a case of peripheral interest. But these data, properly presented and discussed in class, can radically shift the discussion from an intuitively more obvious restrictionist cost basis to a more useful, thorough, cost/benefit analysis possible only when the full data picture is available. Unfortunately, this discussion requires a surefooted grasp of the literature, which

104. *See generally* Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217 (1994).

105. *See id.* at 227–30 (citing Los Angeles County study).

106. *See* JULIAN L. SIMON, THE ECONOMIC CONSEQUENCES OF IMMIGRATION 117–20 (1989).

107. This is an area that remains in flux. After the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act), Pub. L. No. 104-193, 110 Stat. 2105 (1996), stripped permanent residents of many benefits, an outcry ensued, and the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997), restored some, but not all, of the benefits. At the federal level, the only Medicaid services available to persons irrespective of immigration status are emergency care, immunizations, and public health disaster relief, *see* 8 U.S.C. § 1611 (1994), but the attorney general can extend other federal assistance if "necessary for the protection of life and safety." *Id*.

108. *See* ALEINIKOFF ET AL., *supra* note 76, at 611, 616 n.6 (referring to DONALD L. HUDDLE, THE COST OF IMMIGRATION IN 1993 (1993)). *But see* Estevan T. Flores, *The Impact of Undocumented Immigration on the United States Labor Market*, 5 HOUS. J. INT'L L. 287 (1984). Professor Flores analyzes Professor Huddle's work in unrefereed and unpublished forums, such as trials and unpublished papers. *See id.* at 295–300.

109. *See* James Cullen, *Blame the Newcomers*, TEX. OBSERVER, Aug. 19, 1994, at 2, 3.

I do not claim to have, and it also convinces some students that the teacher is not neutral, especially if the AMM casebook is in use, as it is more one-sided on this issue than I would like.

I have also supplemented my course with a visit by a University of Houston sociology colleague whose expertise is in the area of immigrant resettlement and ethnic enterprises. He is able, in an authoritative way, to discuss the low level jobs open to the undocumented in Houston and to explain the growth of ethnic business enterprises.[110] When he says these things, I am forced to referee the different sides and, as a result, appear more objective.

B. Cuban/Haitian Entrants and the Anti-Communist Bugaboo

A related problem arises in explaining how U.S. refugee policy applies unequally to persons fleeing Cuba and their darker-skin counterparts fleeing Haiti. *Jean v. Nelson*[111] is an unsatisfying case for most students (and readers), and it is harder and harder to describe the Cold War and anti-Communist policies and practices to students who were born after 1975, who have seen Lithuanians play in the NBA, and who read about President Yeltsin in *People* magazine.

How does one reconcile the inconsistent treatment of Nicaraguans, whose "Communist" government was said to be within a missile's reach of Brownsville, yet whose people fleeing our proxy war were deemed to be "economic refugees?" How do I explain then-Attorney General Edwin Meese's change of mind to allow Nicaraguans to gain asylum?[112] It is unconvincing to most students that the Federal Aviation Agency should allow U.S. planes to use Florida landing strips to facilitate leafleting Ha-

110. *See* Nestor P. Rodriguez, *Undocumented Central Americans in Houston: Diverse Populations*, 21 INT'L MIGRATION REV. 4, 18–21 (1987); Nestor P. Rodriguez & Jacqueline Hagan, *Apartment Restructuring and Latino Immigrant Tenant Struggles: A Case Study of Human Agency*, 4 COMP. URB. & COMMUNITY RES. 164 (1992).

111. 472 U.S. 846 (1985).

112. Between 1987 and 1990, which was the high tide of Central American immigration to the United States, southern Texas immigration courts granted asylum to a total of 6 Guatemalans, 36 Nicaraguans, 2 Hondurans, and no Salvadorans of the many thousands who applied (in 1988, 2400 sought asylum in the region; in 1990, over 3600 applied). The statistics were no better elsewhere in the United States: only three percent of all Salvadorans and six of 2000 Haitians successfully claimed asylum during the same period. *See Central American Asylum-Seekers: Hearings Before Subcomm. on Immigration, Refugees, and Int'l Law of the House Comm. on the Judiciary*, 101st Cong. 277–79, 328–29 (1990) [hereinafter *1989 House Hearings*]. Following the 1987 "Meese Memorandum," 96% of all Nicaraguan claims in southern Texas were adjudicated in favor of Nicaraguans. In December 1988, the policy was reversed, and again, few were granted asylum. *See id*. at 66–73.

At the time of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, 111 Stat. 2160, 2193–2201 (1997) (codified as amended at scattered sections of 8 U.S.C.), Haitians were not included in the relief provisions. After much furor over NACARA's narrow but important focus, the Haitian Refugee Immigration Fairness Act of 1998 became law. *See* Pub. L. No. 105-277, 112 Stat. 2681-538 to 542 (1998) (codified as amended at scattered sections of 8 U.S.C.); *see also* Beverly L. Jacklin, *The Haitian Refugee Immigration Fairness Act: "HFIRA,"* IMMIGR. BRIEFINGS, Sept. 1999, at 1; Mario M. Lovo, *Nicaraguan Adjustment and Central American Relief Act: "NACARA,"* IMMIGR. BRIEFINGS, Nov. 1998, at 140.

vana,[113] while we sink Haitian vessels at sea and repatriate the Haitians to Port au Prince.[114] Even my few Cuban students are not as reflexively anti-Communist as are their parents.

In a number of classes devoted to this topic, or to the *Reno v. Catholic Social Services* line of cases,[115] I have students—usually (but not always) African LL.M.'s or African American law students—who raise the color issue. As in all these issues, I play them out by pointing out that many Cubans are black and that the 1980 Refugee Act[116] was designed to remove ideological bias remaining from the 1965 changes. Unlike many classroom discussions where race is at issue, this topic seems more clear-cut and straightforward than, for example, constitutional law treatments of race or criminal law's often contentious use of race. Here, students of color are able to point out with specificity the asymmetrical treatment without fear that some Anglo students will put them down or engage in I-was-not-a-slave owner kind of rhetoric. Of course, there is a great deal of grist to point to the poor treatment of Asians, which often gives rise to increased participation by my Asian students, both J.D. and LL.M.

C. The Detention of Undocumented Alien Children

In 1988–89, I organized a clinic at the University of Houston Law Center to serve the particular needs of unaccompanied minors arriving in the Southwest and being incarcerated in South Texas facilities. Although I was away in Wisconsin during this time, I was haunted by the extraordinary situation in South Texas, only hours from my relatively risk-free life in Houston. A converted USDA pesticide storage facility in Port Isabel was used to warehouse these children.[117] I had studied Dickens as an English literature graduate student, so I was prepared in one sense to see these conditions. I interviewed children who were sexually abused on their sojourn through Mexico to the United States. I arranged for a sociologist colleague (the one who lectures in my class about Guatemalan resettlement in Houston) to administer psychological stress inventories, and he had to calibrate the responses because they were all far "off the scale."[118] The Port Isabel facility and others like it (six throughout Texas alone) are located in remote areas, I was (and am) convinced, to keep

113. *See* Rene Sanchez & Catherine Skipp, *Two Exile Planes Shot Down Near Cuba*, WASH. POST, Feb. 26, 1996, at A1 (reporting the loss of the planes and the initial reaction from U.S. officials).

114. *See* Douglas Waller, *A World Awash in Refugees*, NEWSWEEK, Oct. 9, 1989, at 44–45.

115. *See* Reno v. Catholic Social Svcs., Inc., 509 U.S. 43 (1993) (adding a ripeness requirement for class actions); Catholic Social Svcs., Inc. v. Reno, 134 F.3d 921 (9th Cir. 1998) (per curiam) (applying the ripeness requirement on remand).

116. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

117. *See* Olivas, *supra* note 95, at 164. Port Isabel is at the foot of the miles-long bridge one crosses to reach Padre Island's pristine beaches and marinas.

118. Nestor P. Rodriguez & Ximena Urritia-Rojas, Undocumented and Unaccompanied: A Mental-Health Study of Undocumented, Immigrant Children from Central America (1991) (unpublished monograph No. 90-4, University of Houston Law Center, Institute for Higher Education Law and Governance).

lawyers like me away. The nearest law schools (The University of Houston in Houston or St. Mary's in San Antonio) were five to six hours away by car and still remote due to infrequent plane schedules.

Because I wrote about this experience in another venue,[119] I will not replicate that effort here, except to say that I found teaching asylum adjudication a real moral dilemma. I am certain I fell short of my objective to be nonpartisan, as the government was clearly the lawbreaker in this matter—transferring children after they had obtained representation, tricking these children into conceding their rights without even minimal due process, and failing to abide by injunctions and consent decrees to provide basic care and legal services, such as phones.[120] If you think I am exaggerating, read *Flores v. Meese*,[121] *Orantes-Hernandez v. Meese*,[122] *Ramirez-Osorio v. INS*,[123] and *Montecino v. INS*.[124] How do you teach respect for the law and the government when the United States itself is the lawbreaker?

I have found immigration law to be a personally rewarding and intellectually stimulating field of law, and teaching it more often than not makes me feel good about my profession, my government, and the state of things. A balanced approach to the class can lead students to appreciate the considerable good, bad, and ugly of U.S. community-building. Students can learn to critique policy and procedures and, in the right setting, learn a great deal about how we constitute ourselves. Almost no field provides such a running application drawn from that day's headlines. Most importantly, I feel part of a growing community of interest in the teaching of the field. After eighteen years of teaching law, I now have hundreds of former students who practice immigration law, others who teach naturalization classes, many who have undertaken pro bono service in the field, and still others who never took my courses but who seek someone to advise them on an immigration matter.

119. *See* Olivas, *supra* note 31, at 820–35.

120. *See id.* During one trip to another South Texas detention facility, I found all six phones to be out of service.

121. 681 F. Supp. 665 (C.D. Cal. 1988) (discussing the impropriety of strip searches of juvenile aliens), *aff'd*, 942 F.2d 1352 (9th Cir. 1991), *rev'd sub nom.* Reno v. Flores, 507 U.S. 292 (1993).

122. 685 F. Supp. 1488, 1504–05 (C.D. Cal. 1988) (finding widespread abuse of detained aliens); *see also* Perez-Funez v. INS, 619 F. Supp. 656 (C.D. Cal. 1985) (critical of INS detention practices); Nunez v. Boldin, 537 F. Supp. 578 (S.D. Tex. 1981) (injunction prohibiting INS transfer policies), *appeal dismissed*, 692 F.2d 755 (5th Cir. 1982). *See generally* Olivas, *supra* note 31, at 820–35 (reviewing INS detention practices).

123. 745 F.2d 937, 941 (5th Cir. 1984) (noting that normal INS procedures do not require aliens to be told of their right to petition for asylum unless the "country of deportation is designated to the hearing officer").

124. 915 F.2d 518 (9th Cir. 1990) (finding that the legal quality of the decisions made by the Board of Immigration Appeals to be substandard and also criticizing the translator and other conditions of the hearing).

V. CONCLUSION

Professor Johnson's article prompted three responses from me, each of which amounted to a mini-essay. First, by his attention to immigration and race scholarship and its intellectual properties, he is among the first to ask important questions about the origins of the ideas, the influences upon scholars, and the provenance of the project. This is basic, foundational critical inquiry, in his tradition. Second, by engaging in citation analysis, he is doing the kind of critical inquiry that should call textbook authors to account for their material selections. As Professor Johnson notes, textbooks occasion many choices,[125] and his careful examination here should put all the authors on notice that their choices have consequences. As a casebook author myself, I have benefited from many other colleagues' criticisms and suggestions. Professor Johnson's treatment also reminded me of a painful issue in my own experience. Finally, he raises issues of ideological balance and fashions constructive criticism aimed at all parties; he advises majority scholars to read more widely and to incorporate race into their scholarship and to do so critically.[126] He also advises minority scholars to enter the dominant discourse and to "integrate" its ranks.[127] His advice has prompted me to question issues of ideological balance and to recount my own struggles in this arena.

I have always learned from reading Professor Johnson's work, across all the genres—his more traditional doctrinal scholarship, his Critical Race and LatCrit writing, and his more personal scholarship and autobiography. He has carved out a large swath of territory for such a young practitioner, and I am pleased he has provoked so much heat and light.

125. *See* Johnson, *supra* note 1, at 549.
126. *See id.* at 554-55.
127. *See id.* at 553-54.