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A Different Black Voice in Legal Scholarship

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I. INTRODUCTION

The standards of achievement in law are eclectic, subjective, and ad hoc. This observation is offered as a positive assessment rather than a normative criticism. Such standards are all that one should rightly expect of a discipline that takes as its subject a creation of the mysterious human spirit and as its purpose to channel man's changing social, political, and economic relations through the authority of an evolving state. But, regardless of their honorable origins, the fuzzy standards of excellence in law mean that those of us who toil in the field have great difficulty distinguishing the brilliant from the pretentious and the workmanlike from the dull. In fact, this difficulty is greater for legal scholars than for scholars in harder disciplines such as mathematics and physics whose subjects are either purely analytical or God's rational immutable physical laws. While an earlier and more confident breed of intellectual sailors may have been able to navigate this legal sea without a steady deck beneath their feet, our generation seems to have lost its bearings and is without a compass to point towards the legitimate and informative realm of legal scholarship. As a result, our intellectual world has become a strange congeries of the traditional and solid, the innovative and exciting, and some of the most vacuous, puerile ravings.

A. *Judging Black Legal Scholarship*

The problem of judging achievement has become particularly acute in those areas of legal scholarship that are insulated from outside review and critical appraisal. One such area is the emerging category sometimes referred to as minority, or black, jurisprudence. Prudent mainstream scholars have given minority jurisprudence a wide berth because they believe that the more subjective nature of quality judgments in the legal literature leaves them vulnerable to charges that any criticism they offer is motivated by racism or some other invidious form of discrimination. Consequently, minority jurisprudence has become an academic ghetto in which the quality of intellectual discourse is suspect and where mainstream scholars tread at the risk of being declared out of bounds or worse.

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B. *Kennedy Arrives*

Perhaps this situation is beginning to change. In the Summer of 1989 a young black Harvard professor, Randall Kennedy, published as lead article in the *Harvard Law Review* a powerful critique of a main branch of this school of minority jurisprudence.[1] Kennedy's article is an attack on the scholarship and rhetorical posture of three members of the fraternity, Professors Derrick Bell,[2] Richard Delgado,[3] and Mari Matsuda.[4] These authors do not, of course, exhaust the field, but Professor Kennedy wisely chose to limit his critique to detailed examinations of representative works that exemplify the sins against which he preaches.[5]

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1. *See* Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989).

2. The principal works of Professor Bell discussed by Kennedy are: DERRICK BELL, *The Unspoken Limit on Affirmative Action: The Chronicle of the DeVine Gift*, *in* AND WE ARE NOT SAVED 140-61 (1987); Derrick Bell, *Application of the 'Tipping Point' Principle to Law Faculty Hiring Policies*, 10 NOVA L.J. 319 (1986); Derrick Bell, *A Question of Credentials*, HARV. L. REC., Sept. 17, 1982, at 14; Derrick Bell, *Bakke: Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 1 (1979) [hereinafter Bell, *Bakke*]; Derrick Bell, *Minority Admissions as a White Debate*, *in* RACE, RACISM AND AMERICAN LAW § 7.12.1 (2d ed. 1980); Derrick Bell, *Strangers in Academic Paradise: Law Teachers of Color in Still White Law Schools*, 20 U.S.F. L. REV. 385 (1986).

3. The principal works of Professor Delgado discussed by Kennedy are: Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987); Richard Delgado, *The Author Replies*, 3 LAW & INEQ. J. 261 (1985) (responding to criticism of *The Imperial Scholar*); Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984) [hereinafter Delgado, *The Imperial Scholar*].

4. The principal works of Professor Matsuda discussed by Kennedy are: Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1 (1988); Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) [hereinafter Matsuda, *Looking to the Bottom*].

5. Works by other authors of the minority jurisprudence school that Professor Kennedy mentions but does not discuss in detail are: Jose A. Braccamonte, *Minority Critiques of the Critical Legal Studies Movement: Foreword*, 22 HARV. C.R.-C.L. L. REV. 297 (1987); Roy L. Brooks, *Anti-Minority Mindset in the Law School Personnel Process*, 5 LAW & INEQ. J. 1 (1987); Kimberle W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Harlon L. Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435 (1987); Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity*, 23 HARV. C.R.-C.L. L. REV. 295 (1988); Andrew W. Haines, *Minority Law Professors and the Myth of Sisyphus: Consciousness and Praxis Within the Special*

The criticized works argue for two related propositions. "The first—the exclusion thesis—is the belief that the intellectual contributions of scholars of color are wrongfully ignored or undervalued."[6] The second—the racial distinctiveness thesis—is the belief that minority scholars, because of their racial status, as a matter of first principles have a unique and privileged perspective from which to comment on legal issues.[7]

Professor Kennedy finds that Bell, Delgado, and Matsuda "fail to support persuasively their claims of racial exclusion or their claims that legal academic scholars of color produce a racially distinctive brand of valuable scholarship."[8] In addition, and perhaps more important for the future of legal scholarship, Kennedy

> also take[s] issue with their politics of argumentation and with some of the normative premises underlying their writings . . . [S]pecifically [he] challenge[s]: (1) the argument that, on intellectual grounds, white academics are entitled to less "standing" to participate in race-relations law discourse than academics of color; (2) the argument that, on intellectual grounds, the minority status of academics of color should serve as a positive credential for purposes of evaluating their work; [and] (3) explanations that assign responsibility for the current position of scholars of color overwhelmingly to the influence of prejudiced decisions by white academics.[9]

C. *Kennedy's Targets Strike Back*

Professor Kennedy's opponents have not allowed this attack to pass in silence. Their reactions and responses are encapsulated in a summary

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Teaching Challenge in American Law Schools, 10 NAT'L BLACK L.J. 247 (1988); Charles R. Lawrence III, *Minority Hiring in AALS Law Schools*, 20 U.S.F. L. REV. 429 (1986); Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) [hereinafter Lawrence, *Unconscious Racism*]; Henry W. McGee, *Symbol and Substance in the Minority Professoriat's Future*, 3 HARV. BLACKLETTER J. 67 (1986); Kellis E. Parker, *Ideas, Affirmative Action and the Ideal University*, 10 NOVA L.J. 761 (1986); Patricia Williams, *On Being the Object of Property*, 14 SIGNS 5 (1988).

6. Kennedy, *supra* note 1, at 1745-46 (footnote omitted).

7. *Id.* at 1746.

8. *Id.* at 1749.

9. *Id.*

of the debate authored by Jon Wiener, a historian at the University of California at Irvine.[10] To Richard Delgado,

> [t]he debate is about voice . . . about making everybody speak one language. Certain cries of pain lose a lot in the translation. The whole idea of a dominant legal discourse is to limit the range of what you can express, the range of argument you can make. It requires that everything be buttressed by authority, by looking to the past. What happens in the law reviews is important because they are the perfect place to explore a broadening of the dominant discourse. For Kennedy to take us to task for urging experimentation with and broadening of that discourse is singularly unfair.[11]

Another member of the minority jurisprudence school, Patricia Williams, dismisses Kennedy's article as

> a representative response from the academy to new black voices. He is saying "Prove that racism exists." I'm not going to do that. I take American history as given, and work with the results. In the ideology of legal style this is called "unscholarly"—especially if it's done in the first person.[12]

And, Derrick Bell in a letter to the editor of *The New York Times* says, "[Y]ou report that Randall Kennedy . . . touched off a 'rancorous debate' by daring to . . . question[] the scholarly merit of minority legal scholars whose writings use personal narrative and fictional techniques to advance arguments about the pervasive role of racism in American law."[13] Bell then takes *The Times* to task for overstating and mischaracterizing the rancor of the debate, but not for the attribution of its cause to a criticism by Kennedy of the use of personal narrative and fiction.[14]

What are we to make of this dispute between Kennedy and his target/critics? Their conflict is over more than whether minority scholars are discriminated against and whether they have some particularly trenchant things to say. Its less parochial theme is a disagreement over

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10. *See* Jon Wiener, *Law Profs Fight the Power*, NATION, Sept. 4/11, 1989, at 246.

11. *Id.* at 248.

12. *Id.* at 247.

13. Derrick Bell, N.Y. TIMES, Jan. 26, 1990, at A14 (letter to editor).

14. *See id.*

who may participate in such arguments and how they are to be conducted and decided.

Is there something peculiar about minority legal thought such that it can only, or at best, be communicated using allegory and personal history? Are such rhetorical devices suspect or impermissible in legal scholarship? Is it these rhetorical devices to which Kennedy objects? Can scholarship that employs these devices be judged by the usual standards? Or, is some sort of esoteric knowledge—only acquired by an accident of birth or upbringing—required to judge these arguments? To address these questions and to introduce the dispute, I briefly restate some of Kennedy's arguments and those of his targets.

II. WHITHER THE SEPARATE VOICE

Richard Delgado, Patricia Williams, and Derrick Bell are descriptively correct in their characterization of the different rhetorical style of minority scholars. Many of the minority jurisprudence school employ a somewhat different style of discourse. Bell and Williams[15] use allegories and other fictional tales in their writings, and a number of minority scholars, Williams in particular, recite their personal or family history and use that history as a text for legal interpretation. It is the use of these different rhetorical devices that constitute the style, if not the substance, of the distinctive black "voice" in legal scholarship.

A. *Mari Matsuda: Recognizing and Honoring the Separate Voice*

Mari Matsuda is a fan of the distinctive black voice. She believes that "[t]hose who have experienced discrimination speak with a special voice to which we should listen,"[16] and that "[t]he victims of racial oppression have distinctive normative insights."[17] In her articles, she offers examples of what she believes is that "special voice"[18] and are those "distinctive insights."[19]

Matsuda's arguments about the separate, distinctive voice of minority scholars, and Kennedy's response, are less important for the evidence that they marshal, than for their respective epistemic assumptions and standards that form the main axis of the dispute between Kennedy and all

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15. *See* Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

16. Matsuda, *Looking to the Bottom*, *supra* note 4, at 324.

17. *Id.* at 326.

18. *Id.* at 324.

19. *Id.*

of his targets and critics. Although Professor Matsuda was but one of the three main targets of Kennedy's article, it was her argument about the existence and virtue of a separate voice that was taken by all of Kennedy's critics as central to the dispute.[20]

I shall not recapitulate in detail Professor Kennedy's counterarguments and evidence. Suffice it to say, he finds Matsuda's argument and examples unconvincing because they are drawn almost exclusively from outside the legal arena, inapposite.[21] Drawing on the works of both black and white legal academics, Kennedy argues that all black scholars do not speak with a single voice nor are their ideas or reasoning distinct from white scholars.[22]

But beyond this criticism, it is the spiritually degrading character of Matsuda's argument that Kennedy finds most offensive. Professor Kennedy's

> central objection to the claim of racial distinctiveness propounded by Professor Matsuda and others of like mind can best be summarized by observing that it *stereotypes* scholars. By stereotyping I mean the process whereby the particularity of an individual's characteristics are denied by reference to the perceived characteristics of the racial group with which the individual is associated.[23]

Matsuda, Delgado, Williams, Bell, and those who argue that there is something special about minority legal scholarship believe that it is not merely different in subject matter, but that it is different in voice. They believe that this different voice must be attended to and judged in a fundamentally different way and that the traditional standards for evaluating legal scholarship are illegitimate when applied to minority jurisprudence. Matsuda believes that legal scholars "need to develop 'new skills of listening' to learn about minorities' experiences: 'The voices bringing new knowledge are sometimes faint and self-effacing, other times brash and discordant . . . . We should strive to understand their origin and listen carefully for the truth they may hide.'"[24] Kennedy, in contrast, would hold up Matsuda's work and those of other members of her school to the traditional standards of good scholarship.[25]

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20. *See supra* notes 10-14 and accompanying text.

21. *See* Kennedy, *supra* note 1, at 1779.

22. *See id.* at 1778-87.

23. *Id.* at 1786-87.

24. Wiener, *supra* note 10, at 248.

25. This discussion of a separate and privileged voice for black scholars that need

B. *Enlarging or Abandoning Standards?*

Kennedy's critics believe that the intellectual enterprise may become stunted and stultified by a quasi-theological adherence to inappropriate and overly restrictive methodologies of argument. And I, for one, could not agree more. On the other hand, I am compelled to note that their position is neither original, nor peculiar to law. In economics, for example, thoughtful scholars have argued that the laudable desire to raise the true and perceived status of the discipline to a science has led to the adoption of, and an exaggerated faith in, the so-called scientific method borrowed from nineteenth-century physics.[26] In law, economics, and every other intellectual discipline, the nature and limits of proper argument are neither simple nor sharply defined. And, whatever those limits are, they are not identical across disciplines. Proper argument has its bounds, and those

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not meet the traditional criteria of academic scholarship has a familiar ring to it. It was barely two decades ago that black-studies programs began to blossom on college campuses. Thomas Sowell writes of such programs:

> Questions of academic qualifications are dismissed rather than discussed. Quality standards are equated with being "white-like." Such arguments are typically long in colorful characterizations—"academic colonizers," "institutional racism," "house niggers"—and short on specific systematic empirical tests of specific hypotheses. Indeed these very processes of hypotheses-testing are rejected. These rejections are often characterized as "methodological" differences, when in fact they are differences in social-political preconceptions. The very tools of intellectual inquiry are declared to be "conservative tools," and the black intellectual is said to add "something extra." But what this something might be is left undefined: "Writing at the beginning of the development of Black Social Science, one can say only what it might become. The black scholar must use 'his sense of Black consciousness as the cutting edge to redefine reality.'"

THOMAS SOWELL, EDUCATION ASSUMPTIONS VERSUS HISTORY 147 (1986).

26. *See* Donald N. McCloskey, *The Rhetoric of Economics*, 21 J. ECON. LITERATURE 481 (1983):

> Nothing is gained from clinging to the Scientific Method, or to any methodology except honesty, clarity, and tolerance. Nothing is gained because the methodology does not describe the sciences it was once thought to describe, such as physics or mathematics; and because physics and mathematics are not good models for economics anyway; and because the methodology is now seen by many philosophers themselves to be uncompelling; and because economic science would stop progressing if the methodology were in fact used; and, most important, because economics, like any field, should get its standards of argument from itself, not from the legislation of philosopher kings.

Id. at 482.

bounds must be decided by a more general argument about what persuades honest, intelligent scholars within the field.

Professor Kennedy does not directly speak to the question of the validity of the various rhetorical devices favored by the minority jurisprudence school. I infer from his article that he takes the position of all thoughtful and honest scholars that the issue is not one of rhetorical style but rather whether a particular argument is persuasive and powerful. The standards properly brought to bear in making such a judgment need not be confined by a narrow methodology. And, many different forms of scholarly discourse are acceptable. But, such openness does not mean that no standards apply. The arguments of minority scholars must meet the test of sound and persuasive argument. As for the rarefied meta-argument that minority scholarship cannot be judged on the basis of traditional methodologies, that argument, too, cannot escape the tests of soundness and persuasiveness. The reader is always permitted, indeed obligated, to ask whether the writer makes a good case for his position. As an operational matter, this can translate to questions such as: Does the author marshal and explain the available evidence?; Is the argument logically tight?; Are alternate views adequately addressed and countered?[27]

Let us now turn to the rhetorical style and arguments of two of Kennedy's targets, Richard Delgado and Derrick Bell, and those of a writer Kennedy mentions only in passing, Charles Lawrence III, to address three questions: (1) how persuasive are their arguments?; (2) do these prominent minority scholars, as representatives of their genre, speak with a distinctive voice that employs unique rhetorical devices?; and (3) if so, does that voice grant the speakers some special standing in the great legal conversation?

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27. Stephen Carter, another prominent black legal scholar, voicing the same theme has written:

> Scholarship is scholarship, and the quality of a piece of scholarly work doesn't turn on race-specific factors. It doesn't turn on voice. It turns on demonstrated mastery of the relevant material and the ability to contribute to a dialogue, or to spark a new one. It turns on saying something that not only is not *in* the prior literature, but is not *obvious* in light of the prior literature. It turns, further, on making a logical argument—not a correct one, necessarily, or even a non-controversial one, but certainly one that is coherent. And it turns on setting out fairly the possible objections and dealing with them, or even noting, when appropriate, the extent to which they successfully limit one's own position.

Stephen Carter, *The Best Black, and Other Tales*, 1 RECONSTRUCTION 6, 29 (1990).

C. *Richard Delgado: What Voice?*

Richard Delgado has written that racial prejudice exists in the allocation of scholarly recognition. "Delgado charges that the leading white commentators on race-relations law comprise a cadre of 'imperial scholars' who have occupied central areas of civil rights scholarship and have systematically excluded or minimized the participation of minority academics."[28] While he rejects as explanations both "conscious malevolence and crass indifference,"[29] "he posits that the imperial scholars' exclusionary conduct is mainly unconscious and prompted by the desire to maintain control, to prevent scholarly criticism from becoming too threatening to the academic and political status quo."[30] This charge is both serious and highly dubious.[31] Such allegations should be well supported before being used, lest one tar someone with undeserved obloquy and leave oneself open to charges of malice or incompetence.

From a methodological perspective, Professor Delgado's argument is standard academic fare. He is not making some rarefied meta-observation about the world. He is simply saying that certain named scholars, in certain particular articles, fail to cite and to acknowledge works that they should.[32] Whatever rhetorical or epistemic need there may be for minority scholars to use a different voice, it is surely not here. While Delgado's psychological explanation of why the "imperial scholars" have excluded minorities from their ranks may be beyond proof and subject to only the lesser standard of plausible conjecture, this lower standard cannot apply to the charge of invidious racial exclusion itself. That charge is subject to proof or at least persuasive argument supported by empirical evidence.

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28. Kennedy, *supra* note 1, at 1770-71.

29. Delgado, *The Imperial Scholar*, *supra* note 3, at 574.

30. Kennedy, *supra* note 1, at 1771 (citing Delgado, *The Imperial Scholar*, *supra* note 3 at 573-76).

31. I am not alone in my *prima facie* skepticism of Delgado's hypothesis. Stephen Carter has written:

> To imagine that considerations of race motivate the [choice of which articles to cite], however, one must also imagine that the authors of this mainstream literature are sufficiently familiar with their colleagues at other institutions that they are able to tell which are white and which are not. While that may be a fair description of some scholars in some fields, it is my admittedly anecdotal experience that this is not generally so.

Carter, *supra* note 27, at 30.

32. *See* Delgado, *The Imperial Scholar*, *supra* note 3, at 562-63 (stating that the select group of professors who publish important civil-rights articles fails to cite minority authors for legal as well as nonlegal propositions and assertions of fact).

Delgado seems to recognize that no peculiar voice or unusual brand of scholarship is required to make his case. He does not eschew empirical evidence. Indeed, his article examines the citation pattern in twenty-eight civil-rights articles by half a dozen leading liberal white law professors.[33] Delgado finds that they habitually cite one another and virtually never cite the works of minority scholars.[34] How persuasive is such evidence? As Kennedy points out, revealing the citation pattern in the faulted articles is only the first step in a persuasive argument. Delgado's main task was to point to works by scholars of color and demonstrate that they have been wrongfully neglected.[35]

What makes the failure to cite or to reference a work suspect? Perhaps, it was seminal, or particularly eloquent, or more tightly reasoned, or presented unique or at least new evidence. Delgado had to show that given the subject matter of the articles he faults, the scholarship by authors of color would have been the natural substitute or supplemental reference to the ones chosen by the "imperial scholar."

If there is substance to Delgado's charge, he should offer some real proof. This task, while requiring some time and care, need tax neither the budget nor the analytical faculty of a capable scholar. Kennedy points out that similar charges of racial exclusion have been made by historians.[36] Those historians provided detailed explanations of what important insights and research offered by black scholars were wrongly ignored by white academics writing on the same subjects.[37] Professor Kennedy discusses "The Imperial Scholars" in some detail and argues that Delgado tells the reader little or nothing about the works he believes have been wrongly neglected for racial reasons.[38] There is some irony in the fact that

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33. *See id.* at 562-63.

34. *See id.* at 563.

35. *See* Kennedy, *supra* note 1, at 1774 (citing works by or about W.E.B. DuBois, a black historian; Kenneth Clark, a black psychologist and past president of the American Psychological Association; Martin Luther King, Jr.; Cesar Chavez; Malcolm X, and others).

36. *See* Kennedy, *supra* note 1, at 1774.

37. *See id.* at 1774 n.123 ("A considerable amount of revisionist writing on Afro-American history published by white historians in the forties, fifties, and sixties derived part of its perceived 'originality' from an institutionalized ignorance of earlier work produced by black historians, much of it published in *The Journal of Negro History*." [citation omitted]); AUGUST MEIER & ELLIOT RUDWICK, BLACK HISTORY AND THE HISTORICAL PROFESSION, 1915-1980 (1986); Michael R. Winston, *Through the Back Door: Academic Racism and the Negro Scholar in Historical Perspective*, 100 DAEDELUS 678 (1971).

38. Kennedy, *supra* note 1, at 1774 (stating that "Delgado fails to shoulder the essential burdens of championing on substantive grounds specific works that deserve

Kennedy makes his case against Delgado using the very methods that Professor Delgado should have used to substantiate his own more serious charge of invidious racism on the part of respected legal scholars.[39]

D. *Derrick Bell: The Uses of Fiction*

Derrick Bell is arguably the most prominent member of the black jurisprudence movement.[40] Bell's most well known work is the 1987 book *And We Are Not Saved.*[41] The format of the book is a series of discussions between Bell and a character of his invention, the young, beautiful, brilliant, radical, black law professor Geneva Crenshaw. Each discussion uses as its text a highly stylized fictional tale dealing with some aspect of black life.

Professor Kennedy, in his article, focuses on one of Bell's scenarios, "The Chronicle of the DeVine Gift."[42] Bell hypothesizes that Ms.

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more recognition than they have been given").

39. *See generally id.* at 1770-78 (evaluating the merits of Delgado's claim using specific examples).

40. Professor Bell was made a full professor at Harvard Law School in 1971 and, except for a five-year stint (1980-1985) as dean of the University of Oregon Law School, held that position for many years. In 1992 he served as a visiting professor at New York University School of Law and is currently a senior associate scholar at New York University. Professor Bell has been a very visible figure in the law-school world. For several years, he actively and publicly campaigned for more minority and female appointments to the Harvard Law School faculty. In the fall of 1990, he took a leave of absence from Harvard protesting its failure to appoint a tenured minority woman. Several years ago, he was also the focus of a public controversy at Stanford Law School. Stanford's Dean, Paul Brest, recounts the incident as follows:

> In the Spring of 1986, Derrick Bell was a visitor at Stanford Law School, where he taught an introductory course in Constitutional Law. Professor Bell was the former Dean of the University of Oregon Law School, and he teaches at Harvard Law School. He is a prominent legal scholar. He is also black.
>
> Students in Prof. Bell's class criticized his teaching and complained that they were unable to learn the subject from him. Many began auditing other instructors' constitutional law classes. These events ultimately led to the idea of a series of public lectures in basic constitutional law to be given by various faculty members. Although these lectures would be open to the student body as a whole, their unstated purpose was to offer Prof. Bell's students a supplement to his course. The series was called off after members of the Black Law Students Association protested the first lecture on the ground that both the students' dissatisfaction and the unprecedented lecture series were tainted by racism.

Statement of Dean Paul Brest, Stanford University Campus Report, Dec. 2, 1987, at 15.

41. BELL, AND WE ARE NOT SAVED, *supra* note 2.

42. *Id.* at 140.

Crenshaw, while teaching at an elite law school, has been instrumental in recruiting five additional highly qualified "minority" law professors, three of whom are black. When another black candidate, more outstanding than the others, becomes available, the dean of the law school refuses to hire him because it would make the faculty twenty-five-percent minority and thus fundamentally change its identity as a mainstream white law school.[43]

What is one to make of Bell's story? Does he think that white law professors are refusing to hire blacks because they fear being overwhelmed and isolated at their own schools? Or is his argument more subtle? Perhaps he believes that although liberal law professors are now eager to hire blacks, that posture will last only as long as the numbers are not threatening, and that if the qualifications of blacks markedly improved, whites would show their true racist colors. Whether Bell is trying to make this or some other point remains obscure even after repeated readings of his infelicitous essay.

In his introduction to the book, however, Bell writes that:

> affirmative action, a contemporary policy intended to compensate for the damaging effects of past racial discrimination, is examined in the Chronicle of the DeVine Gift. The frequent complaint that "we can't find qualified blacks" may be proof that the affirmative-action policy is serving its real, though unacknowledged, goal: excluding all but a token number of minorities from opportunities that previously were available only to whites.[44]

As I understand it, Professor Bell believes that, under the guise of affirmative action, many law schools are engaged in a massive suppression of black academic prospects. If he is correct, Bell has made a brilliant discovery. The widely held view, however, of those who have seen law-school hiring practices from the inside is the opposite. Most law professors believe that black applicants with weaker credentials will be given extensive consideration and often job offers in circumstances in which white lawyers, males in particular, with stronger credentials by all the standard criteria of grades, LSATs, law-review experience, publications, and clerkships, will not be given a second look.[45]

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43. *Id.* at 143.

44. *See id.* at 8.

45. "The fact is that law schools, particularly leading law schools, actively pursue, hire, and grant tenure to blacks who would not be given a moment's consideration if they were white." Lino A. Graglia, Book Review, 5 CONST. COMMENTARY 436, 446-47 (1988) (reviewing THOMAS R. SOWELL, COMPASSION VERSUS GUILT AND OTHER

Does Professor Bell offer any evidence or argument to support his position? All that either Randall Kennedy or I could find on point was a passing reference to the notion that the standard criteria are either too narrow or invidiously discriminatory.[46] Bell would apparently like to give relatively greater weight in faculty hiring decisions to success in practice. This alternative or supplementary criterion is not without some theoretical appeal. Its shortcoming—and perhaps its unspoken appeal to Bell—is operational.

How does one measure success in practice? The best law students do not go into solo practice. In large firm practice, most of one's work product is not visible to outsiders. In addition, the work product that is visible is usually a joint effort, and individual marginal product therefore remains largely unmeasurable. Nor can appointment committees rely on letters of recommendation. Such letters are of some value when the reader knows the writer, has reason to trust his judgment and character, and has no reason to suspect any conflict of interest. Letters from practitioners meet these conditions less often than those from academics. There is a small village of academics writing letters of recommendation; the reader will usually know the writer, at least by reputation. There is a vast metropolis of practitioners; the writer will usually be unknown to the reader. In addition, academics are repeat players in the recommendation market and must try to preserve their reputation for honesty and good judgment. During the course of their careers they will recommend many former students for teaching positions. Practitioners, on the other hand, are rarely called on for such letters and are usually recommending current employees. Thus, they have little interest in protecting their reputation and may have mixed motives in writing a glowing recommendation.

But this is a mere aside. In two paragraphs, I have spilled considerably more ink discussing the question of whether to use success in practice to judge potential candidates than does Bell. The central message of Professor Bell's opaque story seems to be the assertion, rather than the argument, that, despite all the evidence including his readers' personal experience to the contrary, law schools are invidiously discriminating against blacks in hiring.

Is there something questionable about Professor Bell's rhetorical devices as distinct from the quality of his argument? No! The question is not whether the slightly unusual device of allegory is legitimate—it is. Nor is the question whether a scholar who, on account of cultural background or individual character and style, feels comfortable expressing himself in this mode ought to do so—he should. The real question is purely and

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ESSAYS (1987); DERRICK BELL, AND WE ARE NOT SAVED (1987)).

46. *See* BELL, AND WE ARE NOT SAVED, *supra* note 2, at 143, 156-57.

simply whether a given allegory effectively illuminates the question at hand.

Nor is the use of allegory to illustrate legal problems and propositions far outside the traditional orbit of legal rhetoric. One of the most esteemed works of Lon Fuller, a giant in the history of American jurisprudence, is just such an allegory. *The Case of the Speluncean Explorers*[47] is an account of how an archetypical set of judges would respond to the crime of murder and cannibalism by men who otherwise would have died trapped in a cave. What makes the device so powerful is that Fuller is able to set up a problem that unambiguously captures the salient legal and moral difficulties and then faithfully present the arguments that would be offered by five judges, each representing a different and reasonably appealing legal philosophy.[48]

Derrick Bell's allegory of a black faculty candidate who is not offered a faculty appointment fails, not because it is fictional in the literary sense,[49] but rather because it is false in ludicrously failing to come to grips with the salient problem that there are not enough qualified black candidates to fill even five percent of the slots, let alone twenty-five percent.[50] His strikingly counterintuitive and undocumented charge that affirmative action is in reality a subtle trick for excluding qualified minorities from law teaching cries out for powerful substantiation. Instead, we get a tale about a fictional school. In this particular case, allegory is being used as a means of ducking the inevitable scholarly responsibility of backing up one's charges with evidence. No amount of scholarly sympathy to new styles or "voices"—and we could use a lot more—would make Bell's essay even a jot more convincing. This is because the problems are not with his voice; rather, they are problems that trip up scholars of all kinds of voices: poor argument and lack of evidence.

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47. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

48. *Id.*

49. Many great works of literature, including *Antigone*, *The Trial*, *The Merchant of Venice*, *Billy Budd*, and *Bleak House*, prominently feature legal themes. *See* RICHARD POSNER, LAW AND LITERATURE (1988).

50. Of the applicants for admission to law school in 1987 with LSAT scores between 42 and 45, and between 46 and 48, less than one percent were black. When undergraduate grade point average is also considered, the percentage of black students falling into the elite category declines further. *See* LAW SCHOOL ADMISSION SERVICE, ACCESS 2000 DATA BOOK: U.S. MINORITY EDUCATIONAL ENROLLMENT 47 (1988). In addition, few blacks performed at the elite level after being admitted to law school. A study of 10 leading law schools revealed that the median grade of their black students was at the eighth percentile. ROBERT KLITGAARD, CHOOSING ELITES 162 (1985). It is primarily from the set of the most successful students at the most selective law schools that future law professors are chosen.

E. *The Use of Personal History*

In addition to allegories, another literary device favored by the minority jurisprudence school is the use of personal or family experience as the text for interpretation and argument.[51] Is this an illegitimate rhetorical technique in legal scholarship? I do not believe so. Much good and great writing has been of an exquisitely personal nature; consider Augustine's *Confessions*[52] or Proust's *Remembrance of Things Past*.[53] The skeptical reader might respond that neither of these works is legal scholarship. But even within the legal literature, the essay from the personal perspective is not anomalous. When a leading figure in the law retires or dies, there is the traditional set of remembrance articles in which the authors delve into both their own and the subject's personal history.[54] This is part of the more general category of biography and autobiography, a clearly legitimate avenue of legal scholarship.[55]

Biography or autobiography, however, is not the only vehicle for the discussion of personal experience in a work about law. I confess to having made use of it in my own writing. For example, in discussing the effect of higher divorce rates on women's career choices, I wrote that "[t]he fact that, unlike their grandmother, my daughters will not be told that in order

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51. Patricia Williams, for example, has achieved some notoriety recounting her family experience as the object of racism. *See, e.g.*, Patricia Williams, *On Being the Object of Property*, 14 SIGNS 5 (1988) ("For some time I have been writing about my great-great-grandmother. I have considered the significance of her history and that of slavery from a variety of viewpoints on a variety of occasions: in every speech, in every conversation, even in my commercial transactions class."). Professor Williams's great-great-grandmother Sophie, a slave, was impregnated at the age of 12 by her owner, Austin Miller, a Tennessee lawyer. *Id.* at 6.

52. AUGUSTINE, THE CONFESSIONS OF SAINT AUGUSTINE (Edward Pisey, trans., 1949).

53. MARCEL PROUST, REMEMBRANCE OF THINGS PAST (1954).

54. See, e.g., the following set of articles commemorating the retirement of Professor Walter Blum from the faculty of the University of Chicago Law School: Marvin A. Chirelstein, *Walter J. Blum and My Brilliant Career*, 55 U. CHI. L. REV. 725 (1988); Joseph Isenbergh, *Walter Blum*, 55 U. CHI. L. REV. 734 (1988); Howard G. Krane, *Walter J. Blum and the University of Chicago Tax Conference*, 55 U. CHI. L. REV. 730 (1988); Geoffrey R. Stone, *Wally*, 55 U. CHI. L. REV. 721 (1988), or those written *"In Memoriam" of Paul Bator*: Stephen Breyer, 102 HARV. L. REV. 1741 (1989); Charles Fried, 102 HARV. L. REV. 1739 (1989); David L. Shapiro, 102 HARV. L. REV. 1737 (1989).

55. *See, e.g.*, PETER IRONS, THE COURAGE OF THEIR CONVICTIONS, at jacket (1988) ("Peter Irons' extraordinary book reveals the live faces behind the masks of constitutional law; to read it is to understand the inner dynamic of laws outward development."—Lawrence H. Tribe, Harvard Law School).

'to change diapers you don't need a college degree' is at least in part a reflection of the fact that their job changing diapers will be less secure than was their grandmother's."[56] Then, at another point in the same article, I reproduce my marriage vows.[57] I chose to employ these personal references because they provided a human touch to a literature that, although about the all too human subject of marriage and divorce, is of necessity written from a somewhat detached intellectual perspective. The personal references to what my grandmother said to my mother, what my wife said to me, and me to her, invited the reader to empathize with the subject and, in that process, to recognize something general, perhaps even universal, in the experience being related.

Law is a complicated, deep, and difficult human discipline. In its grand scope, it defies complete human comprehension. It would hardly be prudent to foreclose from discourse inquiries into individual lives, including those of the author, to inform the study of law. If any scholars, men or women, black or white, can use their experiences to add clarity or force to an argument, more power to them.

For a number of minority jurisprudence school authors, however, personal experience functions like an incantation recited to magically endow the writer with special standing rather than as a device to make the human impact of a legal regime more real to the reader. Seeking special standing or authority is not necessarily an illegitimate rhetorical motive, but in a modern intellectual discipline, authority and standing cannot be acquired by magic. It must, instead, derive from the power of the author's rhetoric. If his experience rings true, if his interpretation is enlightening, and if the legal implications he argues for are persuasive, then the discussion of the experience will add authority to the piece. How well does the work of authors of the minority jurisprudence school meet this test?

F. *Charles R. Lawrence III: The Misuse of Personal Experience*

Let us consider the work of someone Kennedy does not discuss, Charles R. Lawrence III. Professor Lawrence begins his article on "Unconscious Racism"[58] by recounting two personal experiences that he believes bear on the subject of the essay. To Professor Lawrence, these experiences exemplify unconscious racism on the part of American whites. Lawrence's first story is an account of his shock and hurt when he brought his three-year-old daughter to nursery school and learned that one of her

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56. Lloyd Cohen, *Marriage, Divorce and Quasi Rents; or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267, 295 n.62 (1987).

57. *Id.* at 272 n.10.

58. *See* Lawrence, *Unconscious Racism, supra* note 5.

classmates had brought his favorite book, *Little Black Sambo*,[59] to school for the teacher to read to the class. The incident reawakens long-suppressed painful memories of shame and embarrassment, memories of Lawrence's kindergarten teacher—whom he describes as a "good, well meaning person,"[60]—reading an earlier edition of the same book to his class. Professor Lawrence's second experience is being told by a white liberal friend at Haverford College, "I don't think of you as a Negro."[61]

Often the author, who examines the actions of others with a microscope to discover their hidden motives and beliefs, would be better advised to turn that lens on himself. Such is the case, I believe, with Professor Lawrence. The affection of his daughter's classmate for *Little Black Sambo* and the comments by his college classmate do not reflect racism, unconscious or otherwise, but Lawrence's imputing a racist subplot to these experiences speaks volumes of the afflictions of his own soul.

It is difficult for adults to appreciate children's literature. With the passage of time we leave the consciousness of four-year-olds further and further behind. But we must try to reassume that consciousness to understand the powerful appeal of *Little Black Sambo* to a small child. The story is about a young boy who uses his wits to escape being devoured by tigers. He convinces four of them in turn to accept a different article of his new clothing in lieu of eating him. A short while later when the tigers meet and observe each other's sartorial splendor, they are overwhelmed by jealousy and anger. After disrobing, they stalk one another around the base of a tree, each seizing with his teeth the tail of the cat in front. Sambo takes advantage of the tigers' preoccupation to ask if they would mind if he took back his clothes. They do not respond, for to do so would require them to open their mouths and release the captive tail. Hearing no objection, Sambo recovers his clothes and departs. This further incenses the tigers, and they try ever harder to devour one another. Their efforts are futile. They race around the tree at such velocity that their image blurs into a mass of yellow and they are magically transformed into a pool of butter. Sambo's father chances upon the butter and brings it home. The story ends with the family feasting on butter-rich pancakes prepared by Sambo's mother.

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59. The original version of the book was HELEN BANNERMAN, THE STORY OF LITTLE BLACK SAMBO (1898). I was able to examine two versions of the book: (1) HELEN BANNERMAN, LITTLE BLACK SAMBO (Keith Ward illustrator, Whitman Publishing Co. 1935); and (2) HELEN BANNERMAN, LITTLE BLACK SAMBO (Eulalie illustrator, Platt & Munk Publishers 1972, 1955, 1928, and 1925).

60. Lawrence, *Unconscious Racism*, *supra* note 5, at 318.

61. *Id.* at 318.

What is this story about? Why does it have an appeal to children that spans the decades? The theme of *Little Black Sambo* is not racist.[62] Children do not view Sambo as a comical, derisive, evil, or repulsive character; indeed they identify with him. Sambo and his world capture and reflect the way children would like to see themselves and their world. Small children feel vulnerable and at times helpless in a world that they are coming to understand contains many perils and is ruled by laws of causation that are both unsympathetic and impervious to their will. Sambo's story is a wish-fulfillment fantasy in which children identify with the hero. Sambo is the child who can through his wits escape seemingly much more powerful forces, the tigers. The image of the four tigers with their jaws locked around one another's tails conveys another satisfying symbolic representation of the world, the powerful and dangerous forces of the world can be brought into perfect equipoise such that a small weak

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62. It is far from clear what race is properly ascribed to Sambo. Several things all lead the reader to conclude that Sambo is an African Negro: (1) the reference in the title to Sambo as black; (2) the fact that "Sambo" may be the corruption of a name in several West African cultures and was a name and pejorative title applied to black males in this country from the late 18th to the early 20th century; and (3) the illustrations in several editions depicting Sambo and his parents with Negro facial features. On the other side of the ledger, however, there is much to suggest that Sambo is an Indian boy. First, tigers are indigenous to India not Africa. Second, in various editions, both oblique and direct references are made to India. Finally, many Indians have very dark complexions and in Britain are indeed frequently referred to as blacks with about as much chromatic accuracy as when the term is applied to most American Blacks. I have been unable to determine whether Sambo is a name, or the corruption of a name, in any of the 23 main languages or 200 dialects of India.

The two editions of the story I examined (*see supra* note 59) not only differed from one another in their treatment of Sambo's race, but each was also internally inconsistent. In the Whitman edition, Sambo and his parents were illustrated with somewhat exaggerated Negro features, and yet the butter into which the tigers were transformed was referred to by the Hindi word "ghi." In the Platt & Munk edition, the story is expressly placed in India, but Sambo and even more so his father are depicted with Negro features, and yet his mother appears Indian, wears a sari, and is named Mama Sari.

I am not the first to argue that *The Story of Little Black Sambo* has been unfairly tarred and to note the mistaken identification of Sambo as an African Negro. Joseph Boskin in an authoritative and unsympathetic work on the pejorative use of the term "Sambo" writes,

> *The Story of Little Black Sambo* . . . was not in fact in the [derisive] "Sambo" tradition. Its title has misled many a reader. The *Indian* youth is no buffoon; on the contrary, he uses his wits to defeat the tigers. But the wording of the title, as well as the illustrations in several editions, was in keeping with the stereotypical pose.

JOSEPH BOSKIN, SAMBO 37-38 (Oxford 1986) (emphasis added).

boy can pass by them with safety.[63] Finally, it is not malefic causality, but rather beneficent magic that rules the world—tigers that would consume us can in an instant be transformed into butter, which we may then consume. This sort of story is common in children's literature and movies. Consider, the recently popular *Home Alone*[64] in which a small boy on Christmas Eve comically, lightly, and successfully foils two determined burglars. That the main theme of both stories is a child confronting and overcoming—sometimes through magical intercession—dangerous malevolent forces is hardly surprising. This theme is also a central feature in children's fantasy play.[65]

Any racist association with the story is merely an historic and linguistic accident. Because for many adults, white and black alike, the name Sambo was a pejorative synecdoche for all blacks, the book bore a racist taint by dint of its title.[66] But this has nothing whatsoever to do with racism, unconscious or otherwise, in the story or, more importantly for Professor Lawrence's thesis, in children's love of it. Nor is it easy to conjure up a racist motive, whether conscious or not, for parents to choose the book for their child. Surely, dyed-in-the-wool racists would no more purchase a book about brave and clever Black Sambo than would Nazis tell their children stories of brave and clever Jewish Moishe who outwitted bears in the forests of Byelorussia. Perhaps Professor Lawrence could contrive some theory of how putatively racially enlightened liberals might choose the book for their children out of some unconscious racist motive, but I doubt that many readers would be persuaded by such a theory; and more to the point, he did not make that case in his article.

Professor Lawrence's discussion of *Little Black Sambo* has struck a chord in my consciousness, but not the one he intended. I too am a member of a despised and persecuted minority. The Christian world has not been kind to Jews. For me, as for many Jews, symbols of Christianity such as the crucifix are the representation of anti-Semitism. At some point in my life, I may have believed that Christians displayed these symbols to proclaim their anti-Semitism. At times I still must remind myself that although the crucifix may symbolize for me the oppression of Jews by

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63. Much the same satisfying imagery is employed in slapstick comedy. I can recall Charlie Chaplin, oblivious to two big fellows charging at him from opposite directions, bending over to pick a flower thereby causing them to crash into one another.

64. HOME ALONE (Twentieth Century Fox 1990).

65. For an enlightening discussion as well as a fascinating retelling of children's fantasy play in which they confront and defeat evil and dangerous forces, see VIVIAN G. PALEY, BAD GUYS DON'T HAVE BIRTHDAYS, at viii (1988) ("[C]hildren use fantasy play to portray fear in order to prove that fear can be conquered: I pretend therefore I am not afraid.").

66. BOSKIN, *supra* note 62, at 34-38.

Christians, that is neither the conscious nor unconscious meaning of it for the vast majority of those who display it. It seems to me that Professor Lawrence has failed to distinguish between what he sees in a work of literature and what it means to others. To Lawrence, Sambo is the ugly black primitive, and he seems not to recognize how implausible it is to ascribe that vision to the four- and five-year-olds who enjoy the story.

Lawrence's interpretation of his second personal incident is equally off the mark. When a white liberal friend at Haverford College, a Quaker institution, in the early 1960's confided that he did not think of Lawrence as a Negro, Lawrence interpreted this as a grossly insensitive and obtuse attempt at a compliment, evincing unconscious racism.[67] Lawrence might have objected to the remark on the grounds that being a Negro was an essential part of his identity and that his friend, in failing to see him as such, was not seeing him at all. If that was Lawrence's objection, however, it would have been to something other than racism, unless the word is to be stretched beyond all recognition to include what is more nearly its opposite, i.e., the failure to recognize race as a significant social characteristic.

But we need not be excessively troubled by such a possible interpretation, because Professor Lawrence's objection is rooted in a more explicitly invidious interpretation. He believes that the unconscious message embedded in his classmate's remark was, "'I think of you as different from other Negroes, as more like [a] white [person],'"[68] and that to "be thought of as a Negro is to be thought of as less than human."[69]

Of course multiple meanings can be attributed to any statement, but some are more natural and consistent than others. Given the era and place in which these words were spoken and the education, motivation, and probable intelligence of the speaker, Lawrence's interpretation though possible, is both extremely ungenerous and highly implausible. A more generous and consistent interpretation is that his friend had chosen a shorthand way of saying:

> We live in a race-charged time and place in which people of other races are reduced to objects. Our friendship has allowed me to overcome that. I am no longer forced to see you through the distorting and collapsing prism of race. To me you have become a subject and not an object.

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67. Lawrence, *Unconscious Racism*, *supra* note 5, at 318.

68. *Id.* at 341.

69. *Id.* at 318.

If Lawrence's friend was confessing to seeing most Negroes as objects rather than subjects, he was admitting to a subtly different and, perhaps, more serious failing than merely reducing people to stereotypes. His friend had failed to recognize the subjectivity, not merely the individuality, of Negroes. To the extent that Lawrence's friend was confessing to stereotyping most Negroes, is it obvious, or even likely, that those stereotypes were pejorative? To many racial liberals, in the early 1960s in particular, Negroes appeared noble and heroic. Nor was this generous stereotype unique to that era. In 1916, Carter G. Woodson, the founder of *The Journal of Negro History*, wrote in its inaugural issue that much of the then current literature on Negroes portrayed them as "persecuted saint[s]."[70]

G. *Personal Voice Once More*

I have spent some time discussing what is the bare introduction of an otherwise stylistically standard law-review article to clarify the appropriate rhetorical standing of the personal voice in legal scholarship. The personal voice, whether that of Whites, Blacks, men, women, other species, or beings from another planet, seems to have two related uses. One is thoroughly legitimate, the other somewhat problematic. The first is to give a tangible sense to the reader of the meaning of various social and legal facts. The second is to grant the author some special standing as a consequence of his recitation of his experience.

The effort to add a personal touch to legal scholarship is, in general, all to the good. Most legal manuscripts are so arid as to defy digestion. Providing context and meaning through personal experience when carried off successfully is admirable and valuable. Does the evocative personal experience also generate authority for the author? Yes, but this increase in authority is secondary to, derivative of, and somewhat inconsistent with, the primary rhetorical use of personal experience.

Our law is about and for human beings. While a good mathematician may be an immature and disturbed savant, a good legal scholar may not. Those who propose to tell us something normatively important about law should have an insight into what people are about. That is why the personal experience that rings true and captures a salient social or psychological fact may add a measure of authority. Had Professor Lawrence's account and interpretation of his experience demonstrated a particularly powerful insight into human consciousness, his work would be valued on that account alone. Even if such an insight is not law or legal scholarship, it surely informs law. Further, had Lawrence displayed such

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70. Winston, *supra* note 37, at 693 (quoting from volume 1 of the J. NEGRO HISTORY).

an insight, he would thereby have placed himself within the class of people whose other thoughts on the subject should be given a respectful hearing for they would be offered by a man of some demonstrated wisdom and understanding.

Note though that the use of personal experience to gain authority is by its very nature a high-risk proposition; there is more to lose from failure than to gain from success. The recitation of personal experience that successfully enables the reader to empathize with the author is a two-edged sword. On the one hand, it demonstrates that the author has some insight and wisdom. On the other hand, to the extent that it successfully educates the reader, it partially undercuts the author's privileged position as a uniquely informed expert. If, however, the author's recitation of his personal experience does not ring true, or his interpretation is unpersuasive, not only does the recitation not add authority to the work, it diminishes the authority it would otherwise have. In Professor Lawrence's case, his interpretation of his experiences with *Little Black Sambo* and a college friend are thoroughly unpersuasive and thus can convey no new insight into race-relations law, or at least not the ones he would wish. His examples tell far more about the demons in his own mind—demons that are arguably the product of the hideous history of race-relations in this country—than they do about the unconscious racism of others.

III. CONCLUSION

What can we make of this dispute between Professor Kennedy and his target/critics? It is certainly not about the legitimacy of the use of either the personal voice or allegory. Nowhere in his article does Professor Kennedy comment on or criticize either rhetorical device. It is poor scholarship and seriously flawed arguments that are the object of Kennedy's wrath. The issue of the use of alternative rhetorical devices is merely an invention of Wiener, Delgado, Bell, and Williams.[71] At most, Kennedy's article may be read to refer to, and to criticize, these devices selectively and by implication. They are to be condemned only when inartfully employed or illegitimately used to occupy a privileged and exclusive position on account of one's personal experience.

There is nothing analytically overpowering or even counter-intuitive in either Professor Kennedy's thesis or presentation. His article is merely a very thorough, scholarly, well-argued, and well-written essay. It is written in the only "voice" that ultimately matters in legal literature, that of the reasonable and articulate scholar. That is enough to sharply distinguish it from the works that it criticizes. While Professor Kennedy's

71. *See supra* notes 10-14 and accompanying text.

article stands on its own as a valuable contribution to the legal literature, the final irony of this debate is that if anyone legitimately uses his or her personal background to successfully enhance his or her scholarly writing, it is not the practitioners of minority jurisprudence, but rather Professor Kennedy himself. Because he is a black scholar with an established record as a supporter of standard black legal claims, the arguments he offers cannot be dismissed as racially or ideologically motivated. Let us hope that Professor Kennedy's example will encourage others in the profession to distinguish *publicly* between sense and nonsense.