

THE OBLIGATION THESIS: UNDERSTANDING THE PERSISTENT  
“BLACK VOICE” IN MODERN LEGAL SCHOLARSHIP

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This Article revisits the debate over minority voice scholarship, particularly African-American scholarship, that raged in the late 1980s and early 1990s with the advent of critical race theory (CRT). Many critical race theorists elevated the voices of minority scholars, arguing that scholarship in the minority voice should be accorded greater legitimacy than work on race produced by white intellectuals. Many white and some African-American scholars disagreed with “Crits” analyses. They charged that good scholarship by African Americans should be judged as a fact-in-itself, not ghettoized or subjected to less rigorous analysis than scholarship by white academics. This Article explores the work of four current up-and-coming black legal scholars to revisit that early disagreement and its ramifications in the modern black legal academy. By and large, it appears that the anti-CRT writers have won the debate. Today’s legal academy, at least as reflected in the work of many highly sought-after black scholars, more closely reflects the anti-narrative perspective on scholarship. Black scholars continue to write on racial topics, but with different methodologies than many CRT scholars. Like other areas of legal scholarship, interdisciplinary and doctrinal methods are most prevalent. The Article suggests that one reason African-American legal scholars continue to write about race, despite the risks of doing so, is their sense of obligation to the black community. I contend that this obligation runs just as deeply for black academics as it does for black practitioners, who tend to closely relate the legal profession with the struggle for racial justice.

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*Prelude: Kenya Cantrell, Professor of Law*

*Kenya Cantrell, a young black woman, manages to get herself admitted to the top law school in the land, Calabresi Law School. Though she and her family have little discretionary income, she does not hesitate to pass up a full scholarship to Happy State School of Law. I mean, **this is Calabresi**. When a student graduates from Calabresi—let alone an African-American student—she has written herself a ticket to fame, fortune, a Supreme Court clerkship, a Presidential appointment, and eventual burial in some fancy white folks' cemetery.<sup>1</sup>*

*Kenya **has** to choose Calabresi. There is simply no other option.*

*I, a fellow Calabresi student, meet Kenya at a workshop in Room 721<sup>2</sup> for students planning to go into legal academia. Excited to connect with the one other black face in the room, I go over and introduce myself.*

*ME: Hey! It's so great to see you here. Not enough of us<sup>3</sup> are getting into academia. So, what are your scholarly interests?*

*KENYA: Well, I was surfing the Internet one night and found this amazing book by Patricia Williams, *The Alchemy of Race and Rights*.<sup>4</sup> It totally changed my perspective on the law. Reading that book reminded me of why legal scholarship is important—it can speak the truth of disenfranchised people into power. To hear our professors tell it, the only important legal concepts are default rules and judicial deference! I want to produce transformative critical race scholarship. I want to give to the next generation of black lawyers what Williams gave me!*

*ME (doubt in my voice): Umm . . . that sounds cool and all, but I don't know . . . People aren't still writing critical race stuff nowadays, are they? Or if they are, does anyone hire them? And do their articles get published in journals people actually read?*

*KENYA: No one reads law journal articles anyway! Just kidding. But you're wrong. Critical race scholars are still out there doing important work. I want to write short fictional stories about the African-American condition and publish them in law journals, just like Derrick Bell. And don't you know about Richard Delgado, Kimberlé Williams Crenshaw, Mari Matsuda, and Cheryl Harris?*

*ME: Yeah, but those people became established a long time ago. Mari Matsuda can get Langdell Law Journal to publish anything she writes. Why not specialize in tax law? There aren't any of us<sup>5</sup> producing work in that field. A black woman writing tax scholarship—the white establishment will eat that right up!*

*KENYA (pensively, hesitantly): I don't know. I love tax, but shouldn't I produce the work that feels most interesting and meaningful to me?*

1. To which we all aspire. See, e.g., Arlington National Cemetery.

2. All of the classrooms at Calabresi begin with "7" to symbolize how lucky we all are that the faculty decided to let us in, since attending Langdell Law School or Learned Hand Legal Center would not have given us nearly as good an education as attending Calabresi.

3. By "us," I mean black people. Though Kenya and I are both native South Carolinians who attended liberal arts colleges, I do not use "us" to refer to Southerners, women, or private school graduates. "Us" is a racial term.

4. The critical perspective, unlike legal realism and law and economics, is not often integrated into first-year classes at Calabresi. Learning about this kind of scholarship requires luck and initiative on the student's part.

5. See *supra* note 3.

ME: Well, no, not really. Not if you want anyone to listen to you, anyway. Look—it's the twenty-first century. Stop talking about race and power all the time, lose the first person, lose the stories, and get yourself a good academic job. If you don't, no law school will give you tenure and no one will ever read or cite your articles. You will have no impact in the world and you will disappoint everyone who supported your high-priced Ivy League education. Say hello to \$40k a year and obscurity at Happy State!

Kenya, convinced, puts race-talk and storytelling on the metaphorical shelf. The following year, she publishes a highly-acclaimed student Note entitled *State Income Tax and the Efficiency of Fringe Benefits in the Calabresi Law Review*. Kenya goes on to a feeder clerkship on the D.C. Circuit and later clerks at the Supreme Court. After she returns to her old stomping ground, Calabresi Law School, for an assistant professorship, she throws herself into research on Coase theorem and tax restructuring. When now-tenured Professor Cantrell occasionally writes about race (as schools expect black scholars to do every now and again), she uses a detached, objective scholarly voice.

With narrative and autobiography purged from her academic arsenal, Professor Cantrell makes important contributions to the canon on race and taxation. She is awarded tenure for her efforts. Supreme Court Justice Clarence Alito cites her work in his unexpected majority opinion in *Johnson v. El Shabazz*, 555 U.S. 777 (2007), which upholds the constitutionality of federal tax credits for black reparations. Thanks to my sage advice, Professor Cantrell's scholarship is actually relevant in the lives of her people.<sup>6</sup> Congratulations, Kenya!



In the late 1980s and early 1990s, the role of the law professor of color was an abundant source of scholarly debate. The critical race theory (CRT) movement, led by Harvard's Derrick Bell, University of Pittsburgh's Richard Delgado, and others, introduced the doctrinally-focused legal academy to narrative and autobiography, or "voice scholarship."<sup>7</sup> Not only were African Americans teaching at the leading legal educational institutions in the nation, but they were also bringing their racial baggage with them. Even if black professors were tempted to "cover"<sup>8</sup> in their daily lives, a substantial portion

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6. "Her people," like "us," is a racial term. See *supra* note 3.

7. The writings in the area are too numerous to list. Representative articles include Arthur Austin, *Deconstructing Voice Scholarship*, 30 HOUS. L. REV. 1671 (1993); Eleanor Marie Brown, *The Tower of Babel: Bridging the Divide Between Critical Race Theory and "Mainstream" Civil Rights Scholarship*, 105 YALE L.J. 513 (1995); Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991); Jerome McCristal Culp, Jr., *You Can Take Them to the Water But You Can't Make Them Drink: Black Legal Scholarship and White Legal Scholars*, 1992 U. ILL. L. REV. 1021 (1993); Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990); Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803 (1994).

8. "Covering" is strategically downplaying characteristics that make one appear outside of the mainstream. KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* ix-xii (2006). See

of their scholarship was rich with racialized storytelling.<sup>9</sup> It is important to note that, although use of narrative is usually the province of CRT and related disciplines like critical legal studies, feminist legal theory, queer theory, “latcrit” (Latino critical studies), and other “outsider scholarship,” CRT’s basic contribution is not in its styles of scholarship. CRT primarily advanced the idea that race is the central organizing principle of society. Voice and narrative—the “most characteristic aspects of CRT”<sup>10</sup>—are core means of emphasizing the centrality of race because they give racial minorities space to “name their own reality.”<sup>11</sup>

As the CRT movement grew, black law professors grew concerned about whether and how the movement was changing black people’s positioning in the legal academy. Far from being forced into so-called objectivity, assimilation, or covering, black law professors were *expected* to incorporate their racial identity into their scholarly pursuits.<sup>12</sup> Even African-American legal scholars who did not write in the CLS/CRT genre began to inject stories into their work.<sup>13</sup>

Two of the most important critics of voice scholarship and its related expectations were Stephen Carter and Randall Kennedy. In the early 1990s, both Carter and Kennedy were young, well-respected professors building careers at two of the nation’s top law schools, Yale and Harvard, respectively. Both were graduates of Yale Law School with only three years separating

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also Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485 (1998).

9. Of course, even critics did not use the narrative and autobiography in all of their work. Even Derrick Bell has authored a number of books and articles on race that use more traditional legal academic methods. See, e.g., DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* (1973); DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004).

10. Greta McMorris, *Critical Race Theory, Cognitive Psychology, and the Social Meaning of Race: Why Individualism Will Not Solve Racism*, 67 UMKC L. REV. 695, 698 (1998).

11. See CRITICAL RACE THEORY: THE CUTTING EDGE 37 (Richard Delgado ed., 1995). See also Johnson, Jr., *supra* note 7, at 808 n.27; Kris Song, *The Present Contours of Asian American Legal Scholarship: Its Themes, Objectives, and the Search for an Asian American Legal Perspective*, 9 ASIAN PAC. AM. L.J. 83, 87 (2004).

12. Stephen Carter, for example, tells a story of a colleague who notes that if she had known that he was black, she would have “gotten so much more” out of his article. Stephen L. Carter, *Academic Tenure and “White Male” Standards: Some Lessons from the Patent Law*, 100 YALE L.J. 2065, 2065 (1991). This pressure to participate in voice scholarship has extended beyond African Americans to other minority ethnicities. See, e.g., Ilhyung Lee, *Race Consciousness and Minority Scholars*, 33 CONN. L. REV. 535, 537 (2001) (recounting a heated disagreement between Asian American scholars Robert S. Chang and Jim Chen, among others).

13. See, e.g., Charles J. Ogletree, Jr., *Introduction: The Conference on Critical Race Theory: When the Rainbow Is Not Enough*, 31 NEW ENG. L. REV. 705 (1997).

them. (Carter graduated from Yale in 1979; Kennedy in 1982.) Both clerked for Supreme Court Justice Thurgood Marshall. Their similarities were limited: While Carter participated in a broad range of legal scholarship, primarily focusing on law and religion in society, Kennedy became an important scholar on race and the law. Indeed, Kennedy was the second professor to teach Race, Racism, and American Law at Harvard Law School, a course that Derrick Bell originated.<sup>14</sup> Though Bell was originally thrilled to have Kennedy as an ally on the Harvard Law School faculty, his delight waned after Kennedy published a scathing critique of voice scholarship, *Racial Critiques of Legal Academia*, in 1989.<sup>15</sup>

Two of Carter's pieces in particular evoked vitriol from pro-voice scholarship academics: His *The Best Black* chapter in his book, *Reflections of an Affirmative Action Baby*,<sup>16</sup> and *Academic Tenure and "White Male Standards": Some Lessons from Patent Law*.<sup>17</sup> Unlike Kennedy, Carter did not level a direct attack on voice scholarship. Instead, he suggested that the person who produces scholarship should not be the primary determinant of the scholarship's quality—the individual piece should speak for itself. Proponents of voice scholarship, especially then-University of Virginia professor Alex Johnson, Jr.,<sup>18</sup> took issue with Carter's advocacy for universal standards of scholarship. Though he recognized in his response to Carter and Kennedy that there are many voices of color, he also claimed that their voices "reflect the majoritarianism and universalism associated with legal academe's male-dominated, hierarchical professoriate."<sup>19</sup> Johnson claimed that both Kennedy and Carter speak with "the 'Hierarchical Majoritarian' dialect of the voice of color."<sup>20</sup>

Now it is 2007, at least fifteen years since the debate between black voice-intellectuals and black universalist-intellectuals was most vigorous. The legal academy has changed significantly. Critical race theory, while still a relevant force in legal academia, is not the novel and refreshing upstart that it once was. With the continuing influence of traditional legal scholarship

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14. Derrick Bell, *The Strange Career of Randall Kennedy*, NEW POLITICS (1998), available at <http://www.wpunj.edu/newpol/issue25/bell25.htm>.

15. *Id.* See also Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) [hereinafter *Racial Critiques*].

16. STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 47-69 (1991) [hereinafter AFFIRMATIVE ACTION BABY].

17. Carter, *supra* note 12.

18. Since 2002, Johnson has served as Dean of the University of Michigan School of Law.

19. Alex Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2009 (1991).

20. *Id.*

(that is, parsing federal appellate opinions with often cursory attention to the social context motivating those opinions) and the increasing emphasis upon empirical and historical interdisciplinarity on all law faculties, many of the brightest legal minds are nurtured in environments that de-emphasize or outright deny the centrality of race in American society.<sup>21</sup>

What does this paradigm shift mean for black intellectuals today, especially young people entering the academic market? Have young black law professors largely abandoned the project of voice scholarship—and if so, is that a good thing? This Article will profile the work of four young black rising stars of legal academia: Tracey L. Meares, Richard R.W. Brooks, Kenneth Mack, and Devon Carbado. These profiles will show that, although identity perpetually informs African-American legal scholarship, up-and-coming black legal scholars tend to “cover” in their work.<sup>22</sup> Instead of overt specialization in racial issues, many of today’s young African-American legal academics specialize in issues that are facially race-neutral, if you will. In 2005 and 2006, the top five most frequently-cited law journals<sup>23</sup> published 123 articles,<sup>24</sup> six of which were authored or co-authored by African Americans. None of those articles uses voice and, in keeping with the theory I put forth in this Article, three use non-critical, non-narrative methodologies to discuss race,<sup>25</sup> one mentions race to juxtapose it against sexual orientation in antidiscrimination law,<sup>26</sup> and two do not mention race.<sup>27</sup> The new black legal scholars appear to have drawn a line between voice scholarship, which by

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21. Law and economics has been an important theoretical presence since the 1960s, coexisting with law and sociology, critical legal studies, and other movements. It is only recently (especially after the virtual end of Critical Legal Studies) that its influence within legal academe has dramatically increased.

22. I again use “cover” in the Kenji Yoshino sense. See YOSHINO, *supra* note 8.

23. According to a database administered by Washington & Lee professor John Doyle, the law journals with the five highest citation scores in 2005 and 2006 are, in order, *Harvard Law Review*, *Yale Law Journal*, *Columbia Law Review*, *NYU Law Review*, and *Stanford Law Review*. John Doyle, Law Journals: Submission and Ranking, <http://lawlib.wlu.edu/LJ/index.aspx> (select 2005 and 2006 under “Comb.” and click “Submit”).

24. I refer to articles in the strictest sense, meaning that only pieces labeled articles were included in this list. Essays and symposium pieces were not included.

25. Richard R.W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 223 (2006); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256 (2005).

26. Jamal Greene, *Beyond Lawrence: Metaprivacy and Punishment*, 115 YALE L.J. 1862 (2006).

27. Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381 (2005); Kevin E. Davis, *The Demand for Immutable Contracts: Another Look At the Law and Economics of Contract Modifications*, 81 N.Y.U. L. REV. 487 (2006). Note that Richard Brooks published both an article that did not mention race at all and one that was centrally about race in these journals during this two-year span.

definition incorporates self into one's work, and scholarship about race, which may or may not include personalized discourse. Scholarship about race, as opposed to voice scholarship, allows these young scholars to participate and be well-respected in the majoritarian legal academic world without "selling out."<sup>28</sup> Like Kenya Cantrell, the young black legal scholars seem to have absorbed the academy's message that voice scholarship can be a counterproductive pursuit, not only for their careers, but also for the African-American community at large.

I will then address one reason that even up-and-coming scholars, who have been successful in the eyes of white-dominated law faculties, continue to pepper their work with race scholarship and even some limited voice scholarship. Some race scholarship, of course, is inevitable—all scholarship is based on intellectual interests, and interests are shaped by experiences. The adage goes, "all research is biographical." Yet, more importantly, black law professors are subject to the same social pressures and obligations that color the work of other black lawyers; that is, African-American legal scholars may feel a special duty to address the African-American condition in their work because of their privileged status. While some black lawyers choose to practice civil rights law or provide pro bono services in their efforts to benefit the African American community, black law professors choose to research and write about race. Following David Wilkins, I term this phenomenon the obligation thesis.<sup>29</sup> Finally, I will address some of the other factors that may be influencing black scholars' rejection of voice/CRT but embrace of traditional civil rights scholarship.

Part I provides an overview of the development of CRT, with special emphasis on the use of narrative and autobiography. I will begin by explaining the political and social matrices that led to the development of CRT and then move more narrowly to discussion of some of its leading lights

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28. The blog Blackprof.com makes a light reference to this problem in a link titled *Ask Mom!: The Advice Column for Professors*: "Mom is ready to advise the law-lorn on a host of everyday problems that professors (especially professors of color) face: What if my new dean seems unfriendly? . . . If my tenure committee seems uncomfortable with my writing about race?" Blackprof.com, Ask Mom!, <http://blackprof.com/askmom.html> (last visited Jan. 19, 2007). African-American professors may feel pressure to conform to "standard" scholarship from their institutions, but also feel a sense of obligation to write scholarship that is meaningful for other African Americans.

29. David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981, 1984 (1993). Wilkins used "obligation thesis" to describe the sense that black corporate lawyers should factor responsibility to the black community in constructing their professional and life plan. I apply this term here to black legal academics. I discuss Wilkins's work in greater detail in Part IV.



that use voice scholarship. Though it is tempting to make this section a comprehensive list paying homage to all of the important pioneers of voice scholarship, I will focus only on three scholars here: Derrick Bell, Patricia Williams, and the lesser-known but influential scholar Jerome McCristal Culp, Jr.<sup>30</sup>

Part II will explain in greater depth African-American contrarians' responses to black voice scholarship. I will focus on the scholars' fear that voice scholarship would lead to the ghettoization of legal scholarship by minorities. The ultimate goal of this inquiry is not defining certain acceptable and unacceptable modes of black legal scholarship, but rather, finding the freedom to choose whichever form and forum a black scholar believes most useful and meaningful.

Part III will examine the work of four up-and-coming African-American legal intellectuals: Tracey L. Meares, Richard R.W. Brooks, Kenneth Mack, and Devon Carbado. As in the first group of scholars, it is impossible to choose a perfect sample, but these scholars provide a fairly broad picture of important young black legal scholars.<sup>31</sup> Meares is a professor at Yale Law School who specializes in criminal procedure and policy. Brooks is a recently tenured professor at Yale Law School where he writes and teaches on law and economics, commercial law, contracts, and racial issues. Mack is an assistant professor at Harvard Law School. Mack is a Ph.D. in history and uses this training to engage in legal historical scholarship, mostly concerning race and civil rights. Carbado is a professor at UCLA Law School who directs the school's Critical Race Studies concentration. Carbado, unlike the other four scholars, *does* engage in critical voice scholarship and will provide some contrast with my overarching argument about upcoming black scholars. I will argue in Part III.D that Carbado, though well-respected and teaching at one of the most elite law schools in the United States, does not disprove my argument that critical race theory is marginalized; in fact, the details of his work may strengthen my point. The dearth of voice scholars at the schools most likely to produce academics illustrates even more clearly that the legal academy is successfully purging critical race theory from its ranks.

In Part IV, I will ask, why, when it is out of fashion, do young black professors still write about race? I suggest that black law professors, like most black professionals, feel obligated to "reach back" and contribute to the well-

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30. A few scholars that deserve special mention include Richard Delgado, Mari Matsuda, Kimberlé Williams Crenshaw, Charles Lawrence, Adrien Katherine Wing, Cheryl Harris, and Kendall Thomas.

31. Other rising stars include, but are in no way limited to, Spencer Overton, Dorothy E. Roberts, Paul Butler, Tomiko Brown-Nagin, and Richard Banks.

being of the larger African-American community. More than many other ethnicities, African Americans are constantly admonished not to “forget where they come from.” For a law professor, the most efficient way to participate in racial uplift is to write about it.

Part V will examine alternative rationales for the decline of voice scholarship and, more generally, CRT approaches in young black legal scholars’ research. The rationale that I offer in this Article is not purely careerist or self-serving. There are substantive questions to ask about “obligation” and the concomitant choices of African-American scholars. Might black academics prefer to engage in scholarship outside of the CRT area in order to participate in dialogue with scholars outside of a narrow field of research? Could African-American scholars’ work on topics beyond race indicate increasing racial awareness among white scholars, such that black writers no longer bear the entire burden of producing work on African Americans and law? Might African-American intellectuals believe that the best way to fulfill their obligations to the black community is to avoid engaging in black scholarship? Do young African-American intellectuals disagree with the fundamental contention of CRT scholarship, the idea that race is the central organizing principle of society? Is the socio-political context that produced CRT—a period following the Civil Rights Movement, the Women’s Liberation Movement, and the advent of critical legal studies—too changed for voice scholarship? Are black legal academics today reacting to the societal backlash against “bleeding heart” politics? What has motivated the decline of voice and CRT scholarship among black scholars is not singular. This Part will explore a number of factors that likely influence the landscape of current African-American legal scholarship in addition to the obligation piece.

Part VI will conclude. What is the state of black voice scholarship today, and where should it be? How should black legal scholars write about race? What does the obligation thesis indicate more broadly about black people, black lawyers, and black legal academics? The argument of this Article is not that African-American legal academics operate only out of careerist concession to the will of white-controlled academic structures; nor is it that African-American legal scholars seek out stealthy ways to perform “me-search” or to advance a particular social agenda. This Article has more nuanced and moderate intentions: I seek to illuminate the ways in which racial pressures—racial responsibilities?—from both black people and people of other ethnicities impact the work of African-American legal intellectuals in ways distinct from scholars of other races. While some writers might make various normative judgments about black scholars’ choices about voice

scholarship or research interests, I do not. Ideally, African-American scholars would be completely free to engage in work ranging from patent law, to civil rights, to family law without concern for retribution. Pragmatically, however, these choices are normatively complex and take place among a variety of push-and-pull factors, including the desire to adapt to their academic environment, the need for racial authenticity, the hope that one's work might have positive societal effects, and so on. One important but under-theorized factor that informs black legal scholars' work, even in academic environments hostile to voice and narrative race scholarship, is community obligation.

#### I. THE ROLE OF THE NARRATIVE IN LEGAL ACADEMIA IN THE EYES OF ITS PROPONENTS

##### A. *Historical Foundations*

The conditions that created what came to be known as critical race theory arose from the increased progressivism of the academy as children of the Civil Rights Movement moved onto faculties in the 1970s, and the subsequent hiring of minority scholars.<sup>32</sup> With the introduction of affirmative action to law schools beginning in 1964,<sup>33</sup> law schools began to remedy years of deliberate discrimination against African Americans in law school admissions. Independent organizations like the Council on Legal Education Opportunity (CLEO), founded in 1968, began preparing incoming minority law students for school during intensive six-week summer sessions, which were designed to increase minorities' likelihood of success once they reached school.<sup>34</sup> Thus, while only 0.65% of lawyers were African-American in 1950 and only 0.76% were African-American in 1960, by 1970, the number of black lawyers increased 76% while the overall number of lawyers increased only 24% during

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32. It is important to note that the legal academy was only one site for the advent of critical scholarship—critical race theory, feminist legal theory, and to some extent critical legal studies engaged scholars outside of law school faculties. Examples of non-lawyer critical race scholars are bell hooks, Cornel West, and Eddie Glaude.

33. Emory University School of Law created one of the first affirmative action programs in the nation. Its program guaranteed African Americans who completed a summer program a spot in its first-year class. Hardy Dillard et al., *Report of the Advisory Committee for the Minority Groups Study*, ASS'N AM. L. SCHS. 1967 PROC. pt. 1 160, 166-67. See also William C. Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1, 11 (2003) (offering a detailed analysis of affirmative action and the general admissions climate during the 1950s and 1960s as they relate to racial minorities).

34. Council on Legal Education Opportunity, What Is CLEO, [http://www.cleoscholars.com/all\\_about\\_cleo/index.htm](http://www.cleoscholars.com/all_about_cleo/index.htm) (last visited Jan. 19, 2007).

that time.<sup>35</sup> Now, based on 2000 Census data, 3.9% of lawyers are African-American<sup>36</sup> compared to roughly 12% of the American population. The raw numbers are more indicative of the upswing—there were 1,450 black lawyers in 1950 and 2,180 in 1960,<sup>37</sup> compared to 33,865 black lawyers in 2000.<sup>38</sup> Faculties were also changing demographically, though not as quickly as student bodies. Though women of color continued to fair poorly, especially at top law schools, men of color were teaching at higher rates and at more prestigious institutions, partially due to controversial affirmative action programs.<sup>39</sup> Though the percentages of black faculty members may have remained stable, waves of faculty hiring in the 1960s added more African-American voices to academic debates. The upswing in minority presence on law school faculties and academia more broadly emerged from an ideological shift among white faculty members, who were also influenced by the ideals of the Civil Rights Era. Critical legal studies luminary Duncan Kennedy, for example, has been a passionate advocate for affirmative action on law school faculties for decades, based on both political grounds and the idea that scholarship would be materially improved if it were produced by a more diverse group of scholars.<sup>40</sup>

At the same time that minority presence on law school faculties was increasing, the lived-legal world, particularly the Supreme Court, was changing. By the late 1980s, the Court that had been an ally in the civil rights struggle was becoming more conservative.<sup>41</sup> The Burger Court had remained generally progressive<sup>42</sup> but issued important rulings, like *Regents of the University of California v. Bakke*<sup>43</sup> and *Gregg v. Georgia*,<sup>44</sup> that moderated its

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35. Kidder, *supra* note 33, at 6-8.

36. COMM'N ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION, AM. BAR ASS'N, MILES TO GO 2000: THE PROGRESS OF MINORITIES IN THE LEGAL PROFESSION (2004), Executive Summary *available at* <http://www.abanet.org/minorities/publications/milesummary.html>.

37. Kidder, *supra* note 33, at 6.

38. ABA Comm'n on Racial & Ethnic Diversity in the Profession, *Statistics About Minorities in the Profession from the Census*, <http://www.abanet.org/minorities/links/2000census.html> (last visited Jan. 19, 2007).

39. Deborah Jones Merritt & Barbara Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 205 (1997).

40. See, e.g., Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705 (1990).

41. See, e.g., Darren Lenard Hutchinson, *Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187 (2004).

42. The Burger Court issued decisions in, for example, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) (on integration programs within school districts, also known as "busing"), and *Roe v. Wade*, 410 U.S. 113 (1973) (on the right to abortion).

43. 438 U.S. 265 (1978) (modifying the permissibility of race as a factor in university admissions

racial progressivism in the later years of Chief Justice Burger's tenure. When William Rehnquist ascended to be Chief Justice in 1986, it seemed as if the Court was likely to curtail legal structures that had empowered African Americans in recent decades. Though the Court did not hastily shift away from its racially progressive roots,<sup>45</sup> the mood of the nation—particularly the mood fostered by President Ronald Reagan's executive branch—was moving in a conservative direction. Critical race theory empowered African-American elites to use academic platforms to move legal discourse beyond formalism and legal realism. Critical race theorists were, in a sense, prophetic: Realizing that even equal protection law was soon to become a discourse counter to, not supportive of, racially progressive ideals, these theorists sought to undermine the law altogether and to point out that the deepest problems of race were not solvable by making fundamentally flawed law race-neutral instead of race-conscious. The legal academy had created a space in which African-American thinkers could push the dialogue about race beyond attempts to gain formal equality. The founders of critical race theory identified the deep societal embedding of race with laser precision.

Critical race theory, of course, borrowed its distrust of legal structures from critical legal studies (CLS). CLS, like the increases in hiring of minority faculty members, also emerged from the Civil Rights Movement. However, what sparked CLS was dissatisfaction with the way the legal academy reacted (read: did not react) to the Civil Rights Movement by adapting the canon of "acceptable" modes of scholarship. In other words, both before and after the legal climate of the United States fundamentally changed, the dominant method of scholarship was the parsing of cases with an almost-reverent view of the law's status as being beyond politics. It was clear to the scholars who pioneered critical legal studies, such as, Duncan Kennedy, Mark Tushnet, Roberto Mangabeira Unger, Mark Kelman, and Robert W. Gordon<sup>46</sup> that the

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when employed as part of a remedial affirmative action program).

44. 428 U.S. 153 (1976) (holding that the death penalty is not necessarily unconstitutional).

45. The early years of the Rehnquist Court brought a number of decisions favorable to the civil rights community, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (on voluntary affirmative action programs); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (on the disparate impact standard for subjective hiring practices); and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (on the burdens on employers in Title VII cases). Of course, these decisions were mitigated by unfavorable cases like *McKleskey v. Kemp*, 481 U.S. 279 (1987) (upholding the death penalty despite evidence that it is applied unequally by race) and *Herrera v. Collins*, 506 U.S. 390 (1993) (holding that prisoners who have exhausted their appeals may not produce new evidence that may exonerate them in federal courts).

46. Note the absence of women from this list. There were certainly women who engaged in critical scholarship, but their work was usually predominantly in the feminist legal theory genre, e.g., Catharine MacKinnon and Janet Halley. Those luminaries who are viewed as distinctly part of CLS were white males.

law was not apolitical—it was, in fact, political at its core.<sup>47</sup> Despite CLS's monumental contributions to liberalizing legal discourse and to fundamentally questioning the legal structures that had operated to subordinate "outsiders" since America's inception, minority scholars complained that their white counterparts did not consider deeply enough minority scholars' unique experiences, or the unique perspectives of minority peoples more broadly.<sup>48</sup> CRT was born out of a response to critical legal studies' failure to adequately address issues of race and to include the perspectives of minority scholars.<sup>49</sup> During the 1987 "Sounds of Silence" conference, a collection of minority scholars labeled the work that Derrick Bell and others had originated in the 1970s "critical race theory."<sup>50</sup> It is important to note that critical race theory was not merely a response to race being talked about only in a certain way; it was mostly a reaction to the complete absence of discussions about race within the legal academy. Whenever a wayward law professor tangentially mentioned race, it was brought up in the context of civil rights and constitutional law. The racial scheme itself—race as a force within society—was either ignored or undervalued by the academic establishment.

This point is essential to understanding why there is a tendency to conflate scholarship about race with critical race scholarship, though the two

This contrasts with CRT, which has work by both women and men as an essential part of its canon.

47. E. Dana Neacsu, *CLS Stands for Critical Legal Studies, if Anyone Remembers*, 8 J.L. & POL'Y 415, 421 (2000) ("Despite the enormous social transformations of the 1960s, the dominant theory of law remained unchanged, and, with what must have been increasing difficulty, continued to present law as neutral and above, or at least autonomous of, politics. CLS was born out of frustration with, and in an effort to expose, the contradictions and incoherence of both liberal and conservative legal theories.").

48. This conflict can be viewed most sharply in CLS's critique of "rights." Entire law journal symposia—for example, in the 1984 *Texas Law Review*—were devoted to critiquing the notion of rights, and some of the most notable writings of the CLS movement derided liberal rights concepts. See, e.g., Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984). While CLS scholars were certainly ideological allies, minority scholars—particularly African-American scholars—were skeptical of CLS's apparent willingness to efficiently dispose of the rights discourse that had animated much of the struggle for civil rights in the preceding decades. See Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404 (1987); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 303-07 (1987).

49. Harlon L. Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435 (1987); Delgado, *supra* note 48.

50. A variety of other names were also suggested for the new scholarship, including "Reconstruction Theory." However, since Randall Kennedy had just started a periodical called *Reconstruction*, conference attendees thought it would be better to avoid confusion by giving the new scholarship a different name. Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door,"* 49 UCLA L. REV. 1343, 1358, 1361 (2002).

practices are only loosely related. Scholars who write about civil rights, even as they write about the black experience within the civil rights structure, are not practicing critical race theory. CRT explores race not merely as a societal marker that functions to deprive certain individuals of rights and goods in reference to other individuals; instead, CRT views race as a foundational aspect of society's power structure. More controversially, CRT wants to turn that power structure on its head wherever it is found—from the court system, to the market, to academia itself. In doing so, CRT scholars reject the detached, objective, formalistic definition of legal scholarship, preferring work from scholars of color speaking in the “voice of color.”<sup>51</sup>

The point of disagreement between black scholars like Alex Johnson and black scholars like Stephen Carter is their different understanding of the extent to which criteria for scholarship reflect white dominance and what, if anything, should be done to alter those criteria.<sup>52</sup> Carter values universalism; Johnson views universalism as yet another tool of race-based domination. So, the relevant question for this Article must be, how much do scholars of color introduce narrative and autobiography into their work? Another central question that will not be the focus of this Article, because it has been amply addressed in the literature, is: How much should the use of narrative and voice weigh into the evaluation of the work of scholars of color?<sup>53</sup>

This section will examine the role of the narrative as some of the most influential CRT scholars view it. Essentially, this section is the “pro” side of the narrative debate. The dean of the CRT movement and the father of CRT narrative is, almost indisputably, Derrick Bell. I will begin my recounting of

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51. Seminal work by Richard Delgado, Mari Matsuda, and others underlies this idea. See, e.g., Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

52. See *infra* Part II.

53. This question is addressed in detail by the writers referenced in this Article, e.g., Kennedy, Carter, Johnson, Culp, Matsuda, etc. Usually a writer falls into one of two categories: Either the scholar believes that the “unique voice of color” warrants greater attention on an essential level, or the scholar prefers universal, “objective” standards. Edward L. Rubin, on the other hand, takes a different approach in his 1992 article, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889 (1992). He attempts to find a middle ground between the two evaluative methods by establishing four criteria for the assessment of scholarship: (1) clarity, (2) persuasiveness, (3) significance, and (4) applicability. *Id.* at 962. What makes his theory unique is his attention to the “phenomenological experience of the individual evaluator.” *Id.* When the evaluator is operating in her own subspecialty, her ability to use the four criteria effectively is more reliable. However, when the field becomes increasingly foreign, she should consider the work's ability to evoke doubt of her own assumptions a presumptive testament to the work's quality. *Id.*

the CRT landscape by addressing pieces of Bell's work, then I will move to Patricia Williams and finally to Jerome Culp.

*B. Derrick Bell*

Derrick Bell was a renowned scholar on race before he ever used the narrative; he is a master of both the formalist and narrative styles of scholarship. His casebook, *Race, Racism, and American Law*,<sup>54</sup> served as a text for his groundbreaking class at Harvard Law School of the same name and has continued to be an important text for classes on race and the law across the nation. Yet, Bell gained his greatest notoriety in two ways: First is his protest of Harvard Law School after they refused to hire a black woman professor, which ultimately resulted in his departure from his tenured professorship at Harvard. Second is his series of allegorical stories that illustrate the black condition in America. I focus here on Bell's narrative writings.

Bell's narrative voice serves several roles in his scholarship, three of which I will highlight. First, Bell uses the narrative to clearly communicate the fact that racism is not bound to a certain time or place. One of the central tenets of Bell's scholarship, for example, is the idea of interest convergence: The idea that white people will support African-American advancement only when it is in their interests as a group to do so.<sup>55</sup> Although there are possibly some other methodologies besides storytelling that Bell could use to make this point, e.g., historical analysis of white support for policies that advance black Americans, the narrative is particularly effective in conveying Bell's point that interest convergence is a pathology within American race relations. It would not be merely enough to empirically show that his argument has been true in the past; it would also not be sufficient to merely state this view outright. Using the narrative places interest convergence in an appropriate socio-political and chronological context. When Bell discusses the permanence of racism, most notably in *Faces at the Bottom of the Well*,<sup>56</sup> the futuristic and

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54. DERRICK A. BELL, *RACE, RACISM, AND AMERICAN LAW* (4th ed. 2000).

55. This idea is continuously expressed throughout Bell's work. See, e.g., DERRICK BELL, *AFROLANTICA LEGACIES* xii (1998); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 7 (1992) [hereinafter BELL, *FACES AT THE BOTTOM OF THE WELL*]; DERRICK BELL, *The Unspoken Limit on Affirmative Action: The DeVine Gift*, in *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 140 (1987); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 20 (Kimberlé Crenshaw et al. eds., 1995).

56. BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 55.



fantasy-driven stories drive home Bell's essential point that racism transcends the constraints of chronology.

Second, narrative allows Bell to reach a broader audience than traditional modes of legal scholarship. For example, his essay *Space Traders*<sup>57</sup> was turned into an HBO television special and later, a video<sup>58</sup>—a public platform that is almost unheard of for a legal scholar. Quite simply, stories are generally more pleasurable to read and more easily digestible than traditional legal scholarship, thus Bell's work is more likely to impact people outside of the legal academy. Furthermore, Bell has tended to publish his narrative pieces as books, not articles, which has allowed a wider audience. *Faces at the Bottom of the Well* was a best-seller. This success would have been highly unlikely if Bell had just stated his theories without the narrative presentation.

Third, and most importantly, Bell's use of the narrative is integral to the point that he is making about legal academia—that academia *needs* minority voices to speak in a unique and unsettling voice because those voices have been systematically excluded from predominately white institutions of power. In keeping with the African-American tradition of storytelling, it logically follows that “authentically black” legal scholarship would necessitate the use of this method. It is this claim that troubled Kennedy and Carter most deeply: They argued, instead, for universal standards of scholarship in which no scholar had any more or less “standing” than another to make racial claims.<sup>59</sup> Their criticisms will be discussed in more detail *infra* Part II.

### C. Patricia Williams

Patricia Williams is a professor at Columbia Law School and a columnist for *The Nation* whose first book, *The Alchemy of Race and Rights*,<sup>60</sup> is an essential text in the CRT canon. Unlike Bell, Williams does not use many allegorical stories, though she opens *Alchemy* with a short parable on *The Brass Ring and the Deep Blue Sea*.<sup>61</sup> Instead, her work is more personal and autobiographical.<sup>62</sup> She states from the outset of the book:

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57. DERRICK BELL, *Space Traders*, in *FACES AT THE BOTTOM OF THE WELL*, *supra* note 55, at 158.

58. COSMIC SLOP (HBO 1994).

59. For an application of standing doctrine to race scholarship, see Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 566-67 (1984).

60. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) [hereinafter *ALCHEMY*].

61. *Id.* at 3.

62. One onlooker described the book favorably as “substantially, though not entirely, the diary of a Black female professor of law concerned with socio-legal and theoretical construction.” Robin D. Barnes, *Politics and Passion: Theoretically a Dangerous Liaison*, 101 YALE L.J. 1631, 1632 (1992) (reviewing

Since subject position is everything in my analysis of the law, you deserve to know that it's a bad morning. I am very depressed. It always takes a while to sort out what's wrong, but it usually starts with some kind of perfectly irrational thought such as: I *hate* being a lawyer . . . .

[T]his is just the sort of morning when I hate being a lawyer, a teacher, and just about everything else in my life. It's all I can do to feed the cats. I let my hair stream wildly and the eyes roll back in my head.

So you should know that this is one of those mornings when I refuse to compose myself properly; you should know you are dealing with someone who is writing this in an old terry bathrobe with a little fringe of blue and white tassels dangling from the hem, trying to decide if she's stupid or crazy.<sup>63</sup>

The key element of Williams's style of scholarship is a rejection of detachedness of the writer from the reader. Like writers who primarily engage in feminist scholarship, Williams believes that who is speaking—or rather, the perspective from which the person speaks—is just as important as what is being said. Indeed, one cannot truly understand what is being said unless one knows who's talking.

Also, unlike Bell, Williams is quite candid in her book about her daily experiences living in New York City as a legal academician, particularly her interactions with students and colleagues. It is her recounting of racialized experiences at work that most clearly illustrates her perspective on why people of color should engage in voice scholarship. Under the guise of academic freedom, white people within the academy are awarded a certain amount of free reign to make racially offensive statements and use strategies that alienate students of color in the classroom. The chapter entitled “Crimes Without Passion” is a vivid recounting of what happened when Williams tried to show faculty members how certain exam questions could be alienating to minority students.<sup>64</sup> After she sent a memo to the faculty expressing her concerns, some of her colleagues called her “didactic” and “condescending.”<sup>65</sup> If Williams had not been a scholar of color, it is less likely that she would have been able to identify with the pain and anger students felt when asked to objectively assess a hypothetical laden with unsavory stereotypes about their own people. In their efforts to help students “think like lawyers,” white professors sometimes forget that it is easier for some students to detach their personal baggage from legal analysis than others. Voice scholarship reminds

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CARTER, AFFIRMATIVE ACTION BABY, *supra* note 16 and WILLIAMS, ALCHEMY, *supra* note 60).

63. WILLIAMS, ALCHEMY, *supra* note 60, at 3-4.

64. *Id.* at 80-97.

65. *Id.* at 91.

white scholars of the subjective implications of their teaching and writing in a way that impersonal, non-narrative scholarship cannot.

Williams would be hard pressed to robustly make one of her central points—that much of what people view as “objective” is actually underscored with subjective assumptions, and that many of these assumptions are racialized—without using personal narrative. She could state her beliefs sans the context, but without acknowledging that her lived experiences shaped those beliefs, her views would be less clear and she would be slightly disingenuous. Despite black people’s identification with her ideas, the felt truth of her statements, there is no authoritative source that Williams could cite to prove, for example, that black people use professionalism and formalism as a way to endear themselves to powerful whites, while white people (especially men) may build better relationships with authority figures by being *less* formal.<sup>66</sup> Moreover, since racism is irrational, logical analysis would also be inadequate to convey Williams’s message. Autobiography is a helpful device for explaining Williams’s analysis of race and the law.

Of course, the danger of relying on personal narrative in scholarship is that the general applicability of the writer’s experiences and claims are more questionable. Patricia Williams experiencing a specific type of racism within an institution does not mean that another black woman would have had a similar experience or that the experience meant what Patricia Williams interpreted it to mean. Voice scholarship works best, and is arguably more convincing to an array of audiences, when it is viewed as only one patch of a large quilt of marginalized voices. White people are more likely to believe minorities’ depictions of racism if more than one minority is speaking out. Otherwise, Williams’s claims might simply be dismissed as racial paranoia. This tendency of traditional-style scholars to dismiss voice scholarship amplifies the importance of mentorship and academic community, especially among critical voice scholars.

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66. See *id.* at 146-48. Professor Williams recounts the different experiences that she and a white male colleague (Peter Gabel) had when leasing apartments in New York City. Her colleague proceeded very informally with his transaction, hoping that his informality would make him more amenable to the landlord. Williams proceeded in the exact opposite way—being very detailed and systematic with the contract—for precisely the same reason her colleague was informal.

*D. Jerome McCristal Culp, Jr.*

Late Duke Law professor Jerome Culp has been one of the most prolific, though underappreciated, writers on the role of the black academic in relation to a predominantly white academy. Because Culp's writings function in this Article primarily as background information on the debate over the role of narrative and autobiography, I address only a few of them here.<sup>67</sup> Culp's identity as the son of a West Virginia coal miner served as a framework both for his scholarship and his teaching.<sup>68</sup>

Of all of the critical race scholars, Culp wrote most explicitly on the responsibilities of black academics. In his essay, *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, he makes a number of broad statements about the inherently different ways that African-American scholars and scholars of other ethnicities engage in legal scholarship. For example, he states in the introduction of his article that "Black people feel the need to justify who they are and to describe where they come from as part of the description of where they want to go."<sup>69</sup> He continues, "Because black professors of law often enter law in order to create and sustain societal change, it should not surprise us that black professors of law use their autobiographies in a number of ways to illuminate their teaching and scholarship."<sup>70</sup> Culp believed that black scholars and scholars of other ethnicities have fundamentally different experiences that shape their propensity for using narrative methodology. He even pointed to scholars with whom he quarreled, like Stephen Carter, to show that they, too, value autobiography.<sup>71</sup>

At the same time that Culp viewed black and non-black scholarship differently, he also acknowledged that autobiography has value even for white academics. White scholars (particularly white male scholars) may be less likely to employ autobiography, but their background still shapes their

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67. Other Culp pieces that insightfully discuss the role of black legal scholarship include Jerome McCristal Culp, Jr., *Telling a Black Legal Story: Privilege, Authenticity, "Blunders," and Transformation in Outsider Narratives*, 82 VA. L. REV. 69 (1996) and Jerome McCristal Culp, Jr., *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, 41 DUKE L.J. 1095 (1992).

68. Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991).

69. *Id.* at 541.

70. *Id.* at 543.

71. *Id.* at 542 ("Black critics (both inside and outside the legal academy) of racial perspectives in the law have also used their autobiography to convince their audience. We learn much of the autobiography of Stephen Carter, Glenn Loury, Thomas Sowell, and Shelby Steele, in their own words and images.").

perception of scholarship and of the world. However, white scholars tend to disvalue their own autobiographies as well as those belonging to people of color. “Their real problem with me,” Culp writes, “is not that they have no autobiographies, but that they do not want to use their real ones, and wish I would not use mine either.”<sup>72</sup> Culp, along with using narrative in his work, studied the biographies and histories of his white colleagues and other white lawyers to expose the role their subjective assumptions played in their analyses of the law. Some of his subjects took offense at his methodology.<sup>73</sup>

Culp’s ultimate goal for African-American scholars and lawyers was to develop a distinctive black jurisprudence. Likening the black lawyers of the 1950s, 1960s, and 1970s, to “mammies,” Culp drew a strong delineation between race scholarship and critical race theory. He wrote:

Until recently, black scholars were, in many ways, in a position similar to that of black women, who were portrayed as mammies by popular culture, and who toiled in white households in the pre-1960 period in great numbers. Both groups were hard workers who had a limit (at least partially self-imposed) on what they could say to the white cohabitants of their world . . . Black legal academicians did not waste their time raising questions or providing answers if their colleagues on the faculty or the judge on the bench would not countenance them. Of course, there were always militants who cried in the wilderness about black problems, but they were not heard, were unlikely to be granted tenure, and little that they said or thought survives as part of the usable past.<sup>74</sup>

Culp argues that, like Kenya Cantrell in my opening story, black scholars have always faced a dilemma when deciding whether to fully engage in the development of black jurisprudence. They could participate in liberatory critical theory—and risk having white people who control the means of communication ignore their work, thereby making their efforts futile—or they could participate in the more acceptable “civil rights” mode of scholarship, which gave them broader appeal and a sturdier platform for making incremental change. In Culp’s view, the late 1980s and early 1990s saw African-American academics becoming more willing to risk obscurity for the integrity of their scholarship. One wonders what happened in the last fifteen or so years to dull the willingness of African-American scholars to take this chance.

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72. *Id.* at 557.

73. Jerome McCristal Culp, Jr., *Water Buffalo and Diversity: Naming Names and Reclaiming the Racial Discourse*, 26 CONN. L. REV. 209, 213 (1993).

74. Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 47 (1991).

Yet one also wonders whether the dulling of CRT vigor arises more from Culp's (and others') mischaracterization of what African-American scholars wanted to say than from black "mammy-like" behavior. Perhaps many African-American scholars did not face a dilemma at all; it is possible that some black scholars, especially those that are gaining prominence today, find that voice scholarship and distinctive black jurisprudence are not useful or desirable. Culp was probably correct that some black scholars performed a practicality calculus to determine in what type of scholarship they would engage. It is also probably correct that some black scholars never wanted to develop a separate black jurisprudence in the first place. Perhaps a better goal for black legal academics is to have the autonomy to participate in voice scholarship, other types of scholarship, or in so-called "Hierarchical Majoritarian" scholarship<sup>75</sup> and for their contributions to be valued regardless of the vehicle they choose.

## II. CRITICISMS OF CRITICISM: KENNEDY, CARTER, AND UNIVERSAL STANDARDS

In light of the changed (more conservative) climate in which academics produce legal scholarship, one might surmise that the CRT/voice scholarship revolution is effectively over. Though some already-established scholars continue to write in the genre, many foundational CRT scholars, like critical legal studies scholars before them, are not engaging in critical methods and narratives as often as they were in the 1980s and 1990s.<sup>76</sup> Given that context, how might one view the attacks that were leveled at CRT by African-American scholars during its heyday? These criticisms, most famously by Randall Kennedy and Stephen Carter, argued that academic rigor should be the test of black scholars' work—that the speech was much more important than the speaker. The black detractors of voice scholarship also protested the essentialist assumptions about race that come along with prioritization of voice.

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75. See Johnson, *supra* note 19.

76. For example, Bell's most recent use of his character Geneva Crenshaw was in 1997's *Afrolantica Legacies*. See BELL, *AFROLANTICA LEGACIES*, *supra* note 55. Bell's two most recent books have not used his unique brand of storytelling. DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2005) (employing traditional methods of case analysis to critique the claim made in *Brown v. Board of Education*); DERRICK BELL, *ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH* (2003) (using some autobiography to explore the concept of a meaningful life).

A. *Randall Kennedy*

Randall Kennedy, a young African-American Harvard Law professor, shook up the CRT movement in 1989 with his piece, *Racial Critiques of Legal Academia*.<sup>77</sup> Kennedy was (and is) a well-respected figure in the race and law genre.<sup>78</sup> In *Racial Critiques*, however, Kennedy took his colleagues directly to task.

Kennedy first critically examined the work of three of the genres most renowned scholars, Derrick Bell, Richard Delgado, and Mari Matsuda, questioning the rigor of their work. Kennedy summarizes two reasons that CRT scholars emphasize the voice of color: First, CRT scholars believe that white academia has historically excluded the voice of color, to the academy's detriment; second, they assert that scholars of color have a unique or "distinctive" voice tied to their lived experience as an ethnic minority. Kennedy rejects the second tenet: "Although promoted in the name of an insurgent, liberatory, intellectual endeavor, race-based standing doctrine replicates deeply traditional ideas about the naturalness, essentiality, and inescapability of race—ideas that have for too long stunted American culture."<sup>79</sup> In other words, CRT scholars accept the racist tenets to justify their modes of scholarship. Kennedy particularly faults Bell and Matsuda for making blanket generalizations about scholars of color and the way majority scholars perceive them.<sup>80</sup> Delgado is pinpointed for looking only at the number of times that white scholars cite scholars of color, but not at the quality of the minority scholars' work.<sup>81</sup> One overarching message of *Racial Critiques* is that CRT scholarship too often lacks the elements of traditionally

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77. Kennedy, *supra* note 15.

78. Other works by Kennedy include RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* (2003); RANDALL KENNEDY, *NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD* (2002); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997); Randall Kennedy, *In Praise of the Struggle for Diversity on Law School Faculties*, 1991 U. CHI. LEGAL F. 1 (1991); Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622 (1986); and Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986). Interestingly, *Racial Critiques of Legal Academia* is not listed in Kennedy's bibliography on the Harvard Law School website, though it is one of his most frequently cited articles. This is probably because it was published so long ago, though there is a piece listed that was published in 1988, the year before *Racial Critiques* was published. Harvard Law School: Faculty Directory, Randall L. Kennedy, Bibliography, <http://www.law.harvard.edu/faculty/directory/facdir.php?id=36&show=bibliography> (last visited Jan. 19, 2007).

79. Kennedy, *supra* note 15, at 1801.

80. *Id.* at 1760-70, 1778-87.

81. *Id.* at 1770-78.

good scholarship, and the mere “voice of color” is insufficient to compensate for CRT’s shortcomings. Kennedy has not written specifically on this subject again in the seventeen years since this infamous piece, despite the numerous responses it evoked from proponents of CRT both during and after its publication.<sup>82</sup> However, some of Kennedy’s more recent writings and undertakings reiterate his belief that the roles and methodologies of an African-American academic are not fundamentally different from those of any other scholar. For example, his 2002 book, *Nigger: The Strange Career of a Troublesome Word*, argues that the “n-word” is not universally derogatory and that its use, even by whites, may sometimes be benign: a proposition that some critics found strange, puzzling, and even bizarre.<sup>83</sup> Furthermore, after his May 2006 testimony in a criminal assault case—on the side of white defendant Nicholas “Fat Nick” Minucci, who was accused of calling his African-American victim “nigger” before bludgeoning him with a baseball bat—Kennedy reasserted his role as a “disinterested scholar,” a characterization that helped him earn recognition as one of 2006’s one hundred most influential lawyers in America.<sup>84</sup> Many commentators raised eyebrows or expressed outright appall at the book and his subsequent

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82. Kennedy makes specific mention of the comments he received in response to Racial Critiques in the article’s conclusion:

Some critics of previous drafts have expressed concern over the effects of my analysis in a political atmosphere that has grown increasingly resistant to claims made on behalf of racial minorities. Thus, I have been advised—in some instances warned—to forgo publishing this Article because, among other things, it will be put to bad use by enemies of racial justice . . . [T]hey argue that my comments on racial distinctiveness claims are hostile to affirmative action . . . Furthermore, it has been intimated that, given my status as a black scholar, publishing this Article shows a *special* lack of political responsibility.

Kennedy, *supra* note 15, at 1810-11. Derrick Bell is frank about his reaction to Kennedy’s piece:

When I read his anti-CRT manuscript, I urged Kennedy not to publish it both because I thought his criticism of the CRT writers was inaccurate and unfair, and because there were a legion of white law teachers who did not like and felt threatened by our writings. They . . . would welcome his article and wield it as a club to denigrate and even deny tenure to young scholars who dared identify with the new movement.

Bell, *The Strange Career of Randall Kennedy*, *supra* note 14.

83. Joseph Williams, *Under the Skin*, BOSTON GLOBE MAG., Nov. 5, 2006, [http://www.boston.com/news/globe/magazine/articles/2006/11/05/under\\_the\\_skin/?page=2](http://www.boston.com/news/globe/magazine/articles/2006/11/05/under_the_skin/?page=2) (“[S]ome in the black community have labeled him everything from an opportunistic provocateur to a race traitor.”). It is interesting to note that Kennedy has expressed some reservations about the attention the book has received—it may be an “unwanted legacy.” *Id.*

84. Michael Moline, *Profiles in Power: The 100 Most Influential Lawyers in America*, NAT’L LAW J., June 19, 2006, at S9, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1150362316389>. Kennedy was careful to note that he was not testifying for Mr. Minucci; he claims that he testified as an expert witness. Corey Kilgannon, *Epithet ‘Has Many Meanings,’ a Harvard Professor Testifies*, N.Y. TIMES, June 8, 2006, at B1.



performance in the Minucci case,<sup>85</sup> but Kennedy's participation reiterated his stance that black scholars should not be subject to different standards or obligations from other scholars.

### B. Stephen Carter

Stephen Carter's book *Reflections of an Affirmative Action Baby* is highly autobiographical and much less direct in its attack on voice scholarship than Kennedy's work.<sup>86</sup> Carter is clear from the outset of his book that his motivation in supporting universal standards for black scholarship is concern for black people.<sup>87</sup> Similar to Patricia Williams, Carter's narrative gives vitality to arguments about the indignity of having different standards for African Americans. In the chapter entitled *The Best Black*, Carter tells stories about his childhood as a "fac-brat," growing up in the shadows of Cornell University, and his eventual ascendance to Stanford University and Yale Law School (thus, employing the narrative to critique scholarship that reveres the narrative).<sup>88</sup>

In an age in which black scholars were writing about the pain of the discrimination they faced in getting jobs, the sting of being denied entry into places where they felt they belonged, and the deprivation of growing up in segregated society,<sup>89</sup> Carter's lamentations may have seemed shallow.<sup>90</sup> Even

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85. See, e.g., Howard Manly, *Defending n-word opens up old wounds*, BOSTON-BAY STATE BANNER, July 6, 2006, at 1, available at <http://www.baystatebanner.com/archives/stories/2006/07/070606-03.htm>; Margaret Kimberlé, *Randall Kennedy Defends Racial Violence*, CHI. DEFENDER, June 16, 2006, <http://www.chicagodefender.com/page/commentary.cfm?ArticleID=5870> ("Kennedy is a very cheap whore . . . Kennedy obviously doesn't care about black people and his intentions are the worst. He is an opportunistic self-hater with all of the establishment's top credentials, a very dangerous enemy indeed."); George E. Curry, *Randall Kennedy: Negro Please*, BLACKPRESSUSA, <http://www.blackpressusa.com/Op-Ed/speaker.asp?SID=16&NewsID=9181>. The jury subsequently convicted Minucci of second-degree assault as a hate crime.

86. Carter even praises Mari Matsuda in the chapter, *The Best Black*: "Mari Matsuda has argued that a serious intellectual ought to make an effort to read books by members of groups not a part of his or her familiar experience, and I think she is quite right." CARTER, *AFFIRMATIVE ACTION BABY*, *supra* note 16, at 66 (citation omitted).

87. "The argument I present in this book is generated by reason but fired by love. My concern is with the situation of Black people in America, a situation about which we need an open and reasoned dialogue." *Id.* at 7-8.

88. *Id.* at 7-8.

89. See, e.g., BELL HOOKS, *BONE BLACK: MEMORIES OF GIRLHOOD* (1996); BELL HOOKS, *YEARNING: RACE, GENDER, AND CULTURAL POLITICS* (1990); BELL HOOKS, *TALKING BACK: THINKING FEMINIST, THINKING BLACK* (1989); AUDRE LORDE, *SISTER OUTSIDER: ESSAYS AND SPEECHES* (1984); CORNEL WEST, *RACE MATTERS* (1993).

90. Carter acknowledges in the next chapter, *Racial Justice on the Cheap*: "Surely, however, these

now, only 37% of African-American men who graduate from high school go to college, and only 35% of those graduate within six years<sup>91</sup>—those numbers were certainly much lower when Carter began at Stanford University in 1972. However, Carter's central point in *The Best Black* is not to discuss those issues. Instead, he argues that black people's merit is universally overlooked because of separate race-based standards; his larger insinuation is that even if racial disparities were resolved, separate standards would continue to marginalize black people and undermine a crucial goal of desegregation and civil rights—equal respect.

Carter differentiates between two phenomena that operate to marginalize African Americans in the workplace and in the academy: the “star system,” which privileges well-connected white people, and the “best black syndrome,” which is often falsely presented as a way to help African Americans (affirmative action is one example of best black syndrome). Carter's analysis is, in a way, much more hopeful than his colleagues' in voice scholarship. He believes that by rectifying these two systems, African-American scholarship can be heard and fully valued. While Carter is careful to note the persistent influence of racism in society, he also posits that by removing artificial barriers to entry, African Americans will be better represented in an array of labor markets.<sup>92</sup> Given the deep embedding of the “star system” within hiring structures and the persistence of unconscious bias,<sup>93</sup> this seems overly optimistic.

How does Carter's analysis translate into a critique of voice scholarship? Carter's criticisms of separate standards for minority scholars, unlike Kennedy's, are not necessarily criticisms of voice scholarship. If a CRT scholar does superb work, Carter's argument would support that scholar's

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experiences are relatively minor in the universe of racist transgressions . . . [I]t would be folly to pretend that I have been damaged in the way the society so often damages through indifference those whom it could, by spending a little more money, protect.” CARTER, AFFIRMATIVE ACTION BABY, *supra* note 16, at 77.

91. Thirty-five percent who enroll in Division I NCAA colleges graduate within six years. Bill Alexander, *Number of Black Men in College Dwindle*, MSNBC.COM, Jan. 14, 2004, <http://msnbc.msn.com/id/3919177/>.

92. CARTER, AFFIRMATIVE ACTION BABY, *supra* note 16, at 65.

93. For information on unconscious bias, also known as cognitive bias, see Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Charles G. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); and Audrey J. Lee, Note, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. REV. 481 (2005).

advancement. However, one framework of CRT is that the scholarship cannot be separated from the scholar, and this view is in direct conflict with Carter's analysis. In *Academic Tenure and "White Male Standards,"* Carter specifically rejects the emphasis of some scholars on author identity when assessing scholarship, arguing that this focus hinders dialogue:

Nowadays . . . a great deal of academic dialogue turns out to be not about the ideas that people express but about the people who express the ideas. It isn't what one says that matters, it is who is doing the saying . . . The more assumptions one can attach to the author before the process of reading begins, the greater the number of biases and preconceptions that one will bring to the reading itself. And the greater the number of biases and preconceptions the reader brings along, the lower the probability that true communication might occur.<sup>94</sup>

Ultimately, Carter does not completely condemn voice scholarship or even specific proponents of it. Rather, he posits that the proper direction of black participation in legal academe is toward the universalized "perfection" of scholarship. He claims that the identity of the speaker should not trump better tests of "good scholarship," though he is quick to note that he is not defending the traditional tests that law faculties employ.<sup>95</sup>

The outcry in the early 1990s from advocates for voice scholarship was not enough to keep the methodology en vogue today. Though CRT is not dead in the same way that many people consider Critical Legal Studies to be dead,<sup>96</sup> it is not the major force that it once was. Law schools are devoting very little class time to critical race theory; for example, neither Yale, Harvard, nor the University of Chicago offered a course specifically devoted to critical race theory in 2005-2006.<sup>97</sup> This situation begs the question: How do black legal scholars write about race today? Is the influence of voice scholarship visible in their work? Have they employed only universalized methodologies? I will address these questions in the next section of this Article, which examines four examples of up-and-coming black scholars to illustrate this trend in legal scholarship.

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94. Carter, *supra* note 12, at 2067.

95. *Id.* at 2074-75.

96. See Richard Michael Fischl, *The Question That Killed Critical Legal Studies*, 17 LAW & SOC. INQUIRY 779 (1992).

97. Yale Law School, Bulletin of Yale University: Course Offerings, <http://www.yale.edu/bulletin/html/law/course.html> (last visited Jan. 19, 2007); Harvard Law School, Elective Courses, Seminars, and Reading Groups, [http://www.law.harvard.edu/academics/courses/2005\\_06/electives-groups-seminars.php](http://www.law.harvard.edu/academics/courses/2005_06/electives-groups-seminars.php) (last visited Jan. 19, 2007); University of Chicago Law School, Course List Details, <http://www.law.uchicago.edu/courses/courselistdetails.html> (last visited Jan. 19, 2007).

### III. AN ANALYSIS OF TODAY'S NEW BLACK LEGAL SCHOLARSHIP

This section profiles the work of four important rising black stars in legal academia to show how they embody the trend this Article identifies. Admittedly, this analytical approach is biased: By focusing on establishment-anointed up-and-comers, my assessment of what is and is not acceptable in today's legal academy is slightly tainted. An important part of winning the establishment's favor is that you are somewhat adherent to its philosophy, so arguing that top law schools prefer these young African-American scholars and that therefore they are the face of young black scholarship may seem a conclusory point. However, as you will see, these scholars are still writing about race. If winning the legal establishment's favor hinges on blending in, one might expect rising stars to be silent on racial issues. On the other hand, if winning the establishment's favor hinges on being the token African American, one would not necessarily expect that black scholars would be less likely to employ voice scholarship than other types of race scholarship. To illustrate successful approaches to navigating these difficult issues, this section will profile the work of Tracey Meares, Richard Brooks, Kenneth Mack, and Devon Carbado.<sup>98</sup>

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98. The dearth of up-and-coming black female legal scholars at top law schools is particularly notable. For example, Yale Law School just hired its first tenured African-American woman in 2006 (Tracey Meares, who was hired laterally), and Harvard has only had one (Lani Guinier, also a lateral hire). Harvard's failure to grant tenure to an African-American woman resulted in Derrick Bell's infamous protest and two-year leave of absence from Harvard Law School. Harvard dismissed Bell in 1992 and, since then, he has been a visiting professor at New York University School of Law. See, e.g., Audrey Edwards & Susan L. Taylor, *Challenging Power: A Dialogue Between Lani Guinier and Derrick Bell*, ESSENCE, Oct. 1994, at 74. The low number of black woman legal scholars is particularly curious given the higher numbers of black women in law schools relative to Black men. See, e.g., *Black Women Now Hold a Large Lead over Black Men in Enrollments in the Nation's Highest-Ranked Law Schools*, J. BLACKS IN HIGHER EDUC., Winter 2005/2006, at 42 (showing that in the 2003-2004 academic year, black women made up 64.3% of black enrollment at the top fifty law schools and that black women were a majority of the black students at forty-seven of the top fifty law schools). Black women will likely become more represented in legal academia as they begin to graduate from law schools in greater numbers than black men, especially since academia is a good option for those who desire balanced working lives.

A. Tracey L. Meares

Until late 2006, Tracey Meares was the Max Pam Professor and Director for the Center for Studies in Criminal Justice at the University of Chicago Law School and is now teaching at Yale Law School. After graduating from the University of Chicago Law School in 1991, Meares clerked on the Seventh Circuit Court of Appeals for one year and spent one year at the Department of Justice, Antitrust Division, before returning to the University of Chicago Law School as a visiting faculty member in 1993. She has held a professorship at Chicago since May 1999.<sup>99</sup>

Meares teaches and writes primarily about criminal procedure and its relationship to social norms, a subject deeply intertwined with race and class.<sup>100</sup> Meares has been an important pioneer of the law and social norms school, arguing that, in many cases, the sanctions that come along with breaking social norms (for example, ostracization) can be more effective at controlling deviant behavior than traditional sanctions that come along with breaking laws (for example, prison sentences).<sup>101</sup> Meares was on the faculty and steering committee of the University of Chicago's Center for the Study of Race, Politics, and Culture, which indicates the centrality of race issues to her scholarly vision.

Meares has adeptly made her interest in racial issues an important feature of her research on crime.<sup>102</sup> Meares employs a sociological and ethnographic approach to the study of crime that involves close examination of the social processes of black communities and institutions, such as the black church.<sup>103</sup> She has criticized the economic approach of Eric Posner's book, *Law and*

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99. University of Chicago School of Law, Curriculum Vitae, Tracey L. Meares, <http://www.law.uchicago.edu/faculty/meares/cv.html> (last visited Jan. 19, 2007).

100. E.g., Tracey L. Meares & Dan M. Kahan, *Black, White and Gray: A Reply to Alschuler and Schulhofer*, 1998 U. CHI. LEGAL F. 245; Tracey L. Meares, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law Enforcement: Lessons for Federal Criminal Law*, 1 BUFF. CRIM. L. REV. 137 (1997). Because American criminal law is so intertwined with American racial history, Meares mentions racial issues in most of her work, though it is not usually the central focus.

101. Jeffrey Rosen, *The Social Police: Following the Law, Because You'd Be Too Embarrassed Not To*, NEW YORKER, Oct. 20-27, 1997, at 170.

102. See, e.g., Tracey L. Meares, Neal Katyal & Dan Kahan, *Updating the Study of Punishment*, 56 STAN. L. REV. 1171 (2004); Tracey L. Meares, *Mass Incarceration: Who Pays the Price for Criminal Offending*, 3 CRIMINOLOGY & PUB. POL'Y 295 (2004).

103. See generally Tracey L. Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593 (2002) (discussing various cooperative behaviors between Chicago black churches and community police, with emphasis on two west-side community prayer vigils facilitated by police).

*Social Norms*,<sup>104</sup> for its failure to “prescribe much helpful criminal law policy where it is most needed—addressing the racial dynamics of criminal punishment and crime reduction in high-crime neighborhoods.”<sup>105</sup> In 2001, she wrote the entry on *Crime and Ethnicity (Including Race)* for the *International Encyclopedia of the Social & Behavioral Sciences*.<sup>106</sup> Her entry addresses “the disproportionately high incidence of racial and ethnic minorities caught up in the justice systems of Western countries and . . . the reasons behind these disparities.”<sup>107</sup> Meares does not attempt to mask her interest in race scholarship, but she does not normally mention her race in her scholarship, nor would she ordinarily publish a piece with an explicit focus on race. One notable exception to both rules is her response to Owen Fiss’s *A Way Out*.<sup>108</sup> Fiss argues that the solution to the problem of urban ghettos is deconcentrating these (predominantly black) populations by moving people into suburbs, which are more economically integrated, and incidentally, are also either predominantly white or racially mixed.<sup>109</sup> Meares warns against this solution, noting that there are many positive things about living in predominantly black neighborhoods that Fiss too quickly discounts and the prejudice that black relocators to white communities face. Meares uses narrative to convey her argument:

The kinds of exclusions the authors describe are not minor to the children involved. They stick and so must be dealt with for the decades to follow. I know a six year old who was excluded from a Brownie troop meeting that all her friends attended. She was the only African American girl in the class. She went to the meeting with all her friends after school. When she arrived, however, the troop leader (the mother of a friend) told her the troop was “full” and that she had to wait outside on the front steps until her mother arrives to take her home. I know that six year old well because she is me.<sup>110</sup>

Meares’s use of narrative in this essay is poignant, and it illustrates that narrative is not only the province of those who write from a critical perspective. It may be worth mentioning that this piece is not included in her

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104. ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000).

105. Tracey L. Meares, *Signaling, Legitimacy, and Compliance: A Comment on Posner’s Law and Social Norms and Criminal Law Policy*, 26 U. RICH. L. REV. 407, 421 (2002).

106. Tracey Meares, *Crime and Ethnicity (Including Race)*, in 5 INT’L ENCYCLOPEDIA OF THE SOCIAL & BEHAV. SCI. 2914-18 (N.J. Smelser & Paul B. Baltes eds., 2001).

107. *Id.* at 2914.

108. OWEN FISS, *What Should Be Done for Those Who Have Been Left Behind?*, in *A WAY OUT: AMERICA’S GHETTOS AND THE LEGACY OF RACISM* (2003).

109. *Id.* at 5, 28.

110. Tracey L. Meares, *Communities, Capital, and Conflicts*, in FISS, *supra* note 109, at 51, 55.

list of publications on the Yale Law School website,<sup>111</sup> though one cannot necessarily derive much meaning from this omission—the Fiss response is only six pages long, after all.

Meares has also written about race and criminal procedure outside of her scholarly pursuits. For example, until recently Meares was a regular blogger on Blackprof.com,<sup>112</sup> a website started by George Washington University law professors Spencer Overton, another rising black scholar who specializes in property, campaign finance, and voting rights law, and Paul Butler, an important black scholar who writes on criminal law issues.<sup>113</sup> Meares blogged about a number of issues, including a racialized incident at the University of Chicago,<sup>114</sup> the *New York Times* article about women from elite colleges “opting out,”<sup>115</sup> and the aftermath of Hurricane Katrina.<sup>116</sup> It is notable that, even in her blog postings, Meares inserted very little autobiography or even personal musing into her writing. Most of her postings were notifications of current events or brief commentary on newspaper articles, in contrast to some of her colleagues’ more frank or casual postings.<sup>117</sup>

The separation of personal information and public persona has served Meares well in her career. She has been able to change the way that many scholars and lawyers view the law, especially as it relates to African Americans, because she has kept her credibility as a legal scholar intact. I believe that part of her success owes to the fact that she has erected a barrier

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111. Yale Law School, Faculty Publications, Tracey L. Meares, <http://www.law.yale.edu/faculty/4026.htm> (last visited Feb. 5, 2007).

112. Blackprof.com, <http://www.blackprof.com/>. The blog was started in September 2005.

113. Butler is well-known for his article defending African-American jury nullification—the idea that Black jury members vote to acquit black defendants, regardless of whether they are guilty of the crimes. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

114. Posting of Tracey Meares to Blackprof.com, [http://www.blackprof.com/archives/2005/11/real\\_life\\_at\\_the\\_university\\_of.html](http://www.blackprof.com/archives/2005/11/real_life_at_the_university_of.html) (Nov. 2, 2005, 13:40 EST).

115. Posting of Tracey Meares to Blackprof.com, [http://www.blackprof.com/archives/2005/09/many\\_women\\_at\\_elite\\_colleges\\_s.html](http://www.blackprof.com/archives/2005/09/many_women_at_elite_colleges_s.html) (Sept. 21, 2005, 11:29 EST). The original *New York Times* article is Louise Story, *Many Women at Elite Colleges Set Career Path to Motherhood*, N.Y. TIMES, Sept. 20, 2005, available at <http://www.nytimes.com/2005/09/20/national/20women.html?ex=1284868800&en=6a8e0c413c09c249&ei=5090&partner=rssuserland&emc=rss>.

116. Posting of Tracey Meares to Blackprof.com, [http://www.blackprof.com/archives/2005/09/parish\\_divided.html](http://www.blackprof.com/archives/2005/09/parish_divided.html) (Sept. 28, 2005, 8:59 EST).

117. For example, in Paul Butler’s May 4, 2006 posting about the relationship between African Americans and the battle over immigration, he writes, “[S]ome of my otherwise progressive African American friends sound like Pat Robertson when they talk about illegal immigrants, especially those from Mexico.” Posting of Paul Butler to Blackprof.com, [http://www.blackprof.com/archives/2006/05/africanamericans\\_and\\_immigrant.html](http://www.blackprof.com/archives/2006/05/africanamericans_and_immigrant.html) (May 4, 2006, 9:27 EST). Meares does not provide even this type of cursory personal information in her posts.

between her personal voice and her scholarly voice; in fact, the legal establishment finds her work credible because she respects this delineation.

*B. Richard R.W. Brooks*

Richard Brooks is an associate professor at Yale Law School. He has been at Yale since 2003; before that, he held assistant professorships at Northwestern and Cornell. Brooks, who holds a J.D. from the University of Chicago and a Ph.D. in Economics from Berkeley, was a notable young member of the Northwestern Law School faculty, and his move to Yale was recognized as a substantial loss for the school.<sup>118</sup> Brooks is an emerging figure in the world of left-leaning law and economics, which is occupied by luminaries like Guido Calabresi, Cass Sunstein, and Ian Ayres. His dual interest in racial issues and law and economics scholarship is well-demonstrated in his scholarship. Brooks's short biography on the Yale Law School website indicates that his scholarly interests are contract law, fiduciary law, law and economics, and proving discrimination.<sup>119</sup> He has published articles on topics ranging from perceptions of law enforcement in minority communities,<sup>120</sup> to the connection between judicial elections and death penalty sentences,<sup>121</sup> to liability rules.<sup>122</sup>

Brooks's publications regularly oscillate between those with and without racial topics, which suggests that he consistently works on pieces addressing

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118. Texas law professor Brian Leiter, who ranks law schools for faculty quality, noted on his blog that Northwestern's high number fourteen ranking was given "before a hotshot assistant professor, Richard Brooks, jumped ship for Yale." Posting of Brian Leiter to the Leiter Reports: Editorials, News, Updates, *Will Northwestern University Law School Still be a Top Law School Ten Years from Now*, <http://webapp.utexas.edu/blogs/archives/bleiter/000427.html> (Nov. 4, 2003 7:22 EST).

119. Yale Law School, Faculty, Richard Brooks, <http://www.law.yale.edu/faculty/RBrooks.htm> (last visited Jan. 19, 2007). Note the ordering of his interests. Law and economics and related fields are first; race is mentioned last, almost as an afterthought. This ordering is interesting because two of Brooks's most well-known articles have dealt centrally with race while using some of the empirical methods of law and economics scholars. Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219 (2000) [hereinafter *Fear and Fairness in the City*]; and Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2005) [hereinafter Ayres & Brooks, *Affirmative Action*].

120. Brooks, *Fear and Fairness in the City*, *supra* note 119; Richard R.W. Brooks & Haekyung Jeon-Slaughter, *Race, Income, and Perceptions of the U.S. Court System*, 19 BEHAV. SCI. & L. 249 (2001).

121. Richard R.W. Brooks & Steven Raphael, *Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment*, 92 J. CRIM. L. & CRIMINOLOGY 609 (2002) [hereinafter Brooks & Raphael, *Life or Death Sentences*].

122. Richard R.W. Brooks, *Liability and Organizational Choice*, J.L. & ECON. 91 (2002); Richard R.W. Brooks, *The Relative Burden of Determining Property Rules and Liability Rules: Broken Elevators in the Cathedral*, 97 NW. U. L. REV. 267 (2002).



both race-related and nonracial issues. One of his most recent articles is *Incorporating Race*, which develops an economic model of race in response to recent court decisions holding that corporations can possess racial identities—a perfect blending of his interests in race and corporate law.<sup>123</sup> One oft-cited Brooks article is *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*. Brooks uses empirical methods honed in his economic training to analyze data from the 1993-1994 National Black Politics Study. Brooks disavows monolithic claims about the “black community’s” view on the criminal justice system and studies differences between the views of younger and older African Americans and poorer and wealthier African Americans.<sup>124</sup> A notable nonracial Brooks piece is *The Relative Burden of Determining Property Rules and Liability Rules: Broken Elevators in the Cathedral*, which was published in the *Northwestern University Law Review* in 2002. He argues from a very traditional legal framework in the article, assessing the difficulty judges face as they choose between liability rules and property rules and directly building on the seminal work of Guido Calabresi and Douglas Melamed.<sup>125</sup> In the same year, Brooks published a historical empirical study on Chicago murder sentences from 1870 to 1930 that showed that the race of the defendant, the race of the victim, whether law enforcement officials were murdered, and whether a specific judge was in an election year are notably associated with the harshness of judges’ sentencing. The article presents evidence about some detrimental effects of judicial discretion, suggesting that capital punishment is more likely to result when judges are worried about potential public reactions to “softness on crime.”<sup>126</sup> This piece, while not centrally about race, has clear relevance to racial concerns and confirms some of the conventional wisdom about race and sentencing.<sup>127</sup>

2005 also saw Brooks publishing articles on both racial and nonracial topics—interestingly, both in the *Stanford Law Review*. In May, Brooks, along with Yale law professor and fellow economist Ian Ayres, published a response to the infamous article by UCLA law professor Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, which

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123. Richard R.W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023 (2006).

124. Brooks, *Fear and Fairness in the City*, *supra* note 119, at 1271.

125. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

126. Brooks & Raphael, *Life or Death Sentences*, *supra* note 121, at 611.

127. For example, Brooks finds that trials with guilty verdicts disproportionately involved African American defendants, and that murders of African Americans were significantly less likely to receive capital sentences than those of whites. *Id.* at 630.

posited that affirmative action in law school admissions causes African Americans to be academically “mismatched,” negatively affecting their preparedness and performance.<sup>128</sup> Ayres and Brooks undermine Sander’s argument by pointing out his misinterpretation of various data. In November, Brooks and Warren F. Schwartz published *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*—a sharp return to the law and economics scholarship that laid the foundation for his academic career.<sup>129</sup> Brooks’s publication of the preliminary injunction article immediately after the affirmative action piece, and in the same journal, makes race a non-issue in his scholarship. No one can confuse Brooks as just another African-American academic only interested in theorizing his or her own experiences; after all, that would be “unscholarly.”

In keeping with legal academic orthodoxy, Brooks never mentions in the affirmative action piece that he is African-American and therefore has, in any way, communitarian motives for debunking Sander’s argument. Likewise, in his other work that explores the African-American community, he does not insert personal narrative or even generally identify himself as a part of that community. The empirical methodology serves even more than traditional legal scholarship to detach the author from the argument; it is super-objective. In a legal academy that has rejected much of the subjectivity encouraged by critical theorists, Brooks’s mode of discussing race is highly effective. Like Carter, he writes in a way that seems to reject the idea that his identity should affect readers’ engagement with his arguments. This separation of the author and the scholarship takes a fairly formalistic view of scholarship, but it is one that is widely accepted in traditional legal and academic circles. Brooks, like Meares and like Kenya Cantrell in the opening story, has won a broader audience for his work by presenting himself as a legal scholar who is African-American, not an African-American legal scholar.<sup>130</sup>

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128. Ayres & Brooks, *Affirmative Action*, *supra* note 119. The authors were responding to an article that had appeared in the *Stanford Law Review* in 2004, Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

129. Richard R.W. Brooks, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381 (2005).

130. This terminology is a derivation from an episode of the television show *Law and Order*, when a black attorney leaves the district attorney’s office to pursue civil rights law. When Robinette explains his departure, he says, “Ben Stone once asked me if I was a Black Attorney or an attorney that was Black. I guess I finally decided which one.” Cheryl Smith-Khan, *African American Attorneys in Television and Film: Compounding Stereotypes*, 22 LEGAL STUD. FORUM 119, 128 (1998). By writing solely or primarily about race, scholars define themselves by race first and academic pursuits second: Blending both roles of race scholar and law and economics scholar enables Brooks to be primarily identified as a bright legal mind.

C. *Kenneth Mack*

Kenneth Mack is a legal historian and assistant professor at Harvard Law School who is quickly rising to prominence in civil rights history. Though he, like Meares, was trained as an engineer as an undergraduate, he went on to law school at Harvard and obtained a Ph.D. in history at Princeton.<sup>131</sup> Between law school and graduate school, Mack clerked in U.S. District Court and worked at a large Washington, DC law firm.<sup>132</sup> Mack specializes in the history of civil rights lawyering and recently published a well-received article in the *Yale Law Journal* arguing that traditional legal historians focus too narrowly on courts and *Brown v. Board of Education*<sup>133</sup> as the crux of civil rights law.<sup>134</sup> Every piece of Mack's work has dealt explicitly with African Americans in the civil rights context.<sup>135</sup> Mack, unlike many of his counterparts, does not market himself as a scholar who studies race as a secondary matter or only as it relates to some subset of law. The legitimizing aspect of his race scholarship is the historical *methodology*, not the presence of alternative subject matter.

Mack's *Yale Law Journal* piece, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, is a rich exploration of civil rights lawyering between *Plessy v. Ferguson* and *Brown v. Board of Education*. In opposition to the legal-liberal narrative of civil rights lawyering in those times, which tends to draw a straight line between *Plessy* and *Brown*, claiming that *Brown* was the singular goal/focus of civil rights lawyers in those years, Mack argues that the road to *Brown* was much more complex and textured than the linear/liberal story suggests:

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131. Harvard Law School, Faculty Directory, Kenneth Mack, <http://www.law.harvard.edu/faculty/directory/facdir.php?id=117> (last visited Jan. 19, 2007). Mack was trained as an electrical engineer, while Meares majored in general engineering. See Curriculum Vitae: Tracey Meares, *supra* note 99.

132. Jennifer McCracken, *Harvard Law Professor to Deliver Hugo L. Black Lecture at UA Law School*, U. OF ALA. News, Oct. 28, 2003, <http://uanews.ua.edu/aneews2003/oct03/blacklec102803.htm>.

133. 347 U.S. 483 (1954).

134. Kenneth Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256 (2005).

135. See Kenneth W. Mack, *A Social History of Everyday Practice: Sadie T. M. Alexander and the Incorporation of Black Women into the American Legal Profession, 1925-1960*, 87 CORNELL L. REV. 1405 (2002); Kenneth W. Mack, *Law, Society, Identity and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875-1905*, 24 LAW & SOC. INQUIRY 377 (1999); Kenneth W. Mack, *Law and Mass Politics in the Making of the Civil Rights Lawyer, 1931-1941*, 93 J. AM. HIST. 37 (2006).

[T]he professional project of the African-American bar during this formative era encompassed far more than the creation of a juridically cognizable right to be free of segregation. In fact, that project generated disputes within civil rights politics and arguments about law, social change, and African-American identity that far exceed the scope of the debates that have animated standard legal histories of the civil rights movement, or the more recent work of its leftist and neo-institutional critics.<sup>136</sup>

In short, the traditional story, epitomized by Richard Kluger's *Simple Justice*,<sup>137</sup> presents an overly simplistic view of African-American lawyers and the civil rights bar. That view emphasizes the "legalist" or "rights-advocacy" strand of black lawyering that focused on changing structures within the white majority world, while largely ignoring the strand of black lawyering that borrowed more heavily from Booker T. Washington's philosophy of intraracial uplift, or "voluntarism."

Mack's dissection of traditional liberalism is, in effect, a somewhat subversive form of critical scholarship. Instead of attacking traditional liberalism as a fundamentally flawed discourse that subjugates people of color wholesale, he dismantles its interpretation of the civil rights community's path to *Brown*. In doing so, he raises questions about traditional legal-liberalism as a larger methodology—how could it have been so inaccurate for so long? Furthermore, Mack's work makes a larger point about black lawyers that falls in line with the views of critical scholars: Even African-American attorneys found it difficult to fully buy into rights discourse. Also, it took a scholar who is himself part of "the bottom" (at least racially) to bring the multiplicity of viewpoints within the early African-American legal community to the fore. Because Mack uses historical analysis, not narrative, to convey his message, a white scholar might have been perfectly capable of producing the same work. However, Mack's unique perspective as a scholar of color—who has been privy to debates among African-American lawyers and has probably wondered how black lawyers could *possibly* have been so cohesive pre-*Brown*, given that their voices are so discordant now—likely provoked his research question in the first place.

Mack's work is illustrative of the distinction that can be drawn between race scholarship and critical race scholarship.<sup>138</sup> Lani Guinier, Charles

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136. Mack, *supra* note 134, at 263.

137. RICHARD KLUGER, *SIMPLE JUSTICE* (1977).

138. Though some scholars believe that the delineation between civil rights scholarship and critical race theory may be a "distinction without a difference." Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CAL. L. REV. 787 (1994).

Ogletree, Randall Kennedy and others are all scholars who write about race, but none of them would be considered a critical race scholar. Mack distinguishes himself from Guinier, Ogletree, and Kennedy (fellow Harvard race and law co-conspirators) by using historical methods to understand civil rights. Though Mack explicitly writes about race most of the time, he still does not employ voice scholarship. The originality of his angle is precisely that he does *not* engage in voice scholarship, but rather, in historical inquiry that illuminates important racial issues.

*D. Devon Carbado*

Devon Carbado, professor of law at UCLA and director of the law school's concentration in critical race studies, is different from the preceding scholars because he writes not only about race generally, but also frequently writes in the critical race genre. At first glance, Carbado might seem to undermine the argument that successful young legal scholars are avoiding critical scholarship. However, a closer look at Carbado's work shows that he, like Meares and Brooks, is actually combining CRT with other topics and working expansively enough that he has avoided the pitfalls that may affect other young academics in CRT.

Carbado has been a jack-of-all-trades in the world of critical legal theory. He writes about feminist legal theory, intersectionality, heteronormativity, and race more generally. One of his most overtly CRT pieces is *Race to the Bottom*, an obvious response to the views of Mari Matsuda's idea of looking to the bottom.<sup>139</sup> Just three months before this symposium piece was published, Carbado had written a racial analysis of the Fourth Amendment and criminal procedure.<sup>140</sup> Carbado's work has been even more wide-ranging; one of his very early pieces was on Latcrit (Latino critical race theory) and was published in the *Chicano-Latino Law Review*,<sup>141</sup> and other works have tackled the role of black men and black women in the feminist movement.<sup>142</sup> Though Carbado is undoubtedly a CRT scholar, he is also a scholar of other related fields and has made himself adaptable enough that almost every scholar can find parts of his body of work that they find enlightening or, at least,

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139. Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283 (2002).

140. Devon W. Carbado, *(E)Racing The Fourth Amendment*, 100 MICH. L. REV. 946 (2002).

141. Devon W. Carbado, *The Ties That Bind*, 19 CHICANO-LATINO L. REV. 283 (1998).

142. E.g., Devon W. Carbado, *Men in Black*, 3 J. GENDER RACE & JUST. 427 (2000); Devon W. Carbado, *Motherhood and Work in Cultural Context: One Woman's Patriarchal Bargain*, 21 HARV. WOMEN'S L.J. 1 (1998).

legitimate (the “legitimizing” factor being the approval of a predominantly white legal academy).

The case of Carbado illuminates the multiple possibilities for black race scholars, especially those who engage in critical, narrative, and voice scholarship, to avoid pigeonholing and easy dismissal. One way is to, like Brooks and Meares, become known as a scholar in a subset of law but to engage frequently in scholarly pursuits that draw out the connections between that area of interest and race (particularly notable in Meares’s case because the criminal law is so laden with racial issues). Another way, the way of Carbado, is to turn a critical eye to an extremely broad range of subjects, only one of which is black/white race relations. In an age of legal specialization and reverence of expertise, the risk of Carbado’s approach is that one could be viewed as an academic dilettante—one hundred miles wide and two inches deep. Carbado has masterfully avoided this characterization.

Carbado is one of few young legal scholars at elite schools keeping critical race theory alive for students and the legal community. However, Carbado is likely mentoring very few people who will become critical race scholars, simply because there is an extremely tight pipeline for academia, and UCLA is not a large producer of academics.<sup>143</sup> The “pipeline problem”—the idea that young African Americans, especially CRT scholars, are in short supply—will only increase as the legal academy selects all of its participants from a small handful of schools where there are no CRT mentors available. The small number of courses and professors who teach critical race theory at the most elite institutions is additional evidence that critical race theory is gradually being phased out of legal academe.

#### IV. THE PLACE OF RACE IN BLACK LEGAL SCHOLARSHIP TODAY: THE OBLIGATION THESIS

Given the academy’s resistance to voice scholarship, which is one step removed from the broader category of race and the law, why do young African-American legal scholars continue to write about race? If it is

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143. According to Brian Leiter, the top five schools for getting hired in law teaching are: 1) Yale, 2) Harvard & Stanford, and 3) University of Chicago & University of Michigan. From 2000-2002, Harvard placed 108 graduates without LL.M.s in law teaching jobs; Yale placed 104 (this is significant because Harvard is approximately three times larger than Yale). The next highest-performing school was Stanford, which placed forty-eight graduates in law teaching during that time. UCLA does not produce anywhere near this number of academics. Brian Leiter, *Leiter’s Law School Rankings, Where Tenure Track Faculty Went to Law School 2000-02*, [http://www.leiterrankings.com/faculty/2000faculty\\_education.shtml](http://www.leiterrankings.com/faculty/2000faculty_education.shtml).

dangerous and unscholarly to employ narrative and autobiography in black legal scholarship, isn't it similarly risky for black legal scholars (who have some personal stake in issues of race) to theorize race at all? Don't black legal scholars take the chance of blowing their proverbial "cover"<sup>144</sup> when they publish books and articles about race?

If we assume that the answer to these questions is yes, there must be some deeper incentive for African-American scholars' continued study of race. This motivation, in my view, is not mere interest in the subject matter as a consequence of their minority status. It is also born of a sense of responsibility to the African-American community; a sense that, as a virtue of being a black person with the means to ascend to legal academia, one has the obligation to produce scholarship that illuminates the plight of his or her racial community. I suggest that, particularly for many African-American legal academics, scholarship is not just about producing interesting ideas. It is often also about producing societal benefit. I term this phenomenon, after David Wilkins, the obligation thesis.

Wilkins has written extensively about the ways in which various push-and-pull factors operate to mold African Americans' employment in legal settings, particularly in the corporate law firm.<sup>145</sup> In his *Houston Law Review* article, *Doing Well by Doing Good*, Wilkins analyzes data that he collected in a survey of African-American graduates of Harvard Law School working in corporate law.<sup>146</sup> His data indicates that African-American corporate lawyers were somewhat more likely to engage in pro bono and community activities than their white counterparts. However, Wilkins notes that African-American corporate lawyers are not willing to sacrifice success in their private careers to spend a disproportionate amount of time advancing the cause of racial justice.<sup>147</sup> Black corporate lawyers are motivated not only out of racial duty,

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144. See *supra* text accompanying note 8.

145. See David B. Wilkins, *Social Engineers or Corporate Tools?* *Brown v. Board of Education and the Conscience of the Black Corporate Bar*, in *RACE, LAW AND CULTURE: REFLECTIONS ON BROWN V. BOARD OF EDUCATION* (Austin Sarat ed., 1997); David B. Wilkins, *Doing Well by Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers*, 41 *HOUS. L. REV.* 1 (2004) [hereinafter Wilkins, *Doing Well by Doing Good*]; David B. Wilkins, *From "Separate is Inherently Unequal" to "Diversity is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 *HARV. L. REV.* 1548 (2004); David B. Wilkins, *Partners Without Power? A Preliminary Look at Black Partners in Corporate Law Firms*, 2 *J. INST. STUD. LEGAL ETHICS* 15 (1999); David B. Wilkins, *Fragmenting Professionalism: Racial Identity and the Ideology of "Bleached Out" Lawyering*, 5 *INT'L J. LEGAL PROF.* 141 (1998).

146. Wilkins, *Doing Well by Doing Good*, *supra* note 145.

147. *Id.* at 16-17. Wilkins's argument makes sense: One would imagine that if a lawyer was primarily interested in advancing racial justice without as much concern about material wealth, that lawyer

but also by the desire to succeed in the overwhelmingly white world of corporate law. Consequently, these lawyers seek a harmonious mixture of public-oriented work and excellent private law firm product. My analysis mirrors Wilkins's in this regard: I maintain that black academics, like black corporate lawyers, are motivated (among other factors discussed in Part V) both by the desire to gain tenure and influence in overwhelmingly white law schools and by their racial responsibility to other African Americans.

Assumptions about African Americans' racial responsibilities also underlie notable criminal law scholarship. Kenneth Nunn pointedly argues in his article, *The "Darden Dilemma": Should African Americans Prosecute Crimes?*, that black lawyers should not be prosecutors. He contends that "when African Americans prosecute crimes, they do extensive and avoidable harm to the African American community."<sup>148</sup> Nunn makes four specific claims that are reminiscent of Paul Butler's 1995 *Yale Law Journal* article *Racially Based Jury Nullification*: (1) The criminal justice system oppresses black people, (2) prosecutors are a primary source of that racism and oppression, (3) black prosecutors cannot remedy the system on their own, and (4) black people should not "contribute to the oppression" of other blacks.<sup>149</sup> Nunn views criminal prosecution as a direct contribution to African Americans' oppression. On a more moderate note, Margaret Russell also discusses the "sell out" label that accompanied black attorney Christopher Darden as he prosecuted O.J. Simpson in the "trial of the century":

[A]s Black attorneys seek an integrated and authentic fusion of personal and professional identities in a legal system that relegates them to a mere token presence, they often face confinement along an extremely narrow continuum of stereotypical identities. If they choose a career path not typically associated with the pursuit of racial justice—for example, corporate law or criminal prosecution—dominant popular discourse (even more than the "Black community") pigeonholes them with an array of labels ("assimilationist," "colorblind," "mainstream," "conservative," "sell-out"), all of which reinforce the ideology that such individuals are divorced from their "Blackness" . . .<sup>150</sup>

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would work at one of the excellent public interest litigation or advocacy organizations such as the NAACP Legal Defense and Educational Fund, the Lawyers' Committee for Civil Rights Under Law, the Mexican American Legal Defense and Educational Fund, the Asian Pacific American Legal Center, the Advancement Project, and so on.

148. Kenneth B. Nunn, *The Darden Dilemma: Should African Americans Prosecute Crimes?*, 68 *FORDHAM L. REV.* 1473, 1478 (2000).

149. *Id.* See also Butler, *supra* note 113.

150. Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice*, 95 *MICH. L. REV.* 766, 782 (1997).



Russell importantly notes that the obligation that black attorneys feel to the “community” is not so rigidly imposed by the community itself as much as it is imposed by popular discourse. I am not sure that her divorcing of popular discourse and “the black community” is fair; yes, non-blacks also participate in the discourse that label certain African Americans as “Uncle Toms,” but black Americans also substantially contribute to this discourse. Nonetheless, her point is significant: Black lawyers face pressures from a host of directions to choose certain types of work. These pressures are much different from similar pressures and internal conflicts with which white lawyers struggle.<sup>151</sup>

The obligation thesis can also explain black lawyers’ propensity for public interest law or participation in pro bono work. Corporate law firms often woo black attorneys, even more than attorneys from other minority groups or women, with promises of pro bono work.<sup>152</sup> Though I am skeptical of arguments that black lawyers are simply opting out of corporate work, it remains a fact that black lawyers are concentrated in the government and nonprofit sectors and that many African Americans continue to associate lawyering with being one of Charles Hamilton Houston’s “social engineers.”<sup>153</sup> “Reaching back” is an integral responsibility for the black attorney, possibly even more integral than for other black professionals, because of the legacy of civil rights lawyers. This sense of responsibility is probably just as strong for African-American legal academics. Having been motivated to attend law school, a professional school, instead of or in addition to less pragmatically oriented graduate school, these scholars feel a substantive obligation to improve society for black people in the same way that their practicing counterparts do.

Derrick Bell and bell hooks have written extensively and commented on the obligations of blacks in academia to African-American students and to the community at large. Hooks focuses mostly on the interaction between African-American professors and African-American students. In her essay *On Being Black at Yale: Education as the Practice of Freedom*, hooks particularly focuses on the affirming role that African-American professors (not just law professors) can and should play for African-American students,

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151. But see David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030 (1995). Spurred by Black attorney Anthony Griffin’s defense of a White Ku Klux Klan member in 1993, Wilkins wrote this article defending Griffin’s decision to prioritize his belief in First Amendment freedoms over race loyalty. Wilkins celebrates Griffin’s “courage and devotion to principle.” *Id.* at 1064.

152. David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 508 n.32 (1996).

153. See *id.* at 508-09.

particularly in Afro-American Studies departments.<sup>154</sup> Hooks notes, “[C]oncerned black students look to black professors for an example of ways to be whole, of ways to exist in this social context that allow celebration and acceptance of difference, ways to integrate rather than adapt, ways to be subject rather than object.”<sup>155</sup> In short, African-American students needed African-American professors to serve as their role models. Black professors should also critically engage with each other to advance what she calls “education as the practice of freedom,” or creating affirming and enlightening academic communities that take on issues of race in the tradition of Paulo Freire.<sup>156</sup> Hooks’ analysis applies beyond the teaching aspect of professors’ work; her concern about the absence of such community—in Afro-American Studies as well as other departments—is also indicated in her assessment of how and why some black scholars choose non-racial research interests. Hooks relates a hypothetical encounter between two black professors:

Witness a new professor coming into an environment where there are few black women. She meets another black professor in her department who, when asked about his interests, says in an offhand manner, “I’m not into that Afro-American shit.” Disassociating himself from blackness, he assumes an attitude of superiority, as though he has more accurately understood the way to succeed—assimilation, negation of the black self.<sup>157</sup>

Hooks sees deliberate avoidance of black-centered scholarship as an attempt at assimilation. Like Kenya Cantrell in the opening vignette, the hypothetical black male professor realizes that the means of success is avoidance of black scholarship and consequently forsakes his duty to nurture black students and fellow black professors.

Derrick Bell makes a more overt claim that black academics have obligations to the black community that should affect the content of their scholarship. In his short narrative essay *The Black Sedition Papers*, Bell pointedly expresses the obligation of black scholars: “Our basic challenge must be to act in ways that alleviate their suffering, if we can, and to strive not to make it worse.”<sup>158</sup> Bell argues that some African-American scholarship, even (or especially) scholarship on the subject of race, may actually worsen the conditions of black people. Thus, Bell would contend that it is not enough

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154. BELL HOOKS, *On Being Black at Yale: Education as the Practice of Freedom*, in TALKING BACK: THINKING FEMINIST, THINKING BLACK 62 (1989).

155. *Id.* at 68.

156. *Id.* at 64. See also PAULO FREIRE, *EDUCATION FOR CRITICAL CONSCIOUSNESS* (1973).

157. HOOKS, *supra* note 154, at 69.

158. DERRICK BELL, *The Black Sedition Papers*, in AFROLANTICA LEGACIES (1998).

for a black scholar to write about race—depending on what she is writing, the black community might be better served if the scholar never wrote about racial issues. Bell’s fictional story argues that scholarship about race that negatively impacts movement for racial justice are “black sedition papers,” tools commissioned by the government to foster negative and frightening views on the black American experience and to prepare the public for action in case the government must ever use authoritarian measures to control African Americans. In Bell’s view, when African Americans produce scholarship on race that actually worsens the status of black people, they have forgotten their responsibility for racial uplift.

Taken together, hooks and Bell illustrate the quandary that faces many African-American academics. For hooks, the ultimate shirking of racial responsibility is to ignore racial issues for the purposes of assimilation, while for Bell the worst scholarly offense might be producing a “black sedition paper” that tackles issues of race while blaming African Americans’ cultural problems or lack of motivation (without acknowledging the white power structure that produced cultures of poverty and other remnants of institutional racism).<sup>159</sup> To be a “good” black academic on all accounts, scholars must write about topics other than race most of the time, and when they occasionally write about race, they must also make sure to select topics that leave readers with positive images of black people. As *New York Times Magazine* writer Adam Shatz notes in his article on the metamorphosis of Reagan-era black conservative turned twenty-first century “race man” Glenn Loury: “To be a black intellectual in the race debate is to have an audience with expectations, even demands; an audience anxious to know which side you’re on.”<sup>160</sup> These factors create a great deal of racial baggage for young academics, an additional, weightier load than many young white academics must bear.

In addition to “aloneness, lack of support, and fear by a dug-in majority that often views minorities as necessary affirmative action hires or diversity or token appointments,”<sup>161</sup> a substantial piece of the challenge for black professors is the sense of responsibility that they often feel as *African*

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159. It is admittedly a bit extreme to characterize hooks and Bell in this way. Hooks would likely also disavow an academic who wrote only pieces that are harmful to the community, and Bell would disdain someone who deliberately avoided race scholarship for the purposes of assimilation. These phenomena are simply the ones they’ve chosen to analyze in their books.

160. Adam Shatz, *Glenn Loury’s About Face*, N.Y. TIMES MAG., Jan. 20, 2002, at 18, 23.

161. Leland Ware, *People of Color in the Academy: Patterns of Discrimination in Faculty Hiring and Retention*, 20 B.C. THIRD WORLD L.J. 55, 69 (2000) (quoting Peter C. Alexander, *Silent Screams from Within the Academy: Let My People Grow*, 59 OHIO ST. L.J. 1311, 1311 (1998)).

*Americans*. Leland Ware, referencing Leonard Baynes, notes, “[T]ime-consuming and burdensome obligations weigh heavily on minority professors.”<sup>162</sup> Lani Guinier has noted that she “feel[s] special responsibilities as a black woman law professor” and has alluded to the “role model rationale for hiring black women law professors.”<sup>163</sup> Cheryl Harris likens the task of the black law professor to that of a poet in a flawed kingdom: “[I]n performing her task, like the poet, [the black female law professor] must not only survive, but tell a story that is both hers and is larger than hers—a story that undermines the prevailing order—thereby risking ‘trouble with the king.’”<sup>164</sup> Black legal academics, like all legal scholars, study the mechanisms that hold together the social order—a social order that, throughout most of American history, conspired against them. That situation naturally creates both an inner conflict and duty to critique and improve those mechanisms. This deep-seated sense of responsibility may sometimes conflict with the law school’s agenda, which (especially in these conservative times) may include reinforcing (or at least deferring to) systems of domination that would have shut African Americans out of law faculties in earlier times.

The negotiation of black legal scholars’ sense of obligation to the “black community” and their concomitant desire to be successful in the predominantly white legal academy—an academy that is increasingly hostile to critical scholarship and race scholarship—involves a delicate balancing act. Finding the perfect combination of mainstream acceptability and street credibility has served well the young scholars profiled in Part III.

It is important to reiterate that my purpose in highlighting the obligation thesis is not to ascribe normative value to it. I share Wilkins’s concern that arguments about African-American lawyers’ responsibilities or obligations—emanating from racial affiliation and the legacies of Thurgood Marshall and Charles Hamilton Houston—are dangerously essentialist.<sup>165</sup> Identity politics can be just as problematic in the legal academy as in political campaigns because, while it encourages African Americans to write from their “special” voice on race, it simultaneously discourages or invalidates progressive race scholarship by whites. At the same time, it would be

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162. *Id.* See also Leonard M. Baynes, *Who Is Black Enough for You? An Analysis of Northwestern University Law School’s Struggle Over Minority Faculty Hiring*, 2 MICH. J. RACE & L. 205, 225 (1997).

163. Lani Guinier, *Of Gentlemen and Role Models*, in CRITICAL RACE FEMINISM 106, 108-09 (Adrienne Katherine Wing ed., 2d ed. 2003).

164. Cheryl I. Harris, *Law Professors of Color and the Academy: Of Poets and Kings*, 68 CHI.-KENT L. REV. 331, 333-34 (1992).

165. Wilkins, *Doing Well by Doing Good*, *supra* note 145, at 15-16.

disingenuous to pretend that this identity-based sense of obligation among African-American lawyers is nonexistent. As Wilkins points out, and as I can confirm, one would be hard pressed to find a Black Law Students Association meeting, a National Bar Association conference, or another gathering of African-American law students and lawyers in which “giving back,” specifically to other black people, is not explicitly promoted.<sup>166</sup> Though Wilkins and others have discussed various formulations of the obligation thesis as it relates to black lawyers or black academics more broadly, my aim is to illuminate how this real phenomenon uniquely affects the perspectives and positioning of black legal academics. Ideally, however, scholars of all ethnicities would be concerned about the plight of racial minorities, women, poor people, and others for whom law and policy often fall short. African-American scholars should feel obligated to care—but so should everyone else.

#### V. OTHER RATIONALES FOR THE CHANGING CONTENT OF BLACK LEGAL SCHOLARSHIP

The obligation thesis seeks to explain why African-American legal scholars continue to write about race, despite the fact that doing so places them at some risk within the legal academy. In this section, I will explore several other motivations that likely play a role in black scholars’ choices of research topics (other than, of course, basic interest). The main objective of this section is to add texture to young black legal intellectuals’ decisions (conscious or unconscious) to move away from CRT and voice scholarship. I will explore some potential “push factors” that entice African-American academics to forego race scholarship but, more specifically, critical race scholarship. I will then briefly mention two “pull factors” aside from the obligation thesis that may encourage black academics to engage in race scholarship despite the possible costs of doing so.

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166. *Id.* at 15. Consider also the themes of some 2006 conventions of African American lawyers and law students in 2006: “Blind Justice: Promoting Equality Under the Law” (National Black Law Students Association convention), “Raising the Bar: Promoting Justice and Equality” (National Bar Association convention), and “Forging a New Path to Empowerment: Reconnecting the Past, Present, and Future of a Multi-Faceted Black Community” (Harvard Black Law Students Association conference).

*A. Push Factors: Further Reasons to Disengage from Voice Scholarship*

*1. Dialogue with Non-CRT Scholars*

One valid concern that African-American legal scholars might have is that engaging in voice scholarship could ghettoize them within the academy. Critical scholars frequently cite each other's work, but other scholars may cite critical scholars' work quite infrequently. The supposedly incestuous nature of not only critical race theory, but critical legal scholarship more specifically, has been noted by one commentator: "CLS no longer seems to possess a voice comprehensible to anyone outside its own small circle."<sup>167</sup> Furthermore, more conservative scholars have derided voice and narrative scholarship, one method of CRT scholarship. Darren Hutchinson notes:

The storytelling and narrative strand of critical race scholarship . . . has been the most provocative for conservative critics . . . . The critics of storytelling argue that personal stories do not advance analysis because other scholars cannot contest them; they are not grounded in empiricism; and they are inapplicable in a legal setting where analytical reasoning pervades.<sup>168</sup>

Non-CRT scholars apparently find it difficult to engage with narrative scholarship, which would feasibly animate some scholars' decisions not to employ it. It is true that the vast majority of legal analysis uses a dialogue of objectivity (though one might reasonably question whether legal analysis can be, in truth, objective). An African-American academic who seeks membership in a scholarly community might reasonably seek out the community with the largest number of participants.<sup>169</sup>

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167. Neacsu, *supra* note 47, at 416.

168. Hutchinson, *supra* note 41, at 1207.

169. It is important to note, however, that the problems of storytelling and non-objective scholarship do not seem sufficient to explain non-CRT scholars' inability to substantively engage with critical race theorists. As Richard Delgado points out, only about 25% of the most influential critical race scholarship is in narrative form. Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 669 (1993). Thus, critics who focus on storytelling as a way of questioning the validity of CRT (which predominantly uses the traditional methods of case-parsing and theorizing) are, in some sense, attacking a straw man.

Also, it may be that, if a critical race scholar can get her article published in a highly prestigious journal, she may have more of an avenue for intellectual dialogue than those who publish articles on other topics. In 2000, Ian Ayres and Fredrick Vars found that critical pieces published in *Harvard Law Review*, *Stanford Law Review*, or *Yale Law Journal* were more likely to be cited in other scholarship than scholarship on other disciplines. Ian Ayres & Fredrick E. Vars, *Determinants of Citations to Articles in Elite Law Reviews*, 29 J. LEGAL STUD. 427, 437-39 (2000).

## 2. *Increased Racial Awareness of White Scholars*

Given the racial progress that America and the legal academy have made over the past few decades, one reason that African Americans are not producing as much voice and CRT scholarship might be because they see less of a need to do so. Perhaps white scholars are now more aware of the importance of race and are engaging in work about race themselves, thereby lightening the burden on African-American academics to produce race scholarship. To be sure, a few prominent white academics do write about race. Owen Fiss, for example, has been writing insightfully about America's racial problems for over forty years.<sup>170</sup> A former clerk for Thurgood Marshall on the Second Circuit Court of Appeals and William Brennan at the Supreme Court, Fiss has been a longtime student of the ongoing struggle for civil rights. Another example is Pamela Karlan, a professor at Stanford Law School. A former attorney at the NAACP Legal Defense and Educational Fund and a cooperating attorney with the organization for nearly twenty years, Karlan has used her academic platform to tackle issues of race and political participation.<sup>171</sup> White scholars in criminal law, such as Paul Robinson, Dan Kahan, and Larry Marshall, and activist-academics like Stephen Bright of the Southern Center for Human Rights really have no other choice but to write about race, given the racial realities of the criminal justice system. However, it is fair to say that these scholars are the exception, not the rule. While white scholars may, on the whole, be more sympathetic with racial struggles than they were decades ago, most are not producing race scholarship. Though most scholars would undoubtedly agree that it is still valuable for the academy to explore racial issues, one might reasonably surmise that if race is going to be a topic of discussion within the legal academy, racial minorities will have to keep leading the way, at least for now.

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170. Some of Fiss's writings on race include *A WAY OUT: AMERICA'S GHETTOS AND THE LEGACY OF RACISM* (2003); *Affirmative Action as a Strategy of Justice*, 17 PHIL. & PUB. POL'Y 37 (1997); and *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965).

171. Some of Karlan's works include *The Impact of the Voting Rights Act on African Americans: Second and Third Generation Issues*, in *VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES* (Mark E. Rush ed., 1998); *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569 (2002); and *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001 (1998).

### 3. *Voice Scholarship Counter to African Americans' Interests*

Perhaps African-American legal academics stopped engaging in voice scholarship precisely *because* of their sense of obligation to black people, not because it would put them out of favor with white people. It may be that voice scholarship runs afoul of African-American interests in a couple of ways: First, many of the people controlling law schools might deem voice scholarship “less scholarly” than other disciplines. Some more traditional academics might view voice scholarship as mere intellectual whining.<sup>172</sup> Participating in CRT voice and narrative scholarship could theoretically worsen the social conditions of black people because it may promote the “cult of Victimology, Separatism, and Anti-Intellectualism,”<sup>173</sup> support claims that racial minorities should be held to different standards for scholarship because of our “unique voice,”<sup>174</sup> and indirectly suggest that African Americans are only interested in “me-search.” If what is best for the black community is to show people of other ethnicities that African Americans are just as strong, scholarly, and meritorious as they are, it might be more beneficial to use a more “objective” writing style.

Second, and more problematically, when African-American academics use marginalized modes of scholarship, some might argue that they are wasting their talents on intellectual dialogue instead of harnessing their analysis to bring about legal change. One of the most direct ways that legal scholars are believed to impact society is by producing scholarship that influences the thought process of judges, which they in return cite. However, courts cite even the most prominent critical race scholars infrequently, at best. Larry Catá Backer’s empirical study of outsider scholarship and federal and state court citation, from 2000, is particularly illustrative of this reality.<sup>175</sup> According to Backer, no federal or state courts cited any of the works of

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172. Evelyn C. White, *The Views from Her Place*, WASH. POST, Feb. 2, 2005, at C10. Reviewing Patricia Williams’s book, *OPEN HOUSE: OF FAMILY, FRIENDS, FOOD, PIANO LESSONS, AND THE SEARCH FOR A ROOM OF MY OWN* (2004), White briefly mentions CRT’s detractors “who decry critical race theory as so much ‘death to whitey’ whining (albeit with an intellectual flair).”

173. See generally JOHN MCWHORTER, *AUTHENTICALLY BLACK: ESSAYS FOR THE BLACK SILENT MAJORITY* 39 (2003).

174. See Carter, *supra* note 12, at 2078.

175. Larry Catá Backer, *Measuring the Penetration of Outsider Scholarship into the Courts: Indifference, Hostility, Engagement*, 33 U.C. DAVIS L. REV. 1173, 1179-81 (2000).



Jerome Culp or Harlon Dalton<sup>176</sup> between 1989-1999.<sup>177</sup> Kimberlé Crenshaw and Patricia Williams were cited only twice.<sup>178</sup> Delgado and Matsuda fared much better, with six and nine citations respectively.<sup>179</sup> The most shocking lack of citations were to Charles Lawrence and Derrick Bell, who were both cited only once.<sup>180</sup> These findings are in sharp contrast to the attention both scholars have received in legal academic circles.<sup>181</sup>

Backer's research would corroborate a black intellectual's fears that her scholarship would have little impact upon the black community should she engage in critical dialogue. Because critical race theory, unlike traditional civil rights scholarship, fundamentally questions legal structures, it is less likely to be cited by courts.<sup>182</sup> Thus, the specter of making only negligible impact on people's lived experience may also be a deterrent to those interested in CRT and voice scholarship.<sup>183</sup> Again consider the opening narrative on Kenya Cantrell, who chose tax scholarship precisely because she believed that it could have more tangible impact than critical scholarship.

This evaluation of CRT is somewhat shortsighted, since one could argue that CRT dialogue within law journals, in which law students participate, informs the types of cases that future lawyers take on and the ways they think

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176. Dalton has written, among other work, the influential CRT article *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435 (1987).

177. Backer, *supra* note 175, at 1192.

178. *Id.* at 1199, 1205.

179. *Id.* at 1193, 1202.

180. *Id.* at 1201.

181. Bell is considered one of the most influential, if not the most influential, critical race theorist, and Lawrence's *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) is a widely cited piece on unconscious bias, which has implications for equal protection and Title VII claims, especially. Richard Delgado has called Lawrence's article "one of the most influential Critical Race Theory articles ever written." Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279, 2279 (2001).

182. See Deborah J. Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?*, 71 CHI.-KENT L. REV. 871, 887 (1996) ("[T]he nature of feminist and critical race perspectives may prevent those articles from ever achieving substantial citation rates in the courts. These perspectives pose fundamental challenges to the fairness of legal rules. To do their work, judges must accept many premises of the legal system and attempt to resolve controversies within the bounds of that system. Critical challenges to basic legal assumptions may win favor with academics and policymakers—and may even eventually alter basic assumptions of the legal system—but they are harder to incorporate into individual judicial decisions.").

183. While non-black scholars are also subject to this type of reasoning—in fact, I have heard this rationale more than a few times from whites—obsolescence may feel like even more of a risk to black scholars, who are often only the first or second generation of college/professional school graduates and who, thus, feel a sense of obligation not only to improving the lot of black people broadly, but also to respecting the legacy of their familial predecessors.

about them, and also the policies for which they choose to advocate.<sup>184</sup> Also, it hardly follows that judges do not read and are not influenced by scholarship other than the pieces that they choose to cite: Courts theoretically could silently absorb CRT principles instead of expressly invoking them.<sup>185</sup> Since judicial decisionmaking involves analysis of precedent and case-parsing, but CRT does not rely predominantly upon case-parsing, CRT scholarship may be difficult to incorporate into an opinion. Still, practicality might be very important to a black attorney-scholar deeply concerned about the plight of black people, and that scholar might choose the safer route of civil rights scholarship or other more mainstream research over CRT and voice/narrative scholarship.

#### 4. *Disagreement with the Central Thesis of Critical Race Theory*

Another reason that young black legal scholars are moving away from voice and critical race scholarship might be that they substantively disagree with the central tenet of CRT, that race is the central organizing tenet of society. Some African-American scholars likely believe, along with some people of other ethnicities, that race is just not as important as it once was. These scholars may argue that class, not race, is the most significant structural barrier to social mobility. One seminal work credited with advancing this view is William Julius Wilson's 1976 book *The Declining Significance of Race*.<sup>186</sup> Although Wilson's title is misleading, as he does not argue that race is no longer an important force in American society, he does maintain that the black middle class's expansion has meant that class mitigates the effects of race on black lives. Wilson's argument is supported by data indicating that middle class African Americans fare better and are more upwardly mobile than their working class counterparts.<sup>187</sup> Wilson is not a conservative, but his

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184. For example, Alex Johnson has maintained that critical race theory's questioning of "merit" and "objective" standards leads to the defense of and advocacy for affirmative action. While a more desirable goal would be destabilization of racial identities, practically, affirmative action is a policy in line with CRT's principles. Alex M. Johnson, Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective*, 95 MICH. L. REV. 1005, 1006 (1997).

185. See Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1579-80 (2006). Resnik differentiates between "express invocation" and "silent absorption" in the context of transjudicial dialogue, noting that, although U.S. domestic courts have often been hesitant to explicitly import foreign law into American law, they have sometimes incorporated international and foreign law indirectly.

186. WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* 2 (1978).

187. See, e.g., MARY-PATILLO MCCOY, *BLACK PICKET FENCES: PRIVILEGE AND PERIL AMONG THE*

language has been co-opted to become a theme of some conservative and libertarian African-American scholars' work<sup>188</sup> (though this idea has not yet become a popular research topic among black *legal* academics). Still, the idea that race is not, indeed, the central organizing principle of society and instead, is just one of many organizing principles, might understandably undermine the extent to which young black legal academics are willing to engage in critical race and voice scholarship. There are other reasons that even a scholar invested in critical race theory might avoid voice scholarship. For some, the risk of self-exposure may be too great; for others, they may believe that narrative scholarship is unnecessary or even detrimental to adequately conveying the arguments of the movement to a traditional, predominantly white legal academy.

### 5. *Progress as Writing About Non-Racial Topics*

A few, but not many, African-American law professors have refrained<sup>189</sup> from writing about race altogether, or have, at least, never made race a central focus of any of their articles.<sup>190</sup> While many African Americans might raise an eyebrow at a black intellectual who *never* writes on racial topics, it is possible that these black writers, far from being unconcerned about the black community, view their freedom to write about non-racial topics as the ultimate in black progress: a step away from pigeonholing. True equality, these scholars might argue, is when it is acceptable for African-American academics to have the same broad range of research options as white academics.

It would not be unreasonable for black professionals to have concerns about pigeonholing. One of the most potent examples of a tokenized, albeit very successful, African-American lawyer is Justice Clarence Thomas. Before he ascended to the bench, Thomas was appointed to the Equal Employment Opportunity Commission (EEOC) by President Reagan—despite his specialization in tax law at Yale Law School and working for Senator John

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BLACK MIDDLE CLASS (1999).

188. *E.g.*, Thomas Sowell; Walter E. Williams; John McWhorter. *E.g.*, WALTER WILLIAMS, AMERICA: A MINORITY VIEWPOINT (1982); THOMAS SOWELL, BLACK REDNECKS AND WHITE LIBERALS (2005).

189. I choose the word “refrained” deliberately—“avoided,” “eschewed,” and even “abstained” imply normative judgment.

190. *E.g.*, Keith Hylton, a law and economics scholar at Boston University School of Law; Marcus Cole, Associate Dean for Curriculum at Stanford Law School and a bankruptcy and contracts scholar; Sherman Clark, a professor at the University of Michigan Law School who has written on a wide array of topics, including direct democracy, evidentiary rules, law and identity, and Title IX.

Danforth in Missouri and minimal prior experience in civil rights or employment law.<sup>191</sup> Thomas made substantial efforts to be viewed as competent in areas that were not “traditionally black,” but was still, in the end, afforded amazing opportunities because he was the “best black.” Black legal scholars in our current environment might also want to avoid pigeonholing by becoming respected scholars in fields that do not focus on race. The political world also reflects a shift in favor of African-American success in non-stereotypical fields: The most salient examples of this shift are General Colin Powell and Condoleezza Rice who, as the first and second African-American Secretaries of State, are known for their competence in areas outside of those that might be more traditionally viewed as areas of black interest (for example, housing and urban development, education, and civil rights). Whether Powell and Rice truly represent a shift away from pigeonholing is debatable, but the fact remains that African-American legal academics may believe that creating more substantive black progress will require African Americans’ talents to be noticed and nurtured in non-race fields.

#### 6. *Changed Socio-Political Context for Scholarship*

Probably the most universally understandable reason that African-American intellectuals might choose to avoid critical race scholarship, and especially narrative scholarship, is the changed socio-political context in which they operate. The legal academy and the political climate in which early CRT scholars operated was substantially more open to discussions of race and race differentiation than today’s environment. The ascendant race consciousness of the 1970s (and the 1980s, in legal academia) meant that white faculties were more attentive than ever to race and the law. Along with general interest in racial diversity, the first products of law school affirmative action programs were moving into legal practice and legal academia.<sup>192</sup>

That unapologetically race-conscious environment has long since dissipated. Legal practice and legal scholarship have increasingly embraced colorblindness as the ideal—meaning that courts and white Americans tend to imagine America as a “post-race” environment.<sup>193</sup> Having internalized this ideology, it has become increasingly acceptable for whites, and even some

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191. KEN FOSKETT, *JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS* 134-60 (2004).

192. *See supra* Part I.A.

193. *See, e.g.,* Ian F. Haney Lopez, “A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness, 59 *STAN. L. REV.* 985 (2007); Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Colorblindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 *CAL. L. REV.* 77 (2000).

minorities, to ignore or dismiss concerns about institutional racism and to disbelieve those who claim to have faced discrimination.<sup>194</sup> Even when courts do acknowledge present-day racism, they express optimism that its end is very near.<sup>195</sup> This tendency seems especially misguided considering the lived experiences of black people, particularly as they relate to the criminal justice and education systems. Despite *Grutter v. Bollinger*,<sup>196</sup> which permits universities to use race-based affirmative actions in higher education, at least for now, neither courts nor laypeople have been friendly to race-conscious policies and discussions on the whole. Michigan's "Civil Rights Initiative," spearheaded by Jennifer Gratz of *Gratz v. Bollinger*<sup>197</sup> fame and "mentored" by black conservative Ward Connerly,<sup>198</sup> was a successful proposal to "ban affirmative action programs that give preferential treatment to groups or individuals based on their race, gender, color, ethnicity, or national origin for public employment, education or contracting purposes."<sup>199</sup> The Initiative, also known as Proposition 2, passed in the November 7, 2006 election with nearly 60% of the vote.<sup>200</sup> Affirmative action plans outside of the higher education realm are also under attack in courts through "reverse discrimination" claims. The Eighth Circuit recently decided in *Kohlbeck v. Omaha*<sup>201</sup> that a city fire department's voluntary affirmative action plan violated the Equal Protection Clause because it was not tied closely enough to remedial ends. The Supreme Court recently struck down two voluntary K-12 school integration programs in *Parents Involved in Community Schools v. Seattle School District, No. 1*,<sup>202</sup>

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194. This phenomenon is particularly visible in the world of Title VII litigation. See, e.g., Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003, 1009-11 (1997); Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177, 1183 (2003).

195. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (O'Connor, J.) ("We expect that 25 years from now the use of racial preferences will no longer be necessary to further the interest approved today.").

196. *Id.*

197. *Gratz v. Bollinger*, 539 U.S. 244 (2003) (declaring a points-based affirmative action admissions program for the University of Michigan's undergraduate school unconstitutional).

198. Michigan Civil Rights Initiative, About MCRI, <http://www.michigancivilrights.org/aboutus.html> (last visited Feb. 5, 2007).

199. MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE (MCRI), BALLOT LANGUAGE, <http://www.michigancivilrights.org/media/Actual%20Ballot%20Language.pdf>. The initiative amends Article I, § 26 of Michigan's state constitution.

200. See Michigan Department of State, State Proposal—06-2: Constitutional Amendment: Ban Affirmative Action Programs, <http://miboecfr.nictusa.com/election/results/06GEN/90000002.html> (last visited Feb. 5, 2007).

201. 447 F.3d 552, 555 (8th Cir. 2006).

202. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, No. 05-908, slip op., available at

one in Seattle, Washington and another in Louisville, Kentucky. Chief Justice Roberts pithily presented the pro-colorblindness perspective toward the end of his majority opinion: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>203</sup> The growing adoption of this philosophy necessarily impacts the legal academy.

With society’s suspicion of even benign race-consciousness, it is understandable that African-American legal academics would choose not to engage in deliberately race-conscious or predominantly race-focused scholarship. Aside from the potential accusations of “race-baiting” or starting “race warfare,” black scholars who write only or mostly about race risk speaking and writing about a society to which most onlookers cannot or choose not to relate. Furthermore, as discussed above in Part V.A.4, black scholars might substantively *agree* that America is more colorblind than ever—a view that raises some questions, but not an uncommon view. First-generation African-American scholars did not operate in a context so hostile to race consciousness. White legal scholars could not ignore the immense structural disadvantages that racial minorities faced, and African-American academics were perfectly situated to address those concerns. Perhaps ascertaining that Americans are “tired of race” or internalizing Shelby Steele’s notion that not only whites, but even middle-class blacks are experiencing “a kind of race fatigue, a deep weariness with all things racial,”<sup>204</sup> second-generation black scholars may be more likely to succumb to pressures of race-neutrality than their predecessors were.

#### *B. Pull Factors: Further Reasons to Engage in Race Scholarship*

The pull factors discussed in this section appear more careerist than the noble picture of black scholars reacting to a sense of community responsibility. I present these alternative ideas not because I believe they unquestionably play a role in black intellectuals’ research interests, but

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<http://scotusblog.files.wordpress.com/2007/06/05-908.pdf>. See also *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1192-93 (9th Cir. 2005) (upholding Seattle School District No. 1’s voluntary integration plan, which used a student’s race as a “tiebreaker” for determining which school he or she could attend under Seattle’s school choice program); *Meredith v. Jefferson Cty. Bd. of Educ.*, 330 F. Supp. 2d 834, 837, 842 (W.D. Ky. 2004), *aff’d*, 416 F.3d 513 (6th Cir. 2005) (upholding the voluntary integration plan in a Louisville school district that used race as one of many components in its “managed choice” plan for school assignment).

203. *Parents Involved in Cmty. Schs.*, No. 05-908, slip op. at 40-41.

204. SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* 93-110 (1991).

because considering their potential role reinforces the view underlying the exploration of the obligation thesis: Human motivations and interests are complex. The obligation thesis is one under-theorized facet of trends in black legal academia, but it is by no means necessarily the only or even primary aspect.

The most blatantly careerist reason that a black intellectual might risk writing about race in these supposedly colorblind times is a desire for public notoriety. Black scholars who write about race, particularly if they make conservative or otherwise unconventional statements about race, rise quickly to the approving spotlight. The public notoriety argument rests on the truism that the messenger of a belief is often equally or more important than the message: John McWhorter's black phenotype issues him a "license" to decry black "victimology" in a way that a white person cannot without being called a racist, as does Bill Cosby's.<sup>205</sup> In the legal academy, Derrick Bell warned Randall Kennedy of "white law teachers who did not like and felt threatened by our writings" who would "welcome his article and wield it as a club to denigrate and even deny tenure to young scholars who dared identify with the new movement" and would view the piece as "an audition to play the role of academic minstrel."<sup>206</sup> Without belaboring the point, mainstream audiences and media may be more supportive of a black scholar who writes about race from a conservative or "self-help" angle than a traditional "race man" or a black person who does not write about race at all.

A second pull factor might be society's expectations about black intellectuals' racial authenticity. Although I examine the obligation thesis primarily as it relates to black-imposed duties—responsibilities that are either self-imposed or externally imposed from African Americans onto African-American legal scholars—people of other ethnicities (specifically those of the "progressive" persuasion) can and often do issue similar demands. In law, the most prevalent example is firms' deployment of African Americans as

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205. Cosby, though not an academic, has gained a new type of notoriety in recent years following his remarks at a 2004 NAACP gala event in Washington, DC to commemorate the *Brown v. Board of Education* decision, which American Rhetoric has labeled the "Pound Cake Speech" due to this portion of Cosby's remarks: "Looking at the incarcerated, these are not political criminals. These are people going around stealing Coca Cola. People getting shot in the back of the head over a piece of pound cake! Then we all run out and we're outraged: 'The cops shouldn't have shot him.' What the hell was he doing with the pound cake in his hand?" Bill Cosby, Address at the NAACP's Gala to Commemorate the 50th Anniversary of *Brown v. Board of Education* (May 17, 2004) (transcript available at <http://www.americanrhetoric.com/speeches/billcosbypoundcakespeech.htm>).

206. Bell, *supra* note 14.

diversity officers and pro bono representatives.<sup>207</sup> While African Americans' own interests and racial loyalties likely play a role in their involvement in these activities, employers also benefit from having black "poster children" serving in these capacities. In most cases, African Americans and whites share desires for racial authenticity; there is "interest convergence."<sup>208</sup> But occasionally, black professionals and their liberal white counterparts do not share racially progressive interests, and the black professionals are forced into the uncomfortable position of foregoing not only their "racial responsibilities" to other black people, but also to defy the positive aspects of the racial expectations of whites. The fact that other groups place racial demands upon African Americans is often overlooked in the literature, but it relates to the idea of pigeonholing and stereotyping discussed above in Part V.A.5.

## VI. CONCLUSION

This Article has made essentially two arguments. After laying out the landscape of the late 1980s-early 1990s debate about modes of black legal scholarship, I first argued that *today's up-and-coming African-American legal minds have largely forsaken voice scholarship but continue to engage in race scholarship*. They continue to produce scholarship about race despite their need to "cover" in a predominantly white academy often hostile to racial inquiry. To support this claim, I analyzed the contents of the ten most-cited law journals and summarized the work of four young legal scholars who have risen to prominence at elite institutions. There are, of course, others I could have also profiled as they also fall into these categories, like Spencer Overton, Richard Banks, and so forth.

Second, I discussed the obligation thesis, the idea that *black scholars continue to engage in race scholarship because they feel an obligation to use their academic work to improve the plight of blacks in America*. In addition to being a part of "conventional wisdom," a number of writers, especially David Wilkins, have written about the obligation thesis as it relates to practicing lawyers. I surmise that the sense of obligation among academics is similarly strong.

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207. See *supra* Part IV.

208. Bell, *supra* note 55, at 20, 22. Bell's idea of interest convergence is that white people will not enact policies that benefit African Americans unless they are also in the interests of whites. Bell argues, for example, that affirmative action is in white interests but reparations are not, which is why we have the former but should not expect the latter. See *supra* Section I.B.



There are a number of ways in which my preliminary inquiry can be deepened. First, an empirical study using survey or interview data would be useful to understanding the psychology of choosing academic work and areas of interest, particularly as it relates to black scholars. Also, a more specific comparative study of the obligation thesis in the legal academy and legal practice—or even comparison between the legal academy and other areas of the academy, would assess whether there is a unique quality in black *legal* academics that make them more susceptible to community obligations, or whether the obligation thesis holds true for black intellectuals across the board. This Article aims to draw connections between the old debate over voice scholarship and black scholars' ongoing negotiation between assimilation and "authentic" blackness. A more narrowly-focused article can delve more deeply into these issues.

The ramifications of this initial investigation are worth the consideration of young African Americans considering a career in legal academia. The message that the academy sends to potential black scholars is: Tread carefully. Success in the academic balancing act leads to the success of young stars like Meares, Brooks, Mack, Carbado—and my old friend Kenya Cantrell. Less successful efforts could result in obscurity, marginalization, and ineffectiveness.