

THE ROLE OF THE MINORITY LAW TEACHER

VOICE, PERSPECTIVE, TRUTH, AND JUSTICE: RACE AND THE MOUNTAIN IN THE LEGAL ACADEMY

*Jerome McCristal Culp, Jr.**

One of the most promising of the young Negro poets said to me once, "I want to be a poet—not a Negro poet," meaning, I believe, "I want to write like a white poet"; meaning subconsciously, "I would like to be a white poet"; meaning behind that, "I would like to be white." And I was sorry the young man said that, for no great poet has ever been afraid of being himself. . . . But this is the mountain standing in the way of any true Negro art in America—this urge within the race toward whiteness, the desire to pour racial individuality into the mold of American standardization, and to be as little Negro and as much American as possible.¹

Scholars of color have created a scholarship that has a black voice and demands that law pay attention to black perspectives. This scholarship of color is important for the freedom it provides to scholars of color to be themselves and to make law live up to its

* Jerome McCristal Culp, Jr., Professor of Law and Director of the John M. Olin Program in Law and Economics, Duke University School of Law.

Jennifer Baltimore provided valuable research assistance. I would like to thank Paulette Caldwell for helpful comments and insights into these issues and to thank the generosity of New York University Law School for providing housing and a valuable intellectual atmosphere while I was on sabbatical in the Fall of 1991.

1. Langston Hughes, *The Negro Artist and the Racial Mountain*, 122 THE NATION 692 (1926).

transformative potential. However, despite the explosion of work by black and white scholars concerned with dealing with a perspective of color, and the almost as significant number of articles written with a voice of color, not all those who have written in this genre agree. I will first discuss the ways that scholars of color agree about using voice and perspective in their work and then I will discuss how they disagree. Much, certainly too much, has been made of the differences among those interested in the voice and perspective of color, but we who are interested have not done enough to talk about how we can use that perspective to make law be transformative. To that important task this paper is directed.

I. DEFINITIONS OF VOICE AND PERSPECTIVE

As a professor of law who is black and a participant in the debate about voice and perspective in the academy, I feel a little like the fan who goes to Madison Square Garden and discovers that during the fights a hockey game has broken out. Unfortunately, a largely useless dialogue was taking place about Randall Kennedy's *Racial Critiques of Legal Academia*.² This dialogue—more like a fight than an intellectual interchange—has been both counterproductive and obfuscating.

Recently, minority scholars have moved beyond that debate to discuss some of the issues that animate this discourse. Alex Johnson in a recent article in the *Yale Law Journal* and in an earlier one in the *Stanford Law Review* suggested that it is possible to end this debate by agreeing on our disagreements and moving on.³ In addition, Leslie Espinoza and Gerald Torres have pointed out the dangers to scholars of color and their scholarship of defining that scholarship in ways that are related to race.⁴ These efforts are likely to be unsuccessful precisely because we have used a number of terms in inconsistent ways.

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

3. Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991); Alex M. Johnson, Jr., *Racial Critiques of Legal Academia: A Reply in Favor of Context*, 43 STAN. L. REV. 137 (1990).

4. See Leslie Espinoza, *Labeling Scholarship: Recognition or Barrier to Legitimacy*, 10 ST. LOUIS U. PUB. L. REV. 197, 199-206 (1991); Gerald Torres, *Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Plural Justice—Some Observations and Questions of an Emerging Phenomenon*, 75 MINN. L. REV. 993 (1991).

Some scholars of color contend that there cannot be a "unique" black perspective, and therefore the notion of a perspective of color is inappropriate. Similarly, some have argued that there cannot be a racial "voice" in scholarship. In this view, when scholars speak they must speak with the neutral voice of scholarship; the race of the scholar is irrelevant to the discussion. Finally, we have begun to talk about the ways of knowing what is truth, and how much experience and personal and community knowledge can or ought to contribute to understanding reality. These are important issues, but scholars of color and white scholars who have written about these concerns have confused themselves and those in the debate by indiscriminately combining these concerns. In this discourse we have talked about voice, perspective, and truth without agreeing on what we mean. Simply—if it is possible to describe such situations as simple—describing the different ways we confuse these definitions will move us toward a better understanding of our disagreements and some possibility of engaging in a useful discourse. Ultimately, I contend that scholars of color must speak with a voice of color and may or may not subscribe to a perspective that is infused by the concerns of people of color in America. Furthermore, if law is to be transformative, we must bring new knowledge as well as use old forms of knowledge.

A. Voice

All scholars of color have a voice of color. This voice is part of their identity. To speak with a voice of color is to speak as a member of a community who are viewed by others and view themselves in terms of their race. To speak with a voice of color has two aspects that need to be separated. One aspect is the attempt by the scholar of color to speak as part of some community of color.⁵ The other aspect of a voice of color is how others hear our voice in our scholarship and teaching. It is possible to not intend to speak with a voice of color, yet have other scholars hear that voice of color and attribute membership in some community to the speaker. The color of a legal scholar is not always known, but all of us have an impression of the scholar's race and gender from the context and tenor of the writing and sometimes from the name or the school

5. It is important to understand that all people of color belong to multiple communities. I belong to a black community and sometimes attempt to speak as a member of that community; I also belong to the community of law and economics scholars and sometimes speak as a member of that community.

affiliation of the writer. For example, if we read an article by Terry Miller of Harvard Law School, most of us will assume the writer is a white male participant in the legal discourse. Similarly, if we read that a writer is Leslie Holmes of Howard Law School, most of us will assume that the writer is a black female legal scholar. We are sometimes wrong about such assumptions, but to the extent that identity matters, we make assumptions about the writers we read everyday.

I also do not mean to make the assumption that any particular attribute will always matter. Color or gender are not essentialist tools that always distinguish people. This means that even though I always speak as a member of a community, I am not always heard as saying something that has a community context. Of course, this can happen either because I tend to agree with those outside my community of color or because those outside do not hear the echoes of difference that are included in my speech. Both of these errors occur.⁶

At this point I know that some are going to contend that they treat every person as an individual and that though they know that such individuals have gender, race, and class, these concerns do not influence how they read or hear what scholars write or say. Scholarship, in this view, is a neutral and objective enterprise into which I and others have injected the politics of race, gender, and class where it should not and in many ways cannot exist. I want to suggest that while such a society of scholarship might be desired we do not have such a society today, particularly when we think or write about race, class, and gender in our scholarship.⁷

It is no accident that much of the work of opposition to affirmative action is being done by scholars of color who are interpreted as having found race conscious policies as inadequate and counter-productive. We—and by we I mean both black and white scholars and students—listen differently to Shelby Steele, Stephen Carter, and Thomas Sowell because they are black and appear to reject affirmative action. Indeed, we know that race is important because

6. The latter occurs for example when my white colleagues read Randall Kennedy's *Racial Critique of Legal Scholarship*, *supra* note 2, as saying that concern for interaction between race and law are not important or that traditional scholars have in general done a good job of dealing with race and legal concerns.

7. Arthur M. Schlesinger, Jr. in his newest book has argued that the race consciousness of blacks is new and pernicious. ARTHUR SCHLESINGER, *THE DISUNITING OF AMERICA* 80-88 (1992).

the authors of these statements tell us they are black and most white admirers point out this fact. Race matters in the rationale for what these writers have said. It is assumed (at least by most white Americans) that those who are black are not adherents of white supremacy so that we can hear a view of the world unprejudiced by the possibility of self-aggrandizement.⁸

Race and gender clearly matter. Consider the long and rancorous debates in American history between Stanley Elkins and his detractors about whether slavery had produced a "Sambo" character in black people. This debate was not of course about black people at all but simply about black men. The myths about black women are different and equally problematic.⁹ The development of black women historians who were interested in these questions forced the history profession to rethink its way of examining the problem of slavery. In a number of fields where race and class are very important, the race, class, and gender of the observer provides a check on our ability to be neutral investigators.

B. Perspective

Voice and perspective are not the same thing. As I have suggested above, all scholars, where relevant, have a voice of color, gender, and class. However, in using that voice, not all scholars necessarily choose to adopt a perspective that is black. In this context, blackness means a perspective that is opposed to racial oppression in the same sense that feminist means opposition to patriarchy and oppression of women.¹⁰ Just as it may be impossible for women to always be feminist, it may be impossible for all blacks or any particular African American to always have a black perspective. It is clear that some blacks will sometimes engage in activity that in fact helps racial oppression either through ignorance or because there may be no course available that is not supportive of

8. It is important to note that almost no one points out that African Americans who are seen favorably by white society might gain economically from that favorable reaction. The opposite view, that those blacks who favor affirmative action might gain some future advantage, is often pointed out, but the other view is ignored.

9. See DEBORAH GRAY WHITE, *AR'N'T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH* 17-21 (1985).

10. I owe my own clarity on this point to Paulette Caldwell; see also Jerome McCristal Culp, Jr., *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, DUKE L.J. (forthcoming Spring 1992).

the existing order. In addition, some black people may become effective supporters of white supremacy because they are afraid to take a different course. Blacks are not always going to agree on the activities that eviscerate racial oppression; however, that is where we must begin to understand the difference between voice and perspective.

The nomination and confirmation of Clarence Thomas to be Associate Justice of the United States puts this distinction in sharp contrast. Clarence Thomas is clearly black—perhaps “blacker” both in pure color and in some of the experiences of his youth than Justice Marshall who he replaced¹¹—but President Bush’s nomination and the confirmation muddied the distinction I have been emphasizing. Because Judge Thomas is black, he will bring a black voice to the Supreme Court. He sees himself and is seen by others as a “black” person. He cannot escape speaking with a black voice, but this voice does not necessarily mean that he has a black perspective.

A perspective that is opposed to racial oppression is part of what black people want when they demand black representation and a black experience on the Court. However, black people also have trouble reading anyone out of the fraternity of black people and claiming that any voice owned by anyone who sees him or herself as black is unauthentic. However, if the black community had separated their concern for a black voice from their concern for a black perspective, they would have seen that it is possible to agree that Clarence Thomas speaks with a black voice but to conclude that his views are inconsistent with a black perspective.

Certainly, a majority of black people do not believe that market and natural forces will end racial oppression or that they would like to accept that brand of conservative republicanism espoused by Justice Thomas. Despite extravagant claims about the increase in the number and strength of the new black conservatives in the national media, these conservatives do not in fact have a game plan to end racial oppression in society and have had minimal impact in changing the views of black citizens. Thomas is, therefore, a voice that is black; but it is possible to question the authenticity

11. Justice Marshall’s experience as Chief Counsel of the NAACP in the 1940s and 50s gave him an opportunity to experience the black situation in ways that no lawyer of today can duplicate.

of that voice in terms of representing a black perspective without also questioning his blackness.

To make this distinction is not to remove from voice all of its power or influence. The race of the speaker, as we noted above, is clearly important. Being black permits some things to be heard that are not cognizable when said by a white person. Martin Luther King's admonition to black people to work hard is heard as a call to a community he is a part of to persevere. The same admonition by a white person might be heard as an effort to delegitimize the efforts of black working people. Similarly, having some things said by a white person may have a power that a black person could not generate. For example, President Johnson's use of the civil rights slogan "We shall overcome" has a power that a black person, even a black President, could not generate.

Voice has a place in the opportunity for change, but it is a weak place. In *Metro Broadcasting, Inc. v. FCC*¹² the Supreme Court examined the Federal Communication Commission's policy of giving minority applicants enhancements in comparative proceedings for licenses and in awarding stations in distress sales to minorities.¹³ These race conscious efforts aimed at increasing the broadcast diversity of stations were found by a bare majority of the court to be constitutional.¹⁴ The majority approved the legislative and administrative determination that greater minority ownership of broadcast licenses would, in the aggregate, amount to a increase in the amount of total broadcasting diversity.¹⁵

The real idea behind the legislatively created rules is that black and other racially minority voices are more likely to occur if there are more black and other racial minority-owned stations. The rule pays homage to voice but does not require a black perspective from the participants. This means that the rule is likely to be weakly effective when there is any dispersal of opinions in the black or other minority community that the majority community can exploit. However, it certainly has the potential to be more effective than some other alternatives that simply ignore such concerns. In addition, all alternatives that have the potential for being

12. 110 S. Ct. 2997 (1990).

13. *Id.* at 3002.

14. *Id.*

15. *Id.* at 3016.

more effective, for example selling to community based organizations or groups, also include difficult issues of definition and control.¹⁶

II. TRUTH AND IDENTITY: THE MEANING OF RACE

It is now possible to understand some of the difficult and confusing debate that a number of our colleagues have engaged in. Professors Stephen Carter,¹⁷ Randall Kennedy,¹⁸ and Alex Johnson¹⁹ have written about their view of the possibility of racial perspective and voice. However, they confused voice with perspective and ignored their differences about truth and how facts are to be discerned. It is in these claims about truth that many of the differences occur.

A friend of mine worked in the Harvard Admission office. Part of his job was to interview candidates for admissions to Harvard and Radcliffe colleges. One evening, he described the disquiet he felt when a student came into his office with a name that could have been bestowed upon either a male or female. This person, he/she, did not provide an answer to the question of gender on the application nor when confronted with her/his appearance, did gender identification become any clearer. My friend proceeded to try to answer the question of gender by seeing whether he/she had engaged in male or female activities. All his efforts were for naught. This applicant had escaped with her/his gender intact. The largely male group of new black intellectuals who oppose the use of race in the academy want to be like that applicant to Harvard/Radcliffe College with respect to race. These new young black intellectuals—Randall Kennedy,²⁰ Stephen Carter,²¹ Glenn Loury,²² and Shelby Steele²³—believe that if black people work hard and do their thing race will not matter.

16. All efforts to get at group issues through individual remedy have the potential to have this kind of diffuse effect when the group influence is diluted by the individual remedy.

17. See *infra* note 24.

18. See *supra* note 2.

19. See *supra* note 3.

20. Professor at Harvard Law School.

21. Professor at Yale Law School.

22. Former Professor of Economics and Public Policy at the Kennedy School of Harvard University and now Professor of Economics at Boston University.

23. Professor of English at San Jose State.

The lawyers in this group have written directly about voice and perspective. Stephen Carter has been disturbed and saddened by the view that knowing the color of the author of an article can help the reader appreciate the article.²⁴ Professor Carter believes that such concerns move us away from appropriate concern with truth in scholarship. Randall Kennedy has objected to the possibility of a racial perspective because he says blackness cannot be defined, and accordingly in terms of scholarship, race is an empty box.²⁵ People can have politics, but since politics are not directly connected to race, efforts to use race as politics are doomed. Alex Johnson, though not a member of this group of new black intellectuals, has tried to bridge the gap between them and the critical race theorists. He has suggested that there can be a black voice but not all black people use their black voices in their scholarship. Alex Johnson argues that scholars of color either directly or indirectly signal their color in taking on the voice of color.²⁶

Stephen Carter believes that there is no black perspective on legal scholarship because race is irrelevant to intellectual discussion, and Randall Kennedy believes that race is undefinable and accordingly that there cannot be a black voice. Alex Johnson argues that race is sometimes important and that the author gets to

24. Stephen L. Carter, *Academic Tenure and "White Male" Standards: Some Lessons from the Patent Law*, 100 *YALE L.J.* 2065, 2065 (1991).

At a conference not long ago, I met a professor from another law school who writes, as I sometimes do, about the efforts of the legal system to mediate the conflicts that arise between religion and society. . . . I anticipated a fruitful discussion of our shared scholarly interest—until the conversation took a disturbing turn.

My new acquaintance told me that she was familiar with two of my articles touching on religion and society. But only one of them, she told me, was clearly written by someone who is black. Had she known that I was black, she said she would have gotten so much more out of the other one. Puzzled, I asked why this should be so. She seemed surprised at the question. It would, she said, have placed the argument in its proper perspective. . . . Why, I asked, could she not simply take the argument as it was, evaluating it without regard to the color of my skin? Because, she explained patiently, she needed a context in which to evaluate the argument. Only then, she added gently, might we have a real conversation.

I found this saddening. . . . In the guise of bringing us together, I suggested, her philosophy (and not only hers!) was actually pushing us apart. The reason, I said, is that she was saying, in effect, "Tell me about yourself, and then we can have a real conversation." My vision of scholarship, and indeed of life, works the other way around, shedding preconceptions in favor of something like: "Let's have a conversation, and that is how I will learn about you."

Id. (footnotes omitted).

25. See, e.g., Kennedy, *supra* note 2, at 1801-07.

26. Alex M. Johnson, Jr., *Racial Critiques of Legal Academia: A Reply in Favor of Context*, 43 *STAN. L. REV.* 137, 163 (1990).

decide when and how the voice of race will be used but that not everything written by a black scholar must have a particular black voice. Their descriptions are wrong, and their error stems from their confusion about voice, perspective, and the nature of truth in the academy.

These three responses are an effort to engage the group of scholars of color who have begun to put together an intellectual community to examine the issue of race. The scholars associated with this group—including among others Taunya Banks, Derrick Bell, Paulette Caldwell, Kimberle Crenshaw, Richard Delgado, Angela Harris, Linda Greene, Dwight Greene, Charles Lawrence, Mari Matsuda, and Patricia Williams—have, in starting to form this intellectual community, made various claims about the need for a black voice or a voice of color in legal debate and scholarship.²⁷ These scholars of color have not argued for a single black voice or voice of race or color.²⁸ Indeed, one of the most important contributions of these scholars of color, particularly some of the female scholars of color, has been to point out the extent to which there are many consciousnesses in every person.²⁹ Such a view undercuts

27. A number of scholars of color have consciously chosen to speak as scholars of color about legal scholarship. See, e.g., Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365; Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984); Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. CR.-CL. L. REV. 323 (1987); and Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. CR.-CL. L. REV. 9 (1989). In addition two books DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987) and PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) are canonical works in this area.

28. Sometimes scholars who have written with the voice of color have not been careful enough to not speak for all people of color, and, as Alex Johnson experienced, sometimes people do not pay attention to the caveats that the writers have used to make it clear that no one voice can capture all the voices inherent in the black community.

29. See, e.g., WILLIAMS, *supra* note 27, at 9-10. Professor Williams writes:

A man with whom I used to work once told me that I made too much of my race. "After all," he said, "I don't even think of you as black." Yet sometime later, when another black woman became engaged in an ultimately unsuccessful tenure battle, he confided to me that he wished the school could find more blacks like me. I felt myself slip in and out of shadow, as I became nonblack for purposes of inclusion and black for purposes of exclusion; I felt the boundaries of my very body manipulated, casually inscribed by definitional demarcations that did not refer to me.

The paradox of my being black yet notblack visited me again when, back to back, the same (white) man and then a (black) woman wondered aloud if I "really identified as black." . . .

I heard the same words from each, and it made no difference to me. I heard the same words from each but differently: one characterized me as more of something I am not, white; the other called for me to be more conscious of something I am, black.

the notion of a single perspective even if we choose only one aspect such as race, because by definition everyone has many aspects. I believe that what people are really saying in their scholarship is that voice and perspective are important and more likely to be ignored and avoided in legal scholarship and judicial decisions than some other important aspects.

Stephen Carter's annoyance with a scholarship of color is misplaced. There is going to be the possibility of a black perspective as long as racial oppression exists, and we will hear black voices as long as black is an important and distinguishing characteristic in society. Professor Carter believes that race sometimes matters or else he would keep all public discussion of his color out of the pages of the law review and any other scholarly book. The fact that he has written a book with his picture on the cover entitled *Reflections of an Affirmative Action Baby*³⁰ suggests that race matters sometimes in his scholarly pursuits.

Professor Kennedy's claim that those scholars interested in creating a scholarship of color have not produced a definition of blackness and, accordingly, that there cannot be a black legal scholarship is wrong. He is confusing the claims of black scholars that black people speak with a black voice with claims that legal scholarship can be black in its opposition to racial oppression. Professor Kennedy is right that it is not possible to deny Clarence Thomas, Thomas Sowell, or Stephen Carter the possibility of speaking as a black person, but he is wrong in saying that difficulty will limit the possibility of a black legal scholarship.

If I am right that all black people have a voice that some may hear as black or they may want to ring with a participation in a black community, then it is possible to see Clarence Thomas as black and as not participating in the community of scholars who are creating an oppositional scholarship that stands in the same position for black people as feminism does for women. People can be heard as black or speak as a black person and not be part of the solution of the racial problem. Alex Johnson's effort to deal with these points agrees partially with some of the views I expressed above, but he contends that the voice of color is something that

I heard the same-different words addressed to me, a perceived white-male-socialized black woman, as a challenge to mutually exclusive categorization, as an overlapping of black and female and right and male and private and wrong and white and public, and so on and so forth.

30. STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1991).

one can voluntarily put on or take off and that people are writing with the voice of color when they tell us something about their racial identity.

People often are confused about the racial identity of authors. I know, for example, that many people have assumed because of the intellectual posture taken in the articles and the criticism of the criminal justice system, that Sheri Lynn Johnson is black. They hear her voice as black and only change when they discover that she is white. Similarly, statements made by a speaker or writer known to be black are heard differently because of the color of the speaker. Thurgood Marshall's claim that the Constitution was unfair was treated differently than similar charges made by Justice Brennan.³¹ Conservatives who had not argued for Brennan's ouster did argue for the ouster of Justice Marshall for such heresy.

It is for this very reason that Professor Johnson wants to empower black authors so that they can decide when and how to use their voice of color, but this view ignores the point he acknowledges in some of his work that the perspective of the listener also matters. It is, therefore, not possible for a black scholar to stop being black. Even if said in the most neutral terms, some of what is going to be heard by both black and white audiences is going to be influenced by the color of the speaker. A tax scholar who is black may not be heard as a black person, but that often means not that we hear him as without color but that we assume that the scholar is white and male. Voice that echoes the experience of being black is almost impossible to eliminate as long as the category of race is so important in our lives.

The point I have made about the racial voice of scholars means that white scholars also almost always speak with a voice that is reflective of their position as white members of American society. This voice also has something to add to legal scholarship and to issues involving race and law. This voice is nascent in the opinions of white judges and the scholarship of white legal scholars. In addition, many white scholars believe in various versions of white supremacy so that they will write both with a white voice and from a white perspective. As I have defined these terms it ought to be clear that it is not possible for a white person to speak

31. Several conservative organizations demanded that Justice Marshall resign for his heretical views of the Constitution.

with a black voice, but it is possible for a white person to adopt a black perspective. The problem sometimes is that the white voice using a black perspective may not be heard by blacks in the way intended, and not all those who wish to speak with a black perspective will adopt conclusions that really oppose white supremacy.

This means that there is no essentialist aspect to racial scholarship but that our own imperfect methods of learning and hearing will make the possibility of whites becoming a part of the movement against racial oppression difficult but not impossible.³² If one reads the scholarship of the people involved in the creation of this new scholarship of color, it is obvious that there is no sign in front of the scholarship that says "whites need not apply." The efforts of males to be feminist, however, ought to give us pause and demonstrate how difficult it is to adopt the perspective of marginal groups when you, at least for some purposes, belong to the current consensus.³³ The efforts of whites to use a black perspective are similarly infected with difficulty but not impossibility.

Professor Carter has contended that it is possible to produce a racially neutral way of doing scholarship and picking those who do so. He is concerned that schools might use race to create a kind of best black instead of permitting scholars of color to be legal scholars. This claim about legal scholarship has two parts. First, those who adhere to this claim believe that truth can be objectively determined. For example, Professor Carter suggests the use of the standard for granting patents to evaluate legal scholarship, i.e., that the scholarship be new and make a novel contribution to the existing body of scholarship. Professor Carter contends the use of that standard for selection of future members of the legal academy would remove the racial politics from faculty hiring and permit scholars of color access. This claim assumes that we as a scholarly community can agree about what is new or novel. Indeed, part of what critical race theory and black legal scholarship are trying to do is to create different definitions of what should be considered

32. Gary Peller and Alan Freeman are seen as having adopted such a pose; see, e.g., Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (Critical race theory is the intellectual child of black nationalism and Malcolm X.); Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295 (1988).

33. See, e.g., ELAINE SHOWALTER, *CRITICAL CROSS-DRESSING: MALE FEMINISTS AND THE WOMAN OF THE YEAR, MEN IN FEMINISM* 116 (Alice Jardine & Paul Smith eds., 1983) (Like the male character in *Tootsie* many male critics attempting to do feminist theory are simply masquerading as women while using male power); *ENGENDERING MEN: THE QUESTION OF MALE FEMINIST CRITICISM* 11-25 (Joseph A. Boone & Michael Cadden eds., 1990).

novel and not crazy.³⁴ Professor Carter might be right to contend that it would be better to argue over whether a particular scholar's work is novel rather than to concentrate on the author's blackness, but this does not eliminate all of our problems. Professor Carter also implicitly assumes that the quest for novel and newness will be appropriately sensitive to changing the nature of who gets to teach at American law schools. The purpose of race sensitive hiring is to increase the black voice inside law schools and to permit the black perspective greater rein. A neutral standard will not accomplish this task if other forces reduce the availability of blacks to those positions. Professor Carter understands the nature of the box created by using race but he does not have a path out. Neutrality will not work because it does not address the changing nature of truth and knowledge that scholars of color are trying to bring to the table, and it ultimately assumes that other nonneutral aspects of the world will not prevent neutrality from working. We know in lots of situations that this is not true.

III. WHO MAY SPEAK?: AUTHENTICITY, VOICE, AND PERSPECTIVE

Stephen Carter also questions the authenticity of black voices from elite legal positions. Why, he asks, should we listen to black law professors who are not presently members of the black underclass when they speak of racial oppression?³⁵ Professor Carter points out that the black community when surveyed often support conservative things (for example school prayer and opposition to abortion), but of course many black legal scholars do not support these conservative themes.

The question of authenticity is difficult, but it ought to be clear that surveys are not necessarily the only way to ascertain

34. This is the point that Professor Johnson is trying to make to Professor Carter that he cannot hear.

35. Professor Carter writes:

My point is not that one who is interested in articulating the authentic perspective of the truly oppressed people of color must come out in favor of organized classroom prayer. My point, rather, is that even if there is an authentic "perspective of the oppressed," I would hesitate to conclude that law professors, of all the various folks one might imagine, are in the best position to articulate it. If, however, law professors are going to articulate the perspective, it would be useful first to take the time to work out exactly what the perspective *is*. What we should not do is assume that we know what it is merely because we know what we want it to be.

Carter, *supra* note 24, at 2077 (footnotes omitted).

community values. We know that surveys often reflect the views of the surveyer and are manipulable. For example, if the surveys are right, it is difficult to see why almost all of the black elected officials, at least at the national level, are liberal on the issue of abortion and school prayer including a number of black ministers elected to public office.

The problem is not in the authenticity, but rather in the definition and the notion of representation. Those who are opposed to racial oppression will not always win approval for their tactics. If you had asked a majority of black people whether it was a good idea to march in Alabama, Mississippi, and Georgia for civil rights in the 1960s, I believe many if not most would have questioned the efficacy of this approach; but it is clear that the black community was united in wanting to end the racial oppression most visible in those places. Our job as law professors is not to be representatives of the oppressed by voting their prejudices when possible, but to provide legal strategies for change, and to challenge the existing structure. There is no question that our communities support us in that effort.³⁶

The other side of the authenticity issue is the attack some have made on the authenticity of the new black intellectuals—Stephen Carter, Randall Kennedy, Glenn Loury, and Shelby Steele—to speak for the black community. These new black intellectuals tend to be social liberals unlike older black conservatives, e.g., Thomas Sowell and Walter Williams, who are economic and social conservatives. These new black intellectuals do not believe that the market will save black people, though they do believe that black people must work harder to take advantage of opportunities afforded by legal and social change. What is new about these intellectuals is their growth in the arena of legal discourse.

These views have roots at least in the sociological discourse of Franklin Frazier, but Frazier's views did not influence the black intellectuals who became legal academics or who sought to change the law through legal discourse in the courts. Many black scholars, Frederick Douglas and Booker T. Washington being examples,

36. If black and white groups in America are asked for the causes of racial disparities in income the answer they provide is highly influenced by the race of the person surveyed. Whites invariably blame a lack individualistic initiative on the part of blacks. Most blacks thought that they were subject to large amounts of discrimination that included deeper processes. See *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* 150-52 (Gerald David Jaynes & Robin M. Williams, Jr. eds., 1989).

thought that black people could prove through hard work that race did not matter in the market or in the combat for jobs. However, most black Americans have thought that their African heritage, their otherness, could not be subsumed in white America. These earlier black American scholars, despite some public utterances to the contrary, understood that they were black and Americans. If I understand the new black intellectuals, they are Americans who happen to be black. This is a great breakthrough. If it happens to the rest of black America, it will create the first truly multiracial, nondiscriminatory society. However, there is an oddness here that these new black intellectuals have not addressed. Why is it that in the black community there is less of a belief in their being Americans who happen to be black? I contend it is because in order to be a American who happens to be black, American society must see you as American first and black secondarily. Despite great changes, this is not the truth of American society. Race, the fact of our blackness, remains the mountain, to paraphrase Langston Hughes, in the legal academy that black intellectuals, past and present, cannot ignore or get around.³⁷

Race is one of the two identifying aspects of our society. We are either white or black in America. Just as most people, the Harvard applicant a clear exception, are men or women, all of us have a race in our society. This is not the only way to order a society. It is possible to not create such categories of description and aspiration, but it is folly to ignore their creation here. Our understanding of who we are and where we belong is an important aspect of our self-definition. Our race defines our obligations and responsibilities. It helps to define the community that we are a part of, and it provides protection and support for us in time of need.

These new black intellectuals can belong to the academic communities they are a part of, but they cannot in this society separate out their blackness and become something else. This duality does not permanently disqualify them from their job as faculty members or academics. The reason why this is true has two parts. First, black people are black not only because they see themselves as black but because white people see them as other than white. It is not possible for black people to emerge free of color when white people see them as black. To do so is to invite the experience of large numbers of black undergraduates who have no protection

37. See *supra* text accompanying note 1.

from invidious and discriminatory remarks. There cannot be unilateral surrender in the war against racism. Second, race—at least for those like African Americans who are members of a disfavored racial group—has the potential to play a powerful role of help in our lives. Race need not play such a role. When race is forced down the throats of black Americans, it is almost always in a negative way. Stephen Carter's example of being denied the opportunity to compete for a National Merit Scholarship as a child and being seen as the best black law professor by some of his colleagues are eloquent examples of the danger of having others define black people as the best black.³⁸ However, this patronizing use of race is not the only way race is used. The new black scholars seem unaware that race can or does play a positive role in their lives. Indeed, what I find most odd about the new black scholars is that the life they lead and the life they preach are completely different. Frederick Douglass once wrote that we must speak two different languages, one to ourselves and the other to the outside community. The problem with the new black intellectuals is that they write about race as if there is only one community. They understand at least in parts of their lives that there are at least two and engage in activity that is directed at their participation in the black community.

What these new black intellectuals seem to want is to have all the advantages of being white males. They are saying if race were not important then we could simply be law professors. Free us to be just law professors and professors of English and Economics. The problem with this cry is that they keep talking about race. Race is unimportant. Race is irrelevant. Race is not the issue. Race is not unique. They also say I am here not because of my race but because of who I am. They do not understand, or even admit, that it is not possible to be colorless in a society that treats all people as if they have color. It is not possible to be a honorary white person free of the apartheid of the academic system. We have black voices because we see ourselves, and others see us, as being different and black. The most vivid proof of this statement is that they have found it necessary to talk about race. If race were really irrelevant, then it ought to be possible to find a year in which the new black intellectuals do not write about race. If race does not limit your life, then, in the words of my colleague Bill Van Alstyne, get beyond it.

38. STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 47-69 (1991).

Two incidents in my career emphasize the extent to which it is impossible to escape race in our system. I came to law school teaching with an interest and some advanced education in economics. I was hired by my first law school to teach labor law and law and economics since I had studied labor economics in graduate school. When I began to teach at Duke University, the Dean requested that I teach employment discrimination. Until then I had an interest in employment discrimination, but I did not teach it. After moving to teach and write on employment discrimination, I started writing more directly and thinking about race. When I came up for tenure, one of my white colleagues and friends suggested that other colleagues might think that I was trying to "mau mau" my colleagues into voting me a tenure offer based upon my color because of my writings on race. From my perspective I had been forced into talking and writing about race. I had been asked by the Dean to think about employment discrimination law. I was told that meant I had put race before me. My colleagues may want me to get beyond race but they understand I am black and ask me to formally and informally perform tasks because of that blackness. I have a number of close white friends on the Duke faculty but that does not mean we have escaped being racial beings in our society. Race is important.

The strangest notion is the one proposed by these new black intellectuals that race does not matter when their own lives belie this truth. When Shelby Steele writes movingly and importantly about race, his testimony as a black person provides a power that no white person in our society can match. It is not that no white person can imagine the hurt or the uniqueness of being black, but no white person can step outside the boundaries of our racial present to speak as an outsider untouched by the racism of the American present.³⁹ Shelby Steele's statement about race being unimportant is all the more important because he is a black person. Similarly, when Randall Kennedy writes an article about what some minority writers have been contending in their articles, he speaks as a black professor of law at Harvard University. Professor Kennedy cannot stop being a tenured member of the Harvard Law

39. One example of an exception to this rule is Gunnar Myrdal who as a Swedish social scientist could examine the racism of the United States as a nonparticipant. Much of the power of that statement came from that position outside. However, most people who write about the questions of race must be participants in order to understand what is going on and, therefore, cannot escape to a kind of freedom.

faculty anymore than he can stop being a black tenured Harvard Law faculty member. No white colleague would have written that article, not because some and maybe most would agree with him, but because they too worry about racism. All of these new black intellectuals have greater platforms because they are black. When these new black intellectuals ignore this obvious point, they ignore the reality that most black people are acutely aware of.

I want to emphasize that I have no personal animosity towards my new intellectual brethren. I consider Randall Kennedy and Stephen Carter more than casual acquaintances and I know, admire, and respect their work on a number of topics. They have always made me proud to share a part of my heritage. I have known Glenn Loury longer than any of the rest because he too is an economist, and he and I have co-authored an obscure paper. I cannot claim to be blacker than them on any grounds that I would find plausible. Indeed, I have never been able to decide how black someone was. To me, to be black is a product of self-awareness. Wherever it comes from it can go away as quickly as it came. If I am right that they have found error instead of truth, I am sure that it is because of failings found not just in them but in most if not all of us.

Indeed, I think the lesson we should learn from the writings of my new black intellectual colleagues is that there are powerful forces that condemn us all to compliance with the norm. (This does not prove that the norm that society forces us to is unproductive or nonfunctional for today's world. It is possible that in the climate of today, black people really ought to follow the prescriptions of the new black intellectuals, but I think not.) When I contend that I do not find the assumptions they have made consistent with the need for an end to racial oppression, I am making a claim about my interpretation of what will end racial oppression. I and those who have criticized these new black intellectuals may be wrong, but we do not mean to deny our colleagues their blackness or to misunderstand the enterprise we are engaged in.

Ultimately the differences between black legal scholars and the new black intellectuals are our views of where society is and how it will change. These young black intellectuals see the black community, or at least the part they are a member of, as a kind of three-hundred year locust who have lived in the mire of discrimination but who are able to molt and fly with the other locusts in their time because all of the relevant and important barriers to

that flight have been removed. Those of us trying to change the legal discourse by building a scholarship that appreciates and includes our racial voice and perspective believe that important impediments to equality and justice remain. If we have sometimes expressed that opposition with too much fervor it is because we have thought Frederick Douglass was right when he wrote:

With apparent surprise, astonishment and impatience we have been asked, "What more can the colored people of this country want than they now have, and what more is possible to them?" It is said they were once slaves, they are now free; they were once subjects, they are now sovereigns; they were once outside of all American institutions, they are now inside of all and are a recognized part of the whole American people. Why, then, do they hold Colored National Conventions and thus insist upon keeping up the color line between themselves and their white fellow countrymen? . . . For we do not forget that they are not only put to us by those who have no sympathy with us, but by many who wish us well, and that in any case they deserve an answer.

Before, however, we proceed to answer them, we digress here to say that there is only one element associated with them which excites the least bitterness of feeling in us or that calls for special rebuke, and that is when they fall from the lips and pens of colored men who suffer with us and ought to know better. A few such men, well known to us and the country, happen to be more fortunate in the possession of wealth, education and position than their humbler brethren, have found it convenient to chime in with the popular cry against our assembling, on the ground that we have no valid reason for this measure or for any other separate from the whites; that we ought to be satisfied with things as they are.⁴⁰

The scholars of color who have built a community around an opposition to racial oppression remain profoundly unsatisfied with things as they are and we believe the law has a role to play in any change. We must learn to use our voices to build a perspective⁴¹ on

40. Frederick Douglass, *The Color Line in America* in *THE VOICE OF BLACK AMERICA* 491, 491-92 (Philip S. Foner ed., 1972).

41. Throughout this text I have called this perspective "black." There are two dangers with this use. The first is the possibility that I will privilege one aspect of race "blackness" when race is increasingly multi-colored and shaded. I have chosen to not change the term to scholars of color or something more inclusive because I want to not become lost in the many experiences of people of color in America that are both similar and different. Professor Angela Harris has helpfully noted the second issue, that is, that I have defined black perspective as opposition to racial oppression or as anti-subordination. She notes that an element of essentialism would be eliminated if everywhere in the text I substituted anti-subordination

race that includes and empowers, but understands that we must climb that racial mountain in the legal academy.

or opposition to racial oppression for black perspective. I have not taken that useful suggestion primarily because people talk about anti-subordination in terms of black perspective. I agree that elements of essentialism could be removed if we thought about black perspective as anti-subordination. My point in defining black perspective as anti-subordination is to make that point as directly as possible. But it is important to remember that the way in which we use language to think about subjects constrains us. If I adopted the anti-subordination language I would, I think, take a step that many who have written or thought about this area are not willing to take. The essentialism that remains among those who think about a black perspective is the essentialism that says that the way blacks and whites see anti-subordination is influenced by race. So what they mean by a black perspective is the anti-subordination of black people as seen through the eyes of the aware black person. This is a statement about how race influences our experiences as black and white people, and it means that most black people do not believe that most white people have been able to adopt an anti-subordination position that rejects the white supremacy that is nascent in the scholarship of many majority scholars.

