ESSAY

AUTOBIOGRAPHY AND LEGAL SCHOLARSHIP AND TEACHING: FINDING THE ME IN THE LEGAL ACADEMY

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INTRODUCTION

I start many of my law school courses with a description of myself. "I am," I say slowly, "the son of a poor coal miner." The reason I do so says much about the difference in how blacks and whites approach the issue of legal scholarship and teaching. Being black I cannot stop, at least in the short run, being an anomaly to many people. I can only hope to shape the way in which that anomaly is understood. I define myself as a poor coal miner's son both to claim a past rooted in the history of my parents' struggle and to define a future rooted in the contrasting nature of a different experience. I am saying to my black students that they too can engage in the struggle to reach a position of power and influence, and to my white students that black people have to struggle. In the strange times in which we live it is not possible for a black law professor to claim a history without creating disbelief among students.

Perhaps my ability to convey who I am has changed, and therefore, I am saying who I am with a different emphasis or cadence. But for some reason students hear what I say differently now than they did six years ago when I first started teaching at my present law school. Black and white students no longer believe that I have a father who is a coal miner. They think that I am telling an exaggerated story to take advantage of them in the repartee between teacher and student. I

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think they say to themselves: "He is not really a son of a poor coal miner. He is something else, or he would not be a law professor."¹

This response is different from the response of those students who believe that law professors are gods who do not have parents or engage in any of the petty indignities of life. In that regard, our students see us like my generation saw John and Jackie Kennedy, or our parents. My generation understood that there was sex, but could not imagine our parents or the Kennedys engaging in it.

The response of my students to my life history is different. It is a product of myths that they have about black people and coal miners. These myths organize their lives and their vision of the law; it is what I want to change in the classroom. According to their myths, black people are not law teachers, coal miners do not have children who become law professors, and the law is produced by people of similar pasts and futures. Because many of my colleagues also believe in this "homogeneity myth" (i.e., we are all the same with the same essential experience), my class is one of the few places where this view of the law is challenged in any way. My autobiography says that we are not the same, that some of our essential experiences are different, and that life can be revolutionary.

Henry Louis Gates, English professor and literary theorist, has noted that black Americans approach the subject of what they write differently from other groups. He suggests that for many of the most famous black American writers autobiography is done at the beginning, rather than at the end, of their literary careers.² This is true of Frederick Douglass and Malcolm X;³ Thomas Sowell and Booker T.

¹ Some of my students think that I have exaggerated my past and certainly, from some perspectives, I have. For a discussion of the extent to which all autobiographies are lies, see T. Adams, *Telling Lies in Modern American Autobiography* 1-16 (1990). Others may believe that my autobiography, like all autobiographies, is unimportant and irrelevant to the objectivity inherent in the law. In its general sense, I reject that notion of objectivity.

² Gates, Introduction to H.L. Gates, *And Therefore I Am: African American Autobiography* (forthcoming in Pantheon Books, 1991) (copy on file with the Virginia Law Review Association).

³ F. Douglass, *Narrative of the Life of Frederick Douglass, an American Slave, Written by Himself* (B. Quarles ed. 1967) (1845); A. Haley & Malcolm X, *The Autobiography of Malcolm X* (1964).

Washington;⁴ Maya Angelou and Michele Wallace;⁵ and Claude Brown.⁶

There is a reason for this use of autobiography by black writers. 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.⁷ In order to be considered a poet, Phillis Wheatley had to prove to a group of white observers that she had written her poetry. The attestation by these white observers, in a preface to Ms. Wheatley's poems, tells of her recent emigration to this country as an "uncultivated Barbarian from Africa."⁸ The work that begins this forward-

⁴ T. Sowell, *Black Education: Myths and Tragedies* (1969); B.T. Washington, *Up from Slavery: An Autobiography* (1901).

⁵ M. Angelou, *I Know Why the Caged Bird Sings* (1969); M. Wallace, *Black Macho and the Myth of the Superwoman* (1978) (The author writes her autobiography through an account of the Black Power movement, an exploration of myths that surround black men and black women, and a call for black women to define and write their own history.).

⁶ C. Brown, *Manchild in the Promise Land* (1965). See generally, *The Slave's Narrative* (C. Davis & H. L. Gates eds. 1985) (a collection of essays and reviews regarding narratives written or dictated by black slaves in the 18th, 19th, and 20th centuries); W. Andrews, *To Tell a Free Story: The First Century of Afro-American Autobiography, 1760-1865* (1986) (The author notes that "free telling" was a vital principle of Afro-American autobiography in the first century of the genre. For autobiographers of this period "the writing of autobiography [was] uniquely self-liberating, the final, climactic act in the drama of their lifelong quests for freedom." Id. at xi.); S. Smith, *Where I'm Bound: Patterns of Slavery and Freedom in Black American Autobiography* (1974) (analysis of famous black American autobiographies, from slave narratives to modern autobiographies, tracing the common thematic and structural patterns recurring throughout these works).

⁷ To some extent all writing is autobiographical. We normally distinguish between good and bad writing by making a distinction between what rings true and what sounds false. In that sense all good writing, fictional and nonfictional, is autobiographical, but there is a difference between white and black writers. White autobiography, meaning those works that are officially classified as autobiography, is done at the end of a writer's career. It has a self-congratulatory tone and reflects over a completed life. Black autobiography is different. It looks not backward over a completed career, but forward to what the black writer is doing and intends to do in the future.

⁸ Preface to P. Wheatley, *Poems on Various Subjects, Religious and Moral* (1773), in *The Poems of Phillis Wheatley* 48 (J. Mason ed. 1966). This proof was enough to convince our most illustrious forefather, Thomas Jefferson, that Phillis Wheatley had written the poetry, but it proved nothing about the intellect of black people because the poetry was bad. Jefferson stated:

Misery is often the parent of the most affecting touches in poetry.—Among the blacks is misery enough, God knows, but no poetry. Love is the peculiar [gift] of the poet. Their love is ardent, but it kindles the senses only, not the imagination. Religion indeed has produced a Phyllis Whately [sic]; but it could not produce a poet.

T. Jefferson, *Notes on the State of Virginia* 143 (W. Peden ed. 1954) (J. Stockdale ed. 1787) (footnote omitted).

looking approach to autobiography by black intellectuals is the autobiography of Frederick Douglass, who felt compelled to include the words "written by himself" in the subtitle of his first autobiography.⁹ Douglass, like Wheatley, wanted to claim a legitimacy that black people in his era could not claim.¹⁰

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.¹¹ When Stephen Carter and Shelby Steele tell us of experiences in their past, where being African-American was used to limit their ambitions, they use their lives as proof. These writers know that their autobiographies are a form of proof (not definitive, but proof nonetheless), a way of defeating those who see them only as just the best black. Despite criticism and doubt about the existence of black perspectives, black writers have a need to tell a story, whether or not it is free. This story is autobiographical. White writers also tell

⁹ See *Narrative*, supra note 3. Douglass wrote three autobiographies; the other two were *My Bondage and My Freedom*, written in 1855, and *Life and Times of Frederick Douglass*, written in 1881.

¹⁰ It is likely that Douglass included the words "written by himself" in the subtitle to signal to others that his narrative was in fact self-written. In this regard, Douglass's narrative was unusual, because most slave autobiographies were ghostwritten by abolitionist writers. Quarles, Introduction to F. Douglass, supra note 3, at xvi.

¹¹ See e.g., Carter, *The Best Black and Other Tales*, in *Reconstruction* 6 (1990):

My father taught at Cornell, which made me a Cornell kid, a "fac-brat," and I hung out with many of the other Cornell kids in a private little world where we competed fiercely (but only with one another—no one else mattered!) for grades and test scores and solutions to brain teasers. . . . And when I decided that I wanted to attend Stanford University, I was told by another guidance counselor that I would surely be admitted because I was black and I was smart. Not because I was smart alone, not even because I was smart and black, but because I was black and smart: always, the skin color preceding any other observation.

Id.; T. Sowell, supra note 4; S. Steele, *The Content of Our Character* (1990).

Randall Kennedy is one of a few black scholars who criticizes the use of autobiography and racial perspectives in the law. Kennedy, however, has a voice that sometimes differs in tone and emphasis. See, e.g., Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 Colum. L. Rev. 1622 (1986); Kennedy, *A Reply to Philip Elman*, 100 Harv. L. Rev. 1938 (1987). I have contended that some of this voice comes out of a black perspective. See Culp, *Toward a Black Legal Scholarship: Race and Original Understandings* (forthcoming in *Duke Law Journal*, February 1991) (copy on file with the Virginia Law Review Association).

their story, but it is not often as consciously autobiographical, particularly early in their academic careers.¹²

I was unconsciously forced by white students, who would ask for my curriculum vitae, to use my own truncated autobiography. Typically on the first day of class, some student raises a question that includes, "Where did you go to law school?" I understand that question to be, "What gives *you* the right to teach this course to *me*?" I did not even realize that the question was being asked every year until a white colleague heard the question and became upset for me. When I answer that question, I give a long response that includes a description of an undergraduate education at the University of Chicago, and graduate and legal training at Harvard University. For most students, this biography is sufficient. It reduces the discomfort they feel about having a black law professor. That is not, however, the biographical information I want them to remember. My autobiographical statement—that I am the son of a poor coal miner—has informational content that has a transformative potential much greater than my curriculum vitae. *Who we are* matters as much as what we are and what we think. It is important to teach our students that there is a "me" in the law, as well as specific rules that are animated by our experiences.

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. Black law professors, of course, are not just their autobiographies; we must communicate material, teach students how to read cases, and perform all the other tasks required of other professors. But many black law professors believe, and most convey the impression, that who we are influences our examination of the law. White colleagues use our racial autobiographies to confirm or, occasionally, to test their views of the world; we use our autobiographies in various ways to define the contours of our teaching and scholarship. Almost all black law professors are forced

¹² The lone exception is the writing of feminist legal scholars. See, e.g., S. Estrich, *Real Rape* (1987); Austin, *Sapphire Bound*, 1989 *Wis. L. Rev.* 539. Among legal scholars, however, minority women have been more likely to use autobiography than nonminority women, and women use autobiography more than men.

to write, teach, or speak their concerns about race.¹³ Neither our colleagues, nor our own interest in racial justice, will permit us to forget that we are black professors of law.

In the remainder of this Essay, I will challenge those who question how to include humanistic concerns in legal discourse by briefly examining how some black scholars use their autobiographical experience in their legal scholarship, and how I try to use it when teaching torts.¹⁴ I will also challenge a notion that all of us in legal academia have the same essential autobiography.

I. PUTTING A ME INTO LEGAL SCHOLARSHIP

Professor Patricia Williams has been an innovator in legal scholarship.¹⁵ She writes about her own experiences and uses them to transform the debate about law. When Professor Williams describes the differences between the needs of blacks and whites in contractual situations by using her experience in renting an apartment in New York, she shows why for blacks there can be a need for formality that whites often do not experience.¹⁶ Her experiences as a black woman are central to the transformative power of that debate. It is, of course, beneficial that Professor Williams is a lawyer and a former litigator, but

¹³ This is significantly true of many aspects of my life as a law professor. Two aspects are good examples of this. I, like many black and other minority scholars, have been brought into the discussion of Randall Kennedy's article *Racial Critiques of Legal Academia*, 102 Harv. L. Rev. 1745 (1989). Kennedy's article and the issues it raised have sparked much debate within the academic community. See, e.g., Responses to Randall Kennedy's *Racial Critiques of Legal Academia*, 103 Harv. L. Rev. 1844 (1990) (containing responses from Milner Ball, Robin Barnes, Scott Brewer, Richard Delgado, and Leslie Espinoza); Culp, *supra* note 11; Johnson, *Racial Critiques of Legal Academia: A Reply in Favor of Context*, 43 Stan. L. Rev. 137 (1990). The other example is from a recent experience I had in the law school with the child of two of my black colleagues. My colleagues' eight year old daughter saw me pushing the cart for garbage normally pushed by the black cleaning staff and she asked whether I had to do a second job as well. She knew that at least in her life black people often push such carts and do menial tasks around the law school. When she saw me push that cart, she was not sure whether I, a black person, also had to perform janitorial work. This is a difficult task for a black faculty member; our racial status influences how the world sees us.

¹⁴ See, e.g., Gellhorn, "Humanistic Perspective": A Critique, 32 J. Legal Educ. 99 (1982).

¹⁵ See, e.g., Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 Harv. C.R.-C.L. L. Rev. 401 (1987) [hereinafter *Alchemical Notes*]; Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 Mich. L. Rev. 2128 (1989); Williams, *On Being the Object of Property*, 14 Signs 5 (1988); Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. Miami L. Rev. 127 (1987).

¹⁶ See Williams, *Alchemical Notes*, *supra* note 15, at 406-08.

more importantly, her unique perspective and experiences enhance both her legal analysis and the truth of what she says. When we read her words, we read a contemporary embodiment of racial and legal experiences. Her approach to legal scholarship is different for the very reason that some legal teachers do not appreciate it as scholarship or recognize it as an effective pedagogical tool.

In order to change the most basic and fundamental notions about the world, it is first necessary to alter the terms of the debate. Professor Williams requires us to see the world through her eyes; her words will not permit us the freedom to ignore her reality.¹⁷ This is good lawyering and good scholarship. The most basic job of a lawyer is to convey a story that puts her client's perspective in its best light; no scholar who fails to create a new intellectual world can hope to be successful. Professor Williams impels us to listen to her history precisely because without that pressure too many of us who read and teach the law will ignore that history. We all start with mythic structures about the world, but for most of us who teach the law these mythic structures do not include black men or women. Patricia Wil-

¹⁷ For example, Professor Williams says:

Some time ago, Peter Gabel and I taught a contracts class together. Both recent transplants from California to New York, each of us hunted for apartments in between preparing for class and ultimately found places within one week of each other. Inevitably, I suppose, we got into a discussion of trust and distrust as factors in bargain relations. It turned out that Peter had handed over a \$900 deposit, in cash, with no lease, no exchange of keys and no receipt, to strangers with whom he had no ties other than a few moments of pleasant conversation. . . . I, meanwhile, had friends who found me an apartment in a building they owned. In my rush to show good faith and trustworthiness, I signed a detailed, lengthily-negotiated, finely-printed lease firmly establishing me as the ideal arm's length transactor

. . . .

In addition to our differing word usage, Peter and I had qualitatively different *experiences* of rights. For example, for me to understand fully the color my sister saw when she looked at a road involved more than my simply knowing that her "purple" meant my "black." It required as well a certain "slippage of perception" that came from my finally experiencing how much her purple *felt* like my black

In Peter's and my case, such a complete transliteration of each other's experiences is considerably harder to achieve. If it took years for me to understand fully my own sister, probably the best that Peter and I can do—as friends and colleagues, but very different people—is to listen intently to each other so that maybe our respective children can bridge the experiential distance. Bridging such gaps requires listening at a very deep level to the uncensored voices of others.

Id. at 406, 407, 411 (footnotes omitted).

liams gives us new mythic structures to use in our efforts to include these two groups.¹⁸

When I started teaching law at Rutgers Law School, a white colleague, and friend, said that one of the things that he found most disquieting about contemporary legal scholarship was the extent to which it was personal. He found that the efforts of radical and critical writers to use their personal histories in legal discourse were destructive of law. "Everything that they are saying could be said in a less personal way," he concluded.¹⁹ I never asked him the question that I will pose here, but I think I know the answer he would give. The question is, "Why is the personal not also legal?" After all, cases (at least in our federal courts) usually involve some personal experience to which the law will be applied. The answer I think I would have received is that law should not be too influenced by the personal aspects of a litigant's experience. Law has to treat rich and poor, pretty and ugly, black and white alike.

The problem for those of us who are black in the legal academy is that it does not seem possible to find a neutral place to observe how race interacts with legal decisionmaking. When the United States Supreme Court acknowledges the validity of a sociological study that reveals a correlation between a victim's race and a likelihood of a jury imposing the death penalty,²⁰ yet concludes that courts cannot consider this study, because to do so would require judges to examine too many conflicting concerns,²¹ black people are reminded that American law has consistently made such injurious decisions. If we are to persuade the next Supreme Court, or Congress, of the tragedy of this perspective on race and the death penalty, then it is important that the experiences of blacks be included in the discourse.²² When we

¹⁸ See *id.* at 427-33.

¹⁹ This was made to me by a colleague whose anonymity I will keep. It is similar, however, to comments that I still hear from my past and current colleagues in faculty lounges.

²⁰ *McClesky v. Kemp*, 481 U.S. 279 (1987). The majority in *McClesky* assumed that the Baldus study was statistically valid. They refused, however, to conclude that the study proved the use of racial considerations in sentencing decisions. *Id.* at 291 n.7. In his dissent, Justice Brennan stated that the existence of "a risk that racial prejudice plays a role in capital sentencing," no matter how small, creates a constitutional concern for the Court. *Id.* at 324-25 (Brennan, J., dissenting).

²¹ *Id.* at 314-19 (Court warns that *McClesky*'s claim of racial bias in sentencing decisions requires a remedy that contains no limiting principle).

²² The Supreme Court suggested that such considerations were for the legislative branch. In regard to capital punishment, the Court stated that its task was limited to deciding whether

leave out the personal in the realm of the law, what is left out is the truth of the experiences of black people in American society. Indeed, to the extent that we permit the personal to be included, we often leave out the reality of being black. For example, the Supreme Court does not believe it is reversible error in a death penalty case (involving a white defendant) for a defense attorney to have not called a black professional who would have testified as a character witness, because the defense attorney feared that the blackness of the character witness would harm his client's case.²³ The only conclusion that we can take from this case is that the stigma attached to blackness is simply a cross that black (and some white) people must bear.

My answer to my former colleague, and continued friend, is that by ignoring the experiences of black people, we are limiting our vision of law to one that reflects a white male perspective. It is not possible to think neutrally about these questions; we either include or ignore black people in the world that is created by our individual assumptions. By leaving out the personal, as my colleague suggests, we simply replace our personal stories with mythic assumptions about race. We tell such a story when we structure an employment discrimination case under the assumption that although most employment decisionmakers are white, they will in fact be color-blind.²⁴ Patricia Williams's scholarship, and the scholarship of a growing number of black

the law was properly applied under the Constitution. *Id.* at 319. Senator Edward M. Kennedy (D-Mass.) has introduced legislation that would prohibit the use of the death penalty by states if it created this kind of effect. See *Senate Outlaws Death Penalty for the Mentally Retarded*, *Boston Globe*, May 25, 1990, at 4, col. 6 (Senator Kennedy's Racial Justice Act is defeated in the Senate. Opponents claim that the Act placed "such a difficult burden on states that it amounted to a back-door effort to ban the death penalty."); *Senate Votes to Reject 'Racial Justice' Proposal*, *L.A. Times*, May 25, 1990, at A4, col. 4 (Senate defeats a "racial justice" plan that "would have enabled defendants in any state to avoid capital punishment if prosecutors failed to prove that racial disparities in sentencing are non-discriminatory").

²³ *Burger v. Kemp*, 483 U.S. 776 (1987). The majority opinion in *Burger* does not mention the race of the lawyer and glosses over the failure to call the lawyer or get other assistance as pure attorney judgment. But Justice Blackmun mentions, "I also find troubling the fact that defense counsel rejected the assistance of another lawyer (who had known petitioner) merely on the basis that the lawyer was black." *Id.* at 814-15 (Blackmun, J., dissenting).

²⁴ This is certainly the suggestion of Justice O'Connor in *J.A. Croson v. City of Richmond*, 488 U.S. 469 (1989). Justice O'Connor argues, "To a large extent, the set-aside of subcontracting dollars seems to rest on the unsupported assumption that white prime contractors simply will not hire minority firms." *Id.* at 502.

and other minority writers and women, proves the existence of these pseudo-stories, if we will listen.²⁵

Whenever one raises the question of including the personal, especially the personal experiences of people of color, one hears the response by many that color does not and cannot matter to legal discourse. "Truth is color blind," is the unstated, but assumed, premise that undergirds the discussion in this area. One sees this premise played out on the undergraduate level in the truly chaotic discussion of what the "canon"²⁶ ought to be in basic history and English courses. The defenders of the current canon combat the onslaught of black and other concerns with nonsensical arguments that the current

²⁵ This literature is too extensive to list here but includes the works of Patricia Williams, *supra* note 15, and has been illuminated by a number of minority women law professors. See, e.g., Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989). In addition, Regina Austin, Kimberle Crenshaw, and Linda Greene have contributed to the growing amount of literature that has come to be called critical race theory.

Some white scholars have been particularly hard of hearing with respect to black voices. See Posner, *Duncan Kennedy on Affirmative Action*, 1990 Duke L.J. 1155, at 1158-59 ("Professor Kennedy does not mention a single idea that critical racial theory has produced. . . . There is some evidence that feminism has had this effect [and that] maybe minority scholarship will as well. I think not, myself.").

²⁶ The notion of canon is a difficult concept to explain since it is used in a number of ways:

"Canon" descends from an ancient Greek word, *kanon*, meaning a "reed" or "rod" used as an instrument of measurement. In later times *kanon* developed the secondary sense of "rule" or "law," and this sense descends as its primary meaning into modern European languages. The sense of the word important to literary critics first appeared in the fourth century A.D., when "canon" was used to signify a list of texts or authors, specifically the books of the Bible. . . . In this context "canon" suggested to its users a principle of selection by which some authors or texts were deemed worthier of preservation than others. . . . Hence the "canonizers" of early Christianity were not concerned with how beautiful texts were, nor with how universal their appeal might be. They acted with a very clear concept of how texts would "measure up" to the standards of their religious community, or conform to their "rule." They were concerned above all else with distinguishing the orthodox from the heretical.

In recent years many literary critics have become convinced that the selection of literary texts for "canonization" (the selection of what are conventionally called the "classics") operates in a way very like the formation of the biblical canon.

Guillory, *Canon*, in *Critical Terms for Literary Study* 233 (F. Lentricchia & T. McLaughlin eds. 1990); see also Gates, *Authority, (White) Power, and the (Black) Critic; It's All Greek to Me*, in *The Nature and Context of Minority Discourse* 72 (A. JanMohamed & D. Lloyd eds. 1990) (creation of a black canon can be used by black critics to explicate black perspectives).

I would like to use the notion of canon both to mean the selection of what is important and the rule used to make that selection. In both senses the notion of canon has become a very hot topic in the academy.

canons have apolitical and transhistorical content.²⁷ They contend that if black concerns and literary works are to be included in the canon they have to earn their way, no doubt the old-fashioned way, through some neutral process. Because it is easy to prove that those who invented the canons in history and English did so partly for political purposes, it is not possible to defend the current canons on such grounds.²⁸ Indeed what ought to frighten us is that so many leaders with significant educational backgrounds would believe that such a defense of educational structure makes sense. One sees the inconsistency of this debate most clearly when the proponents of a single canon in English or history respond to the notion of a black or feminist perspective. "There cannot be a 'single' black perspective," they say to those black writers who try to speak about the growth of racial and sexual perspectives in the law. Differences between black and white scholars, however, will not permit white scholars to create a canon and prevent black scholars from having a perspective. Canon formation is a tricky business, as are attempts to define black perspectives, but neither one is apolitical or neutral. As law professors we are

²⁷ See, e.g., A. Bloom, *The Closing of the American Mind* 95-97 (1987). Allan Bloom makes this presumption when he attacks affirmative action and black studies programs. Bloom states that such programs lead to the "long-term deterioration of the relations between the races." *Id.* at 97. Given the choice between programs focusing on black concerns and the traditional curriculum, Bloom believes that the latter benefits both black and white people. He concludes that the traditional learning is essential because "democratic society cannot accept any principle of achievement other than merit." *Id.* at 96.

²⁸ See P. Novick, *That Noble Dream* 311-14 (1988). Novick notes that one of the reasons for the creation of Western Civilization courses after World War I and World War II was to remind students that Europe and America were one organic society. *Id.* at 312. By saying that the choices made by historians and English professors are political, and that any canon has a political effect, I am not saying they are bad. Canons have to be defended not from how or even why they were created but because of their intrinsic worth. For a classic example of the response to calls for altering existing canons, see *Is the Curriculum Biased?: A Statement by the National Association of Scholars*, 52 *Pol'y Rev.* 49 (1990):

Furthermore, "multicultural education" should not take place at the expense of studies that transcend cultural differences: the truths of mathematics, the sciences, history, and so on, are not different for people of different races, sexes, or cultures, and for that reason alone their study is liberating. Nor should we further attenuate the study of the traditions of the West. Not only is knowledge of those traditions essential for any evaluation of our own institutions, it is increasingly relevant to our understanding of other nations, which, in striking testament to the universality of the values they embody, are rapidly adapting Western practices to their own situations.

Id. (emphasis added). All canons have some political effect. See Culp, *Firing Legal Canons and Shooting Blanks: Finding a Neutral Wax in the Law* (forthcoming in *Saint Louis University Public Law Review*) (copy on file with the Virginia Law Review Association).

not drawn directly into the debate about canons. We normally do not teach undergraduates; though we have canons, we do not claim that a legal canon can make sense by, for example, leaving out *Brown v. Board of Education*,²⁹ or Justice Marshall's dissent in *San Antonio Independent School District v. Rodriguez*.³⁰ Some legal scholars assume that they take care of race in constitutional law when they talk about *Plessy v. Ferguson*³¹ and *Brown*, and demonstrate the redemptive qualities of the Court. This marginal inclusion of race leads to arrogance on the part of my colleagues in the law. Law teachers tend to believe that the "race thing"³² is taken care of in its appropriate place. This puts race in a very restrictive context. For example, most teachers of constitutional law teach about the redemptive qualities of Justice Harlan's dissent in *Plessy*, but they almost never read with any care his opinion in *Cumming v. Richmond County Board of Education*,³³ where Harlan indirectly affirms the segregation of black school children. *Cumming* is much more on point with respect to *Brown* than *Plessy*.

A. Presenting the Black Perspective

In a debate about how to increase the participation of black and other minority groups on faculty-run law journals, a colleague argued that the history of Law and Contemporary Problems, our faculty-run journal, demonstrates that all perspectives, including those of black people, have been heard. I understood this claim as an argument about the color-blindness of the subjects and authors represented in Law and Contemporary Problems. Even so, I found the argument to be an odd one. I was the first black member of the Duke Law School faculty, on other than a visiting or administrative basis, when I accepted a job offer in 1985. I became a potential participant in the faculty-run aspect of Law and Contemporary Problems, and remain

²⁹ 347 U.S. 483 (1954).

³⁰ 411 U.S. 1 (1973).

³¹ 163 U.S. 537 (1896).

³² President Bush was fond of talking about the "vision thing" during the 1988 presidential campaign. See Kamarck, The "Vision Thing" Is Found in the Heart, *Newsday*, July 21, 1988, at 79 (Viewpoints). Mary McGrory has written, "George Bush would have to shut down his campaign if you took the 'thing' thing away from him. He speaks of the 'vision thing,' for instance." McGrory, Faint-Hearted Phrasemakers, *Wash. Post*, July 24, 1988, at C5, col. 5. Bush likes to attach "thing" to any noun and use that as a description of the concept.

³³ 175 U.S. 528 (1899).

the only black, tenure-track faculty member at Duke. How much black involvement was there in choosing topics for issues of *Law and Contemporary Problems* before I joined the faculty?

My colleague never completely justified his claim, so I decided to test it. How often had *Law and Contemporary Problems* dealt with issues of concern to black people in the area of the law? When blacks threatened to march on Washington in the 1940s unless legal steps were taken to protect their interests in the market place, did *Law and Contemporary Problems* examine the issue? When, in the 1950s, the South first began to face the consequences of the protection of black rights, did Duke's *Law and Contemporary Problems* lead the way with an examination of the legal and political consequences of that era? When a group of students less than sixty miles away started the modern, student-led civil rights movement in a lunch counter confrontation with racial oppressors, did *Law and Contemporary Problems* examine how much the Constitution protected these black students? When, in response to the political changes in the 1970s, the Supreme Court used a case involving Duke Power Company to limit the ability of employers to discriminate,³⁴ did *Law and Contemporary Problems* cover the issue immediately? The answer to these questions is no; issues affecting black people were written about as early as 1955 by Arthur Sutherland, but black concerns in general did not enter the pages of *Law and Contemporary Problems* in any serious way until the early 1970s. In the late 1960s and early 1970s, blacks were permitted to contribute as authors for *Law and Contemporary Problems*. Even when talking about general issues, however, the articles often ignored the special, i.e., different, concerns of black Americans.

Would an increased black perspective alter the course of *Law and Contemporary Problems*? Although it is hard to know how much and where the alteration would take place, it is clear that not all concerns could be covered. Law journals—even faculty-run law journals—make tradeoffs. The question is where those tradeoffs will occur as the personnel who make the decisions change. When the faculty editors change over time, the issues examined and the direction of *Law and Contemporary Problems* also change. Black partici-

³⁴ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (conditioning employment on requirement of high school education or passing a standardized general intelligence test violates title VII of the 1964 Civil Rights Act). Duke Power was originally owned by the Duke family, who set up the indenture that turned Trinity College into Duke University.

pants certainly would add their own experiences and perspectives to that mix.

These decisions were not primarily the product of racism.³⁵ What motivated the various editors of *Law and Contemporary Problems* were the concerns of the faculty who made up its editorial board. There was a vision of the law that was informed by the personal experiences of those who were faculty decisionmakers. These experiences, by definition, did not include those of black people until the last six years.

My colleague sees his perspective as neutral. This is the false neutrality of Allan Bloom.³⁶ It is not connected to the experiences of a significant number of black people. We all have a canon of what is relevant, important, and significant in the law. We base our decisions on collective approximations of important value judgments and political decisions; they cannot be neutral.

II. FINDING THE ME IN TORT LAW

I teach tort law, and early in that process I use a hypothetical from my past. As an undergraduate at the University of Chicago, I asked my girlfriend to accompany me to Evanston, Illinois. We got off the train from downtown Chicago with our very long and newly-hip Afros and began walking around Evanston. Near the train station we saw an old white woman. As my girlfriend and I approached the woman, she began to shake. The closer we came to her the more she shook. As I write about this incident, I can remember the beauty of that former girlfriend's face but not her name. But I remember as clearly as I can taste my last cup of coffee the old white woman turning her back and assuming a pseudo-fetal posture as we approached her. I could read that situation as clearly as any other: for the old white woman, the black revolution had come to Evanston. She saw us not as the well-dressed black college students that we were, but as mythic black revolutionaries. In her mind, she knew we were Black Panthers who had come to Evanston to do her harm.

³⁵ I should note, however, that Duke Law School did not admit its first black student until the early 1960s. See *Duke University Lowers Final Color Barrier*, *Carolina Times*, June 9, 1962, at 1, col. 8.

³⁶ See A. Bloom, *supra* note 27.

I ask my class whether it would have been an assault for me to lean over and to whisper "boo" to that old woman. I then add that I thought about doing so and pause, for only a second, before saying that I did not say anything. This is not the pause that refreshes. Indeed my comment changes for all time the impression some have of me. Many white students no longer see me as the affable black person in the front of the room, but understand that I have some anger that some interpret as black radicalism. One student asked me how I could have thought of saying anything to this old white woman, who was captured by her racial past. "That could have been my grandmother," another white student added. I did not respond that this was exactly the reaction I wanted. I would not say "boo" to an old white woman who feared my blackness, but I posed the hypothetical to alter the assumptions that we make about the relationships between people and the tradeoffs imposed by the law. It is dangerous for a black person to make an old woman or white students face the deeply-embedded racism in our society. The old woman is likely to charge an assault of some kind and the students are likely to see such actions as the imposition of politically-connected concerns. I must, however, first be able to think dangerous thoughts before they can become reality, and I want the class to think about how much of tort law is socially-constructed custom.

Black students who are forced to listen to hypotheticals that are seldom, if ever, from their racial perspective, are often invigorated by a hypothetical that permits them to be the person who is claiming a right to be black and free. They generally understand these situations; they have been there before. My hypothetical includes a discussion of what tort liability exists for me if I knowingly say anything that will create in the old white woman an apprehension of intentional and immediate bodily injury. This discussion makes my class aware that I am black; it prompts questions about how race influences the construction of law and legal doctrine. I try to impress on them that they should understand why this case is not governed primarily by tort law in the real world. I also try to show them that there are other rules that limit my actions and require me to censor myself. I hope that my students understand that silence is imposed on me and all black people, and that I say things in many ways to my class and colleagues, even when I do not verbalize them. By raising an explicit racial situation, I hope to free my black students to include their

experiences in the classroom, and to inform the non-black students that other ways of looking at issues are possible and necessary.

III. AUTOBIOGRAPHY AND THE FACULTY

Some of my colleagues and I have discussed the usefulness, appropriateness, and efficacy of Derrick Bell's strike against Harvard Law School. Professor Bell has requested a leave without pay from his job as a Professor of Law until Harvard Law School hires a tenured woman of color. I was struck by Dean Robert Clark's reaction to Professor Bell's strike, and by the fact that none of my white colleagues reacted to it as I did. Dean Clark's response, as Dean of Harvard Law School, was that Professor Bell's action was not "an appropriate or effective way to further the goal of increasing the number of minorities and women on the faculty."³⁷ How is it possible for Dean Clark to define what is appropriate? I do some things that I know my colleagues find inappropriate. Some of them would like me to dress differently, for example, eliminating the shorts I wear in good weather on days when I do not teach. I choose not to listen to criticisms about either my dress or my autobiography. Criticisms of this sort are made on everyone, particularly those who are different, but I have chosen to adopt only some of the qualities that a "good" black professor of law should adopt.

These criticisms have a different quality in the context of challenging the existing order in law schools. I have seen many things in my almost ten years in law school teaching. Faculty have been abusive to students and to each other. I have noticed faculty skating close to and over the edge of sexual harassment. Faculty have been heard to call each other fool, racist, incompetent, and idiot, and to engage in, or threaten, physical combat with each other. I have taught at three very good law schools, but I have yet to see or hear of a dean who *publicly* challenged a faculty member's shortcomings, whether personal or professional. I have never heard of a law school dean chastising a faculty colleague publicly for racial or other allegations of discrimination, though I know of deans who should have been chastised for their own racial insensitivity. If deans, including the small number of nonwhite deans, do not label such actions publicly as inap-

³⁷ Daly, Harvard Law Students Demand Diverse Faculty, Wash. Post, Apr. 25, 1990, at 3, col. 1.

propriate, and they do not, then how is it justified to label a strike by a faculty member against his perception of racism as inappropriate. It is only possible to claim that something is inappropriate if Dean Clark has a model of appropriate behavior for black law faculty. It seems that for Dean Clark, what is appropriate behavior for black faculty is to accept our tenured positions in appreciative silence. The autobiography that Dean Clark requires of Derrick Bell, Professor of Law, is that of supporter of the current order in law schools. Dean Clark argues that Harvard "is a university, not a lunch counter in the [1960s] South."³⁸ Professor Bell contends that his autobiography teaches him that most white institutions, including Harvard Law School, are very similar to lunch counters of the 1960s South.³⁹ Black law professors have a different autobiography, which we use more and more frequently. We do not always use it better than our white colleagues, but certainly no worse.

An anonymous colleague put a copy of one of Shelby Steele's recent writings in my faculty mailbox after an acrimonious faculty meeting about an affirmative action issue. Professor Steele has become the darling of neo-liberal opinionmakers in the pages of the Atlantic, the New York Times, PBS's Frontline program, and ABC's Nightline program for his view that although racial bigotry exists, and is ugly and dangerous, the black middle class are free to prosper despite racial animosity.⁴⁰ Professor Steele has come to the conclusion that racism does not handicap the lives of people like him, who are tenured faculty with graduate degrees and comfortable salaries. By placing that article anonymously in my box my colleague was saying to me: "You are not a black professor of law, you are a professor of law who happens to be black; your blackness does not influence in any important way your present. Be appropriately appreciative of the blessings your position bestows on you." I understand Professor Steele's and my colleague's desire for this to be my autobiographical present, but it is not. I do my students, both black and white, a disservice if I permit my colleagues to rewrite my autobiography in ways that I believe to be incorrect. I have struggled in my own way, as hard as I could, against the racial oppression that exists in America. It has not eroded

³⁸ Flint, Bell at Harvard: A Unique Activism, Boston Globe, May 7, 1990, at 4, col. 6.

³⁹ Id.

⁴⁰ See Steele, On Being Black and Middle Class, Commentary, Jan. 1988, at 42, 47 (This article has been incorporated into Steele's recent book, *The Content of Our Character*.).

to the point where it does not continue to impact my life. I do not ask my colleagues always to consider my concerns and injuries, but I do ask that they not always assume a silent present for me.

Autobiography also influences my white colleagues. I believe I disquiet my colleagues when I raise issues about the composition of our student body or our faculty or what we teach, because it raises issues about their own autobiographies. My white colleagues think I am saying to them, "How did you get here?" They would like me to join them in a conspiracy of silence that claims a common and simple autobiography. I will not.

All of us have autobiographies that help us understand the world and put it into order. I am reminded of the white law professors who were not at the very top of their class, who were not editor-in-chief of their law review, and who did not clerk for the most prestigious judge.⁴¹ Some of these colleagues are the most ardent supporters of narrow notions of "meritorious," credential-based appointments to their faculties. They oppose even the weakest form of affirmative action, including the simple requirement that appointment committees look at black and minority candidates outside of the above-mentioned, elite criteria. Whenever I see this reaction, I am convinced that my colleagues believe in those standards because they are insecure about their own autobiographies. This insecurity seems to be misplaced. The pool of people who end up being the best teachers, scholars, and law professors is not limited to those with excellent credentials; the notion that we must defend our autobiographies by creating a myth that law faculties are limited to the narrowest band of people with the highest credentials is a false statement about who makes up the legal academy. In my opinion, there are various reasons (some good and some bad) for my colleagues, both black and white, to believe in the narrowest credential-based hiring. But it is also true that some of my colleagues defend their autobiographies by defending standards that were not applied to their appointments.

When I raise autobiographical concerns, some of my colleagues complain that I am attempting to privilege my autobiography. They say to me: "If we deal with your autobiography, we ignore *our* histo-

⁴¹ A majority in the legal profession and a significant minority in even the "best" law schools do not have these credentials. See Olivas, *Latino Faculty at the Border, Change*, May-June 1988, at 6, 7; Address by Michael A. Olivas, AALS Conference (Sept. 8, 1989) (copy on file with the Virginia Law Review Association).

ries. Our parents suffered discrimination and hardship, but we do not think it important to mention it, and neither should you." True diversity, they claim, would not look at race or sex, but at other ethnic and cultural concerns that are not included in the current debate for political reasons.⁴² They are correct that such claims are by definition political, but what these law professors will not admit is that it is not possible to be apolitical. It is possible to have a legal curriculum that does not worry about racism, but that decision is political. I do not think the autobiographies of my colleagues are unimportant, but they have to use their autobiographical pasts in their own ways in their teaching and scholarship.

I am willing to admit that I would like to privilege my story if my colleagues in legal education will admit that they tell a story in their teaching and scholarship. The real question is which story will be told. Their real problem with me 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. The very question they have raised is wrong. The challenge I pose for all my colleagues and students is how to permit some of the experiences of black people into the discussion of what is law. The story I tell includes white people and black people. Unfortunately, the story most of us tell in our scholarship and teaching excludes black autobiographies.

It is not possible to tell the whole truth of our lives in the classroom or in our scholarship. Reality is not a novel or an autobiography, where all of the unimportant details are culled by the author offstage so that we can digest "truth" in simple bites. As teachers and legal scholars, we are the authors of our present and our past. We define what is irrelevant and relevant. Black people, because of who they are, know the power of full autobiography. It echoes more explicitly in our lives. I can demonstrate that being the son of a poor black coal miner influences who I am and how I perceive the legal system about which I teach. The hard question for those of us in legal teaching is what that autobiography we teach will look like.

⁴² My colleagues often contend that race is not real diversity and that other criteria are just as or more useful. See, e.g., R. Posner, *The Problems of Jurisprudence* 458 (1990) (Diversity in the judiciary is important but it should not be based upon sexual or racial politics. Other criteria, including religion, health backgrounds, and hobbies are as important as gender and race.); Posner, *supra* note 25, at 1159 (Race, unlike feminism, is not a useful way of understanding the world, because "not all blacks are culturally black.").

There are many truths we can tell about the law; few of them include black people and their concerns. Part of my task as a black professor of law is to insure that black people are included in the mythic structures of legal discourse. Black law professors cannot escape that task. We tell a tale of blackness and the law by our being and through our teaching and scholarship. I choose to convey an autobiography that includes my blackness and my struggles in my past and present. I can only hope that my students and colleagues will listen to my story, attempt to understand it, and accept it as a valid part of legal discourse.

A Postscript to My Colleagues

I have been moved by your responses to this Essay. Almost everyone who has read it and commented on it has revealed to me some facet of their life that I did not know. I appreciate your experiences more than I did before. I have chosen not to alter the text of this Essay, but because of the quality of your responses, I do want to respond to some of the issues that you have raised about your autobiographies. Some of you, who by the vagaries of history and our decisions are all white, wish to emphasize that you are not the children of privilege or believers in a homogeneity myth. I already knew that two of our colleagues are also the sons of coal miners, but not that many others come from backgrounds of similar deprivation, strength, and diversity. Duke Law School's faculty may be unique in the truly Horatio Alger quality of many of its faculty. My point in this Essay is not that all black people have suffered more than all white people, or even that all black law professors have suffered more than all white law professors. I do not even intend to argue over whether the average black law professor has experienced more or less anguish than the average white law professor. It is not necessary to compare pain or disadvantage to understand the importance of my main point—that autobiography can be a powerful tool for legal teachers and scholars.

Black law professors are not permitted by our students or our colleagues to take our backgrounds for granted. Because of our racial past and the racial myths that invade our subconscious, we feel compelled to prove that we are worthy of the high honors and greater glory of our positions. We use our individual histories in our work because we cannot divorce our personal experiences from our legal experiences. Our histories have been shaped by a struggle for equal-

ity, which involved a fundamental desire to change the laws under which we lived. Therefore, there is a valuable lesson that can be learned from our black experiences. White faculty members can use their autobiographies to illuminate gray areas and to change what our students see as reality. As we teach the "me" generation in the 1990s, we must figure out ways to increase the awareness of differences in the world, and the role of experience in law. The use of personal experiences can help white faculty members accomplish these goals. I believe that your depiction of who you are would liberate many of your students. I know that I have been encouraged by the potential for growth and change that such an alteration in your teaching and scholarship could produce.