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Brewer's Plea: Critical Thoughts on Common Cause Essay

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ESSAY

Brewer's Plea: Critical Thoughts on Common Cause

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I. INTRODUCTION

As most legal readers know, members of the Critical Race Studies (CRS) school[1] and mainstream civil rights scholars have been carrying on a rather spectacular and highly public debate. First, Randall Kennedy, a mainstream scholar, took the newcomers to task in his *Racial Critiques* article,[2] charging us with making unfounded accusations and grandiose claims,[3] with finding racial exclusion where none exists,[4] and with various other sins of omission and commission.[5] The controversy moved next to the pages of the popular press.[6] Then, in the June 1990 issue of *Harvard Law Review*, three members of CRS and a white sympathizer were given an opportunity to respond.[7]

In his *Introduction* to that group of responses, Scott Brewer, a young, as-yet unaligned scholar, issued a call for peace.[8] Both sides share a *common goal*, Brewer wrote; why can they not set aside their differences and work together to realize it?[9] This Essay addresses ap-

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1. The loose coalition's program and methods are described at subpart III(A) *infra*. *See also* Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 95 n.1 (1990) (outlining elements of CRS program); Wiener, *Law Profs Fight the Power*, The Nation, Sept. 4/11, 1989, at 246 (describing controversy over CRS and Kennedy's article, *infra* note 2). Other terms applied to the movement are Critical Race Theory, New Race Theory, and sometimes, colloquially, "Race Crits."

2. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989). The initial response of mainstream civil rights scholars to early CRS scholarship was fairly mild. *See* O'Neil, *A Reaction to* The Imperial Scholar *and Professor Delgado's Proposed Solution*, 3 LAW & INEQUALITY 255 (1985). By the time Kennedy wrote his article, however, concern over the new movement was running high. *See, e.g.*, Rothfeld, *Minority Critic Stirs Debate on Minority Writing*, N.Y. Times, Jan. 5, 1990, at B6, col. 3 (anonymous law professor says dissatisfaction with the new movement is broadly shared).

3. Kennedy, *supra* note 2, at 1746, 1760-78 (unfounded accusations of racial exclusion); *id.* at 1746, 1778-87 (unfounded claims of racial distinctiveness in CRS writing).

4. *Id.* at 1760-78.

5. *Id.* at 1787-1801 (misguided efforts at claiming or denying "standing"); *id.* at 1801-07 (self-seeking promotion of race as a scholarly credential); *id.* at 1807-17 (unwarranted militarization of discourse and calculated or cynical playing of the "race game").

6. *E.g.*, Wiener, *supra* note 1; *Racism in Legal Academe*, L.A. Daily J., Feb. 27, 1990, at 6, col. 1; Rothfeld, *supra* note 2.

7. *Colloquy: Responses to Randall Kennedy's* Racial Critiques of Legal Academia, 103 HARV. L. REV. 1844 (1990). The colloquy contains articles by Robin Barnes, Leslie Espinoza, and Richard Delgado, all associated with the Critical Race Studies movement, and Milner Ball, a white male sympathizer.

8. Brewer, *Introduction: Choosing Sides in the* Racial Critiques *Debate*, *id.* at 1844-54.

9. *Id.* at 1847 (stating that it "seems plausible to assume . . . that Kennedy and his critics had a 'common goal' whose acknowledgment, although allowing for 'respectful disagreement,' might prevent the debate from collapsing into a 'ferocious ideological struggle' . . . [and] 'bitter personal enmity' "); *id.* at 1851 (noting that it is "possible for Kennedy and his critics to share that broad goal"); *id.* at 1854 (stating that "Kennedy and his critics do share a goal whose importance is so overwhelming as to dwarf instrumental disagreement about the best ways to achieve it").

Is Brewer guilty of essentialism—of imposing sameness on adversaries who see themselves as quite different—or of denying scholars of color the "right to squabble"? *See infra* note 13 and

peals, like Brewer's, to common cause. I first explore the inner logic of these appeals to see what functions they may serve. I then apply this analysis to the dispute between CRS and the mainstream figures. Although scholars have investigated the conditions of cooperation in other areas,[10] little has been written on appeals to common cause in connection with radical legal movements like CRS. I focus attention on the form and politics of such appeals, as well as on their merits and chance of success. When are appeals to common cause helpful, and when are they naive, incoherent, or even disingenuous?[11]

II. Appeals to Common Cause

Common-cause appeals conceivably could be made to any two disputing factions, but not with equal cogency or probability of success. For example, suppose a visitor from another planet approaches both sides of the abortion controversy and urges them to end their quarrel and work together. Both are concerned, the visitor points out, with the same things—women's welfare, human dignity, and respect for life. Given these common goals, the two groups should stop working at cross

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accompanying text (essentialism sometimes warranted). This is a subtle and sensitive point within the community of minority scholars.

Earlier, Derrick Bell, a leading CRS figure, urged Kennedy not to publish his article, arguing that it could harm the cause of civil rights and chill the development of alternative legal scholarship. *See* Delgado, *supra* note 1, at 96 n.8. Although some first amendment absolutists criticized Bell's letter as a form of censorship, to my way of thinking, Brewer's appeal represents a more troubling threat to diversity in scholarship than does Bell's. Bell merely called for Kennedy to conduct his critique in private, not public forums, to keep the dispute "within the family"—a position with which I disagree. Nevertheless, Bell arguably was calling only for a time-place-manner restriction. Brewer, on the other hand, urges the two groups to take the sharp edges off their respective positions in order to better blend and work together. This would entail qualitative compromises in content, particularly for CRS. *See infra* notes 58-59 and accompanying text.

10. The principal areas that have been investigated are negotiation and alternative dispute resolution, *e.g.*, R. Fisher & W. Ury, Getting to Yes (1981) (negotiation between individuals or small groups); L. Sohn, Cases on United Nations Law (2d ed. 1967) (negotiation among nations); and game theory and the politics of interest groups, *e.g.*, C. Lindblom, The Intelligence of Democracy (1965).

11. Although peacemaking has a long and honorable history, and Brewer should be commended for urging the two groups of civil rights scholars to focus on what unites rather than what divides them, history and literature are full of appeals for peace that have failed. These appeals have failed because the peacemaker has not dealt with the underlying source of conflict, because one or more parties is unwilling to compromise, because conflict has become habitual, or for a myriad of other reasons, some of which I explore immediately *infra*.

For literary examples of long-running feuds that withstood appeals to peace and self-interest, see W. Faulkner, Sartoris (1929) (continuing antagonisms between North and South a half century after the end of the Civil War) and W. Shakespeare, Romeo and Juliet (1600) (vendetta between houses of Capulet and Montague ended only by two lovers' deaths). "Real world" examples of unending feuds are, unfortunately, legion: labor and capital; East and West; Arabs and Jews; strict and broad constructionists.

purposes, demilitarize their discourse toward each other,[12] and unite in a common cause. Both parties would reject such an appeal as ludicrous, but why? It is not because the factions reject the goals the visitor reminds them of; actually, they embrace them wholeheartedly. Rather, the issue that divides them is, in their minds, both more subtle and more urgent. That the groups could agree on more concretely or abstractly stated goals, such as women's need for food, shelter, and equal respect, is almost beside the point.

Other situations will call more clearly for cooperation. Imagine two mountaineers who have suffered an accident on a dangerous slope. Most of their equipment has been swept away. They must reach the bottom of the mountain by nightfall. One of the climbers has a rope, the other water. Plainly, the two should cooperate; their common danger overwhelms any differences between them.[13]

Other cases will fall between these extremes, for example, when both sides have a common goal but working together will bring subordinate goals into conflict. Imagine two sled teams trying to reach the North Pole. A prize awaits each to arrive, but being first brings no advantage. The teams obviously should cooperate. Now imagine, however, that commercial sponsorships of future expeditions await the team that arrives first, or that one team wants to perform scientific experiments along the way, while the other team has little interest in science. Even though the teams have a common goal, division over these secondary goals may cause them to pursue separate courses. Finally, the common goal may prove illusory—both teams want to go to the North Pole, but one team means the magnetic pole, the other, the geographic one. Joining forces ensures that one or both teams will end up at the wrong destination.

III. BREWER'S PLEA

As the above examples suggest, appeals to common cause are most likely to prove effective if the parties actually have a pressing common goal, if they see that cooperation will help more than hinder achieving it, and if working toward that goal does not require sacrificing important subordinate ones. It also will help if the parties speak a common

12. *See* Kennedy, *supra* note 2, at 1815 (charging CRS writers with unwarranted militarizing of discourse).

13. For example, imagine that one of the climbers (up to this point the two have been climbing separately) uses mechanical aids, such as pitons hammered into the rock face, but the other is a purist who finds those practices a defilement of nature. Despite these differences, the climbers probably will cooperate, at least until they reach the bottom. Brewer may have been seeing the civil rights predicament, at least in some of its aspects, in this way. If so, no one could quarrel with him—death is the most essentializing, totalizing event of all.

language in which they can discuss these matters.[14] Applying these criteria to the CRS-versus-Kennedy dispute requires a brief overview of CRS's program and methodology and the respects in which these differ from those of the mainstream scholars.

The two camps do agree on certain things, in particular (1) everything Kennedy prefixes with the words "of course" in his *Racial Critiques* article,[15] and (2) everything he wrote before writing *Racial Critiques*.[16] Violence and insults against people of color are bad.[17] Racist jurors who prejudge black defendants are bad.[18] Stereotyping blacks as lazy or intellectually inferior is bad.[19] Executing blacks more frequently than whites for the same crimes is bad.[20] Increasing the

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14. The importance of each of these criteria varies depending on the type of common-cause appeal being made. Brewer might have been urging that CRS and mainstream scholars:

(1) unite behind *concrete reform proposals*, *e.g.*, federal legislation;

(2) aim for *mutual comprehension* (*i.e.*, try to better "understand each other");

(3) aim for willingness to *compromise and be persuaded* by each other; or

(4) some combination or order of the above (or, indeed, some other version of common cause).

Because Brewer does not clarify which form of appeal he is making, *see* Brewer, *supra* note 8, at 1847, 1851, 1854 (meaning, respectively, (1) work to be done, (2) parties should work to eliminate blocks to comprehension, and (3) willingness to compromise or accept differences), I address all three. *See infra* notes 40-57 and accompanying text (possibility of productive discussion); *infra* note 58 and accompanying text (disagreements over goals); *infra notes* 65-66 and accompanying text (possibility for compromise).

15. Dismissive or grudging concessions of existing racism and the need to work to confront it appear throughout Kennedy's article. *See* Kennedy, *supra* note 2, at 1748 (stating that we need "to transform society, including of course, the law schools"); *id.* at 1752 (emphasis added) (noting that covert color bars which stereotyped blacks as intellectually inferior are "*of particular relevance*" in understanding the appearance of critical movements of scholars of color); *id.* at 1760 (emphasis added) (stating that given "the pervasiveness and tenacity of racial prejudice in American culture, it is *readily imaginable* that current practice . . . in legal academia could be tainted by biases"); *id.* at 1765 (emphasis added) (stating that this "is *not to discourage* efforts to unmask and reform criteria that fail . . . to accomplish . . . the purposes they purportedly serve"); *id.* at 1767 (emphasis added) (noting that his "comments should *not be read to suggest* that legal academia is free of racial prejudice"); *id.* at 1780 (emphasis added) (stating that this "is not to say that Matsuda's assertions are *wholly incorrect*"); *id.* at 1807 (emphasis added) (stating that there is "nothing *necessarily wrong* with race-conscious affirmative action"); *id.* at 1816 (observing that racial differences may exist in jury behavior).

16. Prior to writing *Racial Critiques*, Kennedy wrote a number of articles on various aspects of racial justice. All were solid contributions; none elicited complaints from the left. *E.g.*, Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989); Kennedy, McClesky v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988) [hereinafter Kennedy, McClesky v. Kemp]; Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986); Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622 (1986).

17. Kennedy, *supra* note 2, at 1751-53; *id.* at 1767 (deploring the "Derrick Bell incident," in which a leading black professor suffered humiliating treatment at Stanford Law School).

18. *See id.* at 1816 nn.229-301. *See generally* Kennedy, McCleskey v. Kemp, *supra* note 16.

19. Kennedy, *supra* note 2, at 1751, 1753, 1797, 1801-07, 1817.

20. Kennedy, McClesky v. Kemp, *supra* note 16, at 1396-1400.

number of "qualified" law professors of color is good.[21] Despite these agreements, formidable differences of substance and style remain.

A. *Overview of Critical Race Studies*

1. Program

Critical race scholarship sprang up in the late 1970s with the realization that the civil rights movement of the 1960s had stalled, and many of its gains were being rolled back.[22] It was time to stop perseverating; we no longer could justify depleting our already frustrated energy on what we had been doing all along—filing amicus briefs, coining new litigation strategies, writing another law review article exhorting judges to exercise moral leadership in the search for racial justice—in hope of making things better.[23] We needed new ideas and theories—sometimes if you are up a tree and a flood is coming, you have to climb down before climbing up a taller one.[24]

Accordingly, we have been borrowing and experimenting with new approaches, examining, for example, the relationship between naming and reality.[25] We have been looking at the relation between knowledge, especially legal knowledge, and power,[26] and exploring the role of liberal-capitalist ideology in maintaining an unjust racial status quo.[27] We

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21. Kennedy, *supra* note 2, at 1761 (stating that "Bell rightly insists upon considering whether . . . prejudices play a role" in suppressing the number of black professors); *id.* at 1762-63, 1765 (noting that Bell ignores the possibility of black candidates lacking the traditional standards); *id.* at 1765-68, 1813-14 (calling attention to the "real problem"); *see also infra* subpart III(B)(1)(a) (discussing the role of merit).

22. Address by Richard Delgado, New Voices in Legal Scholarship (AALS Workshop), in Washington, D.C. (Sept. 8, 1989) (tape on file with AALS) [hereinafter New Voices]. For a detailed discussion of the ebb and flow of civil rights doctrine and consciousness, see D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987).

23. New Voices, *supra* note 22.

24. I owe the metaphor to Alan Freeman, whose work has been an inspiration. On the difficulty of formulating, or even imagining, arguments for radical change, because of constraints imposed by legal categories, see Delgado & Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STAN. L. REV. 207 (1989).

25. *See, e.g.*, Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (right to "name our reality"); Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

26. Delgado, *supra* note 25; Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984) [hereinafter Delgado, *Imperial Scholar*]. Critical Race Scholars borrowed many of these approaches from other areas of critical scholarship, such as Critical Legal Studies, but Critical Race Scholars use the tools to further the more focused goal of racial justice.

27. D. BELL, *supra* note 22; Delgado, *Imperial Scholar*, *supra* note 26; *see also* Freeman, *Antidiscrimination Law: A Critical Review*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 96

have been examining the role of legalisms, such as merit, fault, and causation, in advancing or impairing the search for racial justice.[28] We have been identifying majoritarian self-interest in the ebb and flow of civil rights doctrine.[29] We have been showing how areas of law ostensibly designed for our benefit often benefit whites even more than blacks.[30]

2. Methods

In addition to exploring new approaches to racial justice, we have been experimenting with new forms of scholarship. Many CRSers are modernists who believe that form and substance are closely connected.[31] Accordingly, some of us have been using parables,[32] chronicles,[33] stories,[34] and counterstories[35] to show the false necessity and unintentional irony of much current civil rights doctrine and scholarship. Many of us have been using unconventional texts—poetry, fiction, revisionist histories—written by authors of color to illustrate our message.[36] Some of us have been experimenting with humor, satire, and irony to show the circular, self-serving, or inequitable aspects of civil rights jurisprudence.[37] Some of us have called for greater attention to questions of audience—for whom do we write, and why?[38] Although none of these elements is new, their combined use over the past decade by a group of thirty to fifty scholars, most of color, warrants the terms "movement" or "position" that Kennedy and others apply to us.[39]

(D. Kairys ed. 1982); Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

28. D. BELL, *supra* note 22; Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923 (1988).

29. Derrick Bell has been the prime, and most persuasive, proponent of this "interest convergence" hypothesis. *See* D. BELL, *supra* note 22, at 51-75, 140-62.

30. *Id.*; *see also* Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

31. On modernism generally, see Luban, *Legal Modernism*, 84 MICH. L. REV. 1656 (1986) and Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1213 (1989).

32. *E.g.*, Williams, *supra* note 25.

33. *E.g.*, D. BELL, *supra* note 22; Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985).

34. *E.g.*, Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435 (1987); Delgado, *supra* note 25; West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985).

35. *E.g.*, Delgado, *supra* note 25.

36. The main proponent for this view is Mari Matsuda. *See* Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1 (1988); *see also* Williams, *supra* note 25.

37. *E.g.*, Delgado, *supra* note 25, at 2413-15; Williams, *supra* note 25.

38. *E.g.*, Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 543-44 (declaring that her article is aimed at the audience of women of color).

39. *E.g.*, Kennedy, *supra* note 2, at 1746, 1747, 1785, 1807 (discussing CRS's "tenets," "traditions," "paradigms," and "programs").

What are the prospects for a linking of arms between modernist critical race scholars and conventional civil rights scholars, such as Kennedy? Are we like explorers who purportedly have the same destination but on examination turn out to have quite different ones in mind? I think the prospects of rapprochement are not great—most CRSers believe a flood is coming and that we are up a too-short tree. I may be wrong, however; we may be like mountaineers, stranded in an accident, who must cooperate to reach safety. To assess the chances for collaboration I offer two imaginary colloquies, one about merit, the other about context. My objective is not so much to see which of the two sides would "win," but whether they could talk usefully—whether they occupy the same world.

B. Possibilities of Reconciliation

1. Nature of the Impasse: Two Colloquies

To evaluate prospects for the reconciliation that Brewer envisions, imagine two colloquies between the Crits and mainstream civil rights scholars. One of the dialogues is about merit, a recurring element in Kennedy's and the moderate left's writing about racial justice, the other about context, an article of faith for many CRSers, feminists, and other postmoderns.

a. Merit

In his *Racial Critiques* article, Randall Kennedy takes CRS writers to task for making various claims of race-based exclusion.[40] In each case, the criticism is the same: None of us has shown that the works or scholars we say are excluded deserve to have been included.[41] Without proof that a work, citation, or teaching candidate meets the relevant merit-based standards, one can say nothing about whether or not exclusion is warranted.[42]

How would CRSers respond to this argument? Most, I think, would begin by questioning the premise, asking why satisfaction of conventional merit standards should be a precondition for making a claim of exclusion. We would point out the irony of demanding that insurgent claims satisfy existing standards when those very standards are among

40. Kennedy, *supra* note 2, at 1760-78 (critiquing Delgado, *Imperial Scholar*, *supra* note 26 and Bell's CHRONICLE OF THE DEVINE GIFT, in D. BELL, *supra* note 22 ("seventh candidate")); *see also* D. BELL, *supra* note 22, at 140-61.

41. Kennedy, *supra* note 2, at 1760-63, 1765, 1769-78.

42. *See id.* at 1774 (stating that "Delgado fails to shoulder the essential burden of championing on substantive grounds specific works that deserve more recognition than they have been given").

the things we want to change.[43] We would note that merit standards pose as objective and fixed, but generally turn out to be highly situational—move the hoop up or down six inches in a basketball game, and you change markedly the distribution of who has "merit."[44] *Standards* are etymologically related to where one *stands*,[45] yet recent scholarship rejects the notion that any one perspective can be shown to be true, inevitable, or best.[46] Thus, merit is that which I, the preexisting and presituated self, use to judge you, the Other. The criteria I use sound suspiciously like a description of me and the place where I stand.[47]

The mainstream writer may concede all this, but retreat to a commonsense conventionalism: Most persons, in our society at least, understand merit in certain agreed-upon ways.[48] Moreover, such understandings are essential to determining when illegitimate exclusion has occurred. Wrongful exclusion obviously presupposes some notion of what "wrongful" means in particular settings, and this, in turn, cannot be divorced from notions of merit and desert.[49] But the modernist retorts that the majority is capable of changing its idea of the relevant standards over time. A few decades ago, law professors adhered to a model of law as rational, mechanical, and syllogistic. Today this would

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43. Why, for example, when evaluating faculty candidates do we not broaden existing criteria to include perseverance in the face of obstacles, successful operation as a near-solitary token in an uncomfortable milieu, first-hand acquaintance with the problems of an excluded group, and willingness to grapple with fundamental critiques of the existing system? *See* Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855, 1857-62 (1990); Delgado, *supra* note 1, at 100-03.

44. I am indebted to Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. ___ (forthcoming), for this example. For a nonsports illustration, consider a competition billed as a musical talent show. Among the entrants are an outstanding opera singer, an equally outstanding rap star, and an accomplished blues musician. Who will win? The answer obviously depends on the range of skills the judges require the entrants to perform in displaying their talent, as well as the range of the judges' knowledge about those skills.

45. WEBSTER'S NEW WORLD DICTIONARY 1387 (2d collegiate ed. 1980) (standard: "a place, . . . a point . . . a standing place").

46. *E.g.*, Tushnet, *Critical Legal Studies: An Introduction to Its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505, 517 (1986); *see also* Gordon, *Critical Legal Studies*, 10 LEGAL STUD. F. 335, 339 (1986); Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 430-31 (1987).

47. *See* Delgado, *supra* note 1, at 100-01. *But cf.* Brewer, *supra* note 8, at 1850 n.20. Brewer doubts whether mainstream scholarship has absorbed this lesson yet:

> Kennedy can safely assume that most of his readers will themselves assume the legitimacy of the scientific-legal paradigm; after all, for the past several centuries of European cultural hegemony, that style has established its predominance as *the* paradigm whose mastery virtually determines the distribution of awards in most of the intellectual professions.

Id.

48. Kennedy, *supra* note 2, at 1772 (invoking "widely accepted ideal of scholarly procedure"); *id.* at 1762, 1801 (referring to conventionally accepted standards of merit).

49. *Id.* at 1762-63, 1772-74.

be regarded as laughable.[50] The debate thus proceeds in a circle: the modernist rejecting necessity and singleness of perspective, the traditionalist asserting that we must start *somewhere*, the modernist demanding to know why just *here*, and so on.

b. Context

Kennedy, like most mainstream scholars, embraces universalism over particularity, abstract principles over how-it-is-for-me at this time and place.[51] Modern movements like feminism and CRS emphasize the opposite, in a manner recently known as the "call to context."[52] For the modernist, general laws may be fine in some areas, but political and moral discourse is not one of them. Normative discourse is highly fact sensitive—the addition of even one new fact can change moral intuition drastically. Imagine, for example, a youth convicted of a serious offense. The issue is the severity of the punishment. The case is unusually close; you have no clear intuition one way or the other. Now, add one new fact—the defendant did the same thing several times before, or was seen walking away from the scene of the crime laughing. One's intuition moves toward harsh punishment. Add a different fact—the defendant was abused as a child, or is mentally impaired. Intuition changes—leniency now seems more fitting.

Most moral and political discourse, the CRSer might emphasize, is highly fact sensitive in this fashion. Yet, many mainstream scholars, when asked to analyze a situation like the one above, (1) will declare only certain features of the problem relevant, and then (2) will decide the case under some general principle of law or policy.[53] Such an ap-

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50. On legal formalism—the view that law consists of drawing logical conclusions from premises taking the form of rules of law—see Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243 (1938) (legal realist critiques of formalism) and Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). On formalism-rationalism generally, see Schlag, *supra* note 31, at 1209-13.

51. *E.g.*, Kennedy, *supra* note 2, at 1773 & n.116, 1802, 1807; *see also* Brewer, *supra* note 8, at 1850 n.20; Kennedy, *supra* note 44, at 1772-73 (both referring to this position as "scientific legal" or "universal[ist]"). On the current movement back toward formal neutrality in public law, see Karst, *Private Discrimination and Public Responsibility:* Patterson *in Context*, 1989 SUP. CT. REV. 1, 24-46.

52. *See* Delgado, *Mindset & Metaphor*, 103 HARV. L. REV. 1872, 1873 (1990). *See generally Symposium: Legal Storytelling*, 87 MICH. L. REV. 2073 (1989) (collection of articles on narrativity and subjective experience in legal discourse).

53. *See, e.g.*, Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99; Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (both discussing neutrality and "colorblindness" in the law of race remedies and sentencing). The movement away from particularized excuses and defenses in criminal law exemplifies the mindset I have in mind. A conservative substrate within this general orientation manifests itself in the movement toward strict construction. *See* Schlag, *supra* note 31, at 1209-13 (discussing "rationalist" and "prerationalist" legal thought).

proach, the modernist insists, "throws away facts" and is inferior to one that considers them all at once.

To which the mainstream scholar might retort that moral reasoning is not nearly so contextual as the CRSer or feminist thinks. Particularity may be what calls up moral judgment in given cases, yet those cases ultimately must be addressed under general rules.[54] Thus, principled argument does not "throw away facts," rather it tells us that some are more pertinent than others. The relevant principle of law or ethics tells us which facts are to be considered. These principles are necessary because morality would be undermined if actors came to see obligations as merely contextual, or if rules had too many exceptions and loopholes. Our approach to social and ethical problems must be coherent and subject to duplication by others. Like cases must be decided in like ways.[55]

To which the CRSer might reply that the appearance of certainty and objectivity given by general rules comes at too great a cost. Subsuming the present case under a broader rule saves time and gives the impression of consistency. Yet, just as this case is like that other one, it also will be unlike it in certain respects. The universalist approach will conceal those respects, rendering the decision worse than one made free of the encumbering rule. Political and moral analysis is situational—truths only exist for this person in this predicament at this time in history.[56] This impasse, like the earlier colloquy on merit, cannot be resolved—the argument goes in a circle, driven by dissonant modes of argument, premises, and understandings about self, objectivity, and even the "genderedness" of discourse.[57]

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54. The principal spokesperson for this view is Ronald Dworkin. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); *see also* Winston, *On Treating Like Cases Alike*, 62 CALIF. L. REV. 1 (1974).

55. *See* Winston, *supra* note 54.

56. *See* sources cited *supra* note 53.

57. I say "genderedness" because the need to approach social and moral problems by means of universal rules tends to be associated, in our society at least, with males. *See, e.g.*, L. KOHLBERG, ESSAYS ON MORAL DEVELOPMENT (1981) (pronouncing the rule-bound approach superior and most women's ethical reasoning inferior); *see also* L. KOHLBERG, THE PSYCHOLOGY OF MORAL DEVELOPMENT: THE NATURE AND VALIDITY OF MORAL STAGES (1984); L. KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE (1981). The women in Kohlberg's sample approached hypothetical ethical problems on a case-by-case basis, seeking imaginative solutions that the examiner's hypothetical had not contemplated. Because their approach was concrete, not abstract, particularized, not universal, Kohlberg placed women at a lower ethical stage than most men he tested, prompting a well-known reply by Carol Gilligan. *See* C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). Gilligan argued that women's approach to ethical reasoning was different from, but not qualitatively inferior to, men's, and that it was based on an ethic of care and connection, not abstract rule following. A feminist or postmodernist replicating Kohlberg's study today might go further than Gilligan, finding men's abstract rule-bound approach positively inferior to women's more context-based one, thus, in effect reversing the hierarchy and placing men (like those in Kohlberg's sample at any rate), at the bottom and women on the top.

2. A Way Out of the Impasse? Brewer's Call for Storytelling

As the colloquies and previous discussion show, the two schools of civil rights scholars are divided sharply over goals, methods, and even the terms and pictures they would use to discuss these matters.[58] Because of these differences, Brewer's call for cooperation and common cause might begin to sound *coercive*. Consensus gives power to members of the dominant group—they dictate its terms, and they determine when (as with CRS) it has been breached and when it has been restored.[59] Consensus threatens to erase our identity, not that of the mainstream scholars—it is significant that this Essay is written by someone in CRS rather than in the latter group.

Perhaps to soften these overtones, Brewer concludes his Foreword with a call for narrative, for "the telling of stories, to the potential importance of which one coursing stream of Critical Race Theory alerts us."[60] Legal storytelling, Brewer writes, can soothe some of the "bad feelings among these common aspirants that stand in need of repair for the still unfinished and still morally and politically critical work

58. *See supra* Part II, distinguishing various ways in which an appeal to common cause can fail, including (1) disagreement over the goal to be attained, and (2) conflict among subgoals. Suppose, despite what I have said about the difficulties of conversation between the two sets of scholars, they nevertheless were able to sit down at a table and talk. Could they find agreement on a program and objective?

(1) *The main goal.* Brewer writes that the two camps of civil rights scholars could agree at least on the main goal of equality among the races, or "equal concern and respect, or anti-subjugation, or anti-oppression." Brewer, *supra* note 8, at 1851. This deceptively simple statement of goals, however, conceals sharply different conceptions of equality. Kennedy's vision of racial justice consists of the present system minus "social bias," by which he means intentional, provable discrimination aimed at a superbly qualified black candidate. CRS scholars envision racial justice quite differently. In their vision, persons of color would not need to resemble successful whites to fit in, but would achieve success without sacrificing what is distinctive about themselves. The system would change to meet their unique needs and in the process would expand and enrich itself. *See* Delgado, *supra* note 25; Kennedy, *supra* note 44.

(2) *Means and subordinate goals.* CRS scholars also differ with Kennedy in their nnderstanding of the tasks necessary to achieve the goal. For both, the problem could be termed "discrimination" in the system, but that term would have very different meanings for each. For Kennedy, ending discrimination means (a) eliminating direct, conscious bigotry aimed at blacks and others, and (b) assuring access to a good education so that people of color are equipped to compete. For CRSers the main obstacle to equality is majority mindset—a vast, interlocking set of conscious and unconscious structures, of thought and practice, that subordinate people of color for the benefit of whites. What appear to be common goals, then, are only linguistically similar articulations of different visions—one, incrementalist and moderate, the other radical and ambitious. The common ground on which the two camps stand is only our common dissatisfaction and rage with the status quo.

59. They also determine, by reference to their own understandings, when a compromise offer is reasonable, *i.e.*, what constitutes "meeting the other group halfway." For example, imagine: "We will agree to expand merit criteria to include perseverance in the face of obstacles, if you will agree to give up this postmodern silliness about point of view and extremely unflattering ideas about interest convergence."

60. Brewer, *supra* note 8, at 1854.

ahead."[61]

Is legal storytelling up to this task? Until now, we have considered stories and counterstories as tools for changing belief among receptive but uncommitted members of the majority group.[62] Thus, there is a degree of irony in Brewer's suggestion that we in effect treat each other as though the other were white. We should not reject Brewer's suggestion merely for this reason, however; the truth often may be ironic. Nevertheless, I confess doubt. Storytelling works best with the uncommitted, and even then, it must work insinuatively, not frontally.[63] Stories require suspension of disbelief. If the listener is on guard or firmly committed to another position, the story will fail.[64]

IV. CONCLUSION

For the reasons I have mentioned, I believe Brewer's common-cause appeal is likely to go unheeded. CRS and the mainstream liberals see the race problem in different terms. They disagree on its shape and dimensions and, unsurprisingly, offer different prescriptions on how to

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61. *Id.*

62. Indeed, the story Brewer recounts to illustrate his point, Martin Luther King's "Dixie" story, was one King told to a largely white audience. Brewer, *supra* note 8, at 1854; Delgado, *supra* note 25, at 2413-16.

63. Delgado, *supra* note 25, at 2430-31, 2434-35.

64. *Id.* Consider, for example, how four different audiences might react to Brewer's own story. Brewer recounts a story Martin Luther King once told a radio audience. In the story, King's children took part in a musical program at their newly desegregated Atlanta school. The program contained only music drawn from the musical mainstream. No spirituals or other black music was included, and the program concluded with the playing of "Dixie." Brewer, *supra* note 8, at 1854. This is surely an effective and moving story, told by a master storyteller. Yet, would it automatically produce agreement—reduce the original distance among—all readers? One could imagine different readers reacting as follows:

(1) *A hard-line Southerner*: "Of course the program concluded with 'Dixie'—it's our cultural symbol. If these newly admitted blacks want to fit into our schools and culture, they had better get used to that. There is nothing political or offensive about 'Dixie'; it's a rousing good song. Whether minstrel music ought to have been included in the program, well, we couldn't include everybody's favorite music or we would have had an interminable program with Irish jigs and Polish polkas going on all night."

(2) *A sympathetic white*: "King is absolutely right. Anyone can understand the pain of a young black schoolchild forced to listen to the symbol of whito resistance. And the failure to include black music in the program was indefensible—sheer cultural supremacy and narrowness. The school administrators should have been ashamed of themselves."

(3) *A scientific legalist*: "This may suggest cultural imperialism at work, but it may not. We must first determine whether black spiritual music meets the merit-based standards required for inclusion. Maybe the rest of the program consisted of Beethoven and Mozart. What specific black works were proposed, and how do we know they measured up to the competition?"

(4) *A member of CRS*: "Brewer's very story illustrates our point—the school administrators simply didn't see anything wrong with what they did. Under prevailing musical standards in effect in the South at the time, they probably did the right thing—offered the audience what most of it wanted. Our point is that this entire mindset was wrong and needed changing; but it won't change until we begin asking the right questions."

cure our racial ills. Perhaps recognizing the size of the gulf between the two groups, Brewer concludes his call with a plea for mutual storytelling. The exchange of stories and narratives should, of course, be encouraged.[65] Yet, I question whether they will have much effect in the current polarized climate.

Some of us believe a storm is coming, but others believe it is only a squall. Some of us are committed deeply to the present system, but others liken the current civil rights approach to a too-short tree and are anxious to try a taller one. Conflict and vigorous competition thus may be more in order today than a premature peace that leaves vital questions unaddressed.[66] Just as explorers sometimes really want to go to different destinations, CRS and the scientific-legalists, for now at any rate, may be destined to march along different, and not appreciably converging, tracks.

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65. I have made the same suggestion a number of times. *See, e.g.*, Delgado, *supra* note 1; Delgado, *supra* note 25; Delgado & Stefancic, *supra* note 24. Indeed, a few mainstream liberals have modified their views in our direction.

66. Not all disputes can be made to disappear through verbal means. On the limits of storytelling, see Delgado & Stefancic, *Norms and Narrativity: Can Judges Avoid Serious Moral Error?*, 67 TEX. L. REV. ___ (1991, forthcoming). *See also* Delgado, *supra* note 52, at 1876-77 (observing that unarticulated differences about power, knowledge and the "naturalness" of certain arrangements may impede discussion between CRS and the scientific-legal wing of civil rights scholars).