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MINDSET AND METAPHOR

Richard Delgado*

Much of what Professor Randall Kennedy says in *Racial Critiques of Legal Academia*¹ has caused puzzlement if not outright consternation among his colleagues of color.² On reflection, I believe this is so not because of what he says; others have been exhorting us for years to buck up, stop blaming all our ills on racism, and give credit where credit is due.³ Nor do I think the disquiet stems from the identity of the writer — an articulate, well-placed young black scholar. Neoconservative black writers such as Thomas Sowell, Glenn Loury, and Clarence Pendleton have been leveling similar (if not harsher) charges in our direction for some time.⁴

I think, rather, that the puzzlement — the sense that something is wrong, or at least odd, about Kennedy's article — results from certain ways he deploys legal language and argument. If I am right, these features of Kennedy's discourse, not its content, are responsible for the furor that accompanied the article's publication.⁵ In this Response, I focus on one major feature of this discourse: Kennedy's mixing of insider and outsider language and his concomitant use of analogy and metaphor.

For the purposes of justifying the current politico-legal system, Kennedy first appears as a scientific, objective proponent of meritocratic, neutral-principles analysis and argument.⁶ Oppositionists'

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

² See, e.g., Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 97-103 (1990); Wiener, *Law Profs Fight the Power*, NATION, Sept. 4/11, 1989, at 246; see also Matsuda, *Critical Consciousness*, NATION, Nov. 27, 1989, at 622 (letter to the editor) (responding to charges of lack of rigor and "poverty-pimping").

³ See sources cited *infra* note 4; diLeonardo & Reed, *Academic Poverty-Pimping*, NATION, Oct. 23, 1989, at 442 (letter to the editor). Some of Kennedy's criticisms remind one of formalistic, neutral-principles themes we have been hearing since at least the 1950's. See, e.g., Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

⁴ See, e.g., T. SOWELL, *AFFIRMATIVE ACTION RECONSIDERED: WAS IT NECESSARY IN ACADEMIA?* (1975); T. SOWELL, *BLACK EDUCATION: MYTHS AND TRAGEDIES* (1972). For a more literary, less clear-cut formulation of some of these themes, see Steele, *I'm Black, You're White, Who's Innocent? Race and Power in an Era of Blame*, HARPER'S, June 1988, at 45.

⁵ See Wiener, *supra* note 2; Rothfeld, *Minority Critic Stirs a Debate on Minority Writing*, N.Y. Times, Jan. 5, 1990, at B6, col. 3; see also *Racism in Legal Academe*, L.A. Daily J., Feb. 27, 1990, at 6, col. 1 (covering the same controversy). Kennedy's article was a centerpiece for discussion at a panel entitled *New Voices in Legal Scholarship*, Association of American Law Schools (Sept. 8, 1989) (videocassette on file with AALS).

⁶ See, e.g., Kennedy, *supra* note 1, at 1773 (describing universalism, the "ethos of modern science," and the notion that truth claims must be tested by impersonal criteria); see also *id.* at

claims must be proven,⁷ critics must bear heavy burdens of persuasion,⁸ and persons demanding entry into inner circles must show that they satisfy agreed-upon standards of excellence.⁹ To be compelling, claims of system-wide exclusion must account for potential causes of exclusion other than prejudice.¹⁰ In legitimating the current system, therefore, Kennedy poses as a conventionalist.

But for purposes of resisting attacks on the legal academy's existing structure — of showing that the exclusion of scholars of color may be deserved — Kennedy adopts the stance of the criticalist, abjuring generalization and insisting that we particularize and limit each of our statements.¹¹ Speaking on behalf of our communities, Kennedy reminds us, is “essentialist”; we must remember the many differences that exist within minority groups.¹² Data, even those showing flagrant exclusion,¹³ do not speak for themselves but require interpretation, after which they may end up proving nothing, or the opposite of what the proponent intended.¹⁴ Arguments, too, need not go where their proponents think, but may reach some unforeseen and much more alarming destination.¹⁵ We should ask: “who benefits from our claims; what is their underlying agenda?”¹⁶ Kennedy deconstructs the deconstructors, critiques the critics, contextualizes the contextualizers.

I believe Kennedy's mixing of discourses — sometimes adopting conventional, quasi-scientific analysis, other times critical or modernist approaches — accounts for much of the discontent his article has spawned. If he did no more than analyze the new Critical Race scholarship through the lens of conventional, neutral-principles criticism, we would say: “fair enough — we recognize that; we know how

1749 (“Stated bluntly, they fail to support persuasively their claims”); *id.* at 1762 (“Considerable evidence suggests that the paucity of black professors is explained by”); *id.* at 1778 (noting that quantitative claims fail without qualitative analysis).

⁷ See *id.* at 1774, 1778.

⁸ See *id.* at 1774 (noting my failure to carry the burden); *id.* at 1779 (noting Matsuda's failure).

⁹ See *id.* at 1776–77, 1801–02, 1806 (emphasizing the role of merit in the distribution of social and academic rewards); see also Delgado, *supra* note 2, at 106 (describing Kennedy's unwillingness to acknowledge “procedural racism”).

¹⁰ See, e.g., Kennedy, *supra* note 1, at 1762–70 (suggesting that claims of exclusion must account for the asserted lack of qualified minority candidates for academic posts).

¹¹ See *id.* at 1775–76, 1779–82.

¹² See *id.*

¹³ See Espinoza, *Masks and Other Disguises: Exposing Legal Academia*, 103 HARV. L. REV. 1878, 1882–83 & nn.21, 23 (1990).

¹⁴ See Kennedy, *supra* note 1, at 1763.

¹⁵ See *id.* at 1778–87 (asserting that Matsuda's arguments about the distinctiveness of minority voices could lead to negative stereotyping).

¹⁶ *Id.* at 1789; see also *id.* (noting that our motivations are “political”); *id.* at 1807 (charging that we engage in guilt-tripping); *id.* at 1809–10 (charging that we play the “race-game”).

to respond."¹⁷ If he used critical tools¹⁸ against us, again we would say "fine" and begin soul-searching to see whether we had in fact overstepped.¹⁹ But his deployment of the two approaches — at times scientific, rational, meritocratic, at other times the direct opposite — makes us question his sincerity. Both modes of attack have the same bottom line — the empowered remain empowered, while the disempowered are rendered even more so. Neutrality and objectivity are deployed to make the current system impregnable. And deconstruction, anti-essentialism, and other critical tools are used to atomize, weaken, and invalidate the claims of outsiders asking to be let in. The discourse of powerlessness is used against the powerless; that of power, in defense of the powerful. Each approach could be used to *attack* the status quo (as many critics and some mainstream liberals have done). But when used together to defend the current system, one wonders about the author's objectivity and consistency.²⁰

Kennedy's article is also curious in the way it deploys metaphors and word-pictures. One way in which we make sense of the world around us is by means of narrative structures, stories, and metaphors.²¹ These representations help us explain and deal with the unfamiliar and troubling by likening them to that which we know. But they also say something about the speaker who chooses them: the choice of metaphors and other word-pictures can give a glimpse into how the writer reasons and can show the hidden contours of his or her mental world.

In the racial arena, insiders and outsiders, unsurprisingly, often choose different stories and metaphors to describe their experience.²² Through retelling, these stories and pictures come to seem natural and

¹⁷ Derrick Bell, for example, debunks neutral-principles reasoning virtually throughout his work. See, e.g., D. BELL, *AND WE ARE NOT SAVED* (1987); see also Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–28 (1987) (arguing that conventional antidiscrimination law and theory are incapable of dealing with racism and that new approaches are needed).

¹⁸ By "critical tools," I mean anti-essentialism, deconstruction, exposure of base motivations, and a demand for context. See *supra* p. 1873.

¹⁹ See Matsuda, *supra* note 2, at 622.

²⁰ Of course, Kennedy may be using mainstream arguments for the benefit of one audience (mainstream readers) and critical arguments to enlighten us — choosing his approach to suit the audience at hand. Yet he nowhere makes this plain, with the result that his article strikes us as having an ad hoc, what-works quality, in which the author, like the writer of a hastily prepared brief, adopts whatever combination of arguments may get the job done, without focusing on consistency or thematic focus.

²¹ See I & 2 P. RICOEUR, *TIME AND NARRATIVE* (K. McLaughlin & D. Pellauer trans. 1984–1985); Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4–7 (1983); Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413–18 (1989). See generally Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989).

²² See, e.g., Delgado, *supra* note 21, at 2418–35.

true, and those of other groups, unnatural or false.²³ Kennedy, an insider, looks at our metaphors harshly and critically. For example, in my *Imperial Scholar* article,²⁴ I use the metaphor of "standing" to explain how the legal system would gain by incorporating more fully the views of scholars of color in civil rights theory.²⁵ Kennedy finds the metaphor outrageous and subjects it to the test of literal truth.²⁶ Not surprisingly, he finds it wanting.²⁷

Despite his sensitivity to the slightest hint of overstatement in our use of metaphor, Kennedy deploys ones of his own that strike me as ill-considered, if not downright menacing. Consider, for example, his use of the metaphor of the minority *pool*, central to his attack on Derrick Bell.²⁸ When Kennedy speaks of the minority pool, he means at least two things: that lawyers of color with the aptitude and credentials for law teaching are few in number²⁹ and that law schools wishing to draw from this pool will soon come into competition with each other and with private employers for the services of these stellar candidates.³⁰ Consequently, Kennedy reasons that we should not be too critical of law faculties that are making slow progress toward integrating themselves.³¹

Kennedy offers little support for the proposition that the pool is small, citing only a single newspaper article that is itself devoid of any factual or statistical data on the pool's size.³² Yet Kennedy elsewhere accuses his targets of arguing from unsupported assertion and unproven analogy.³³ I believe mental pictures such as the pool enable him to avoid noticing his own inconsistency. Pools conjure up the image of something static. They rarely change shape or direction; unlike rivers or streams, they are inert, requiring heroic efforts to alter their shape or size. Thus, if minority lawyers compose a pool, one immediately knows that there cannot be many of them and that

²³ See sources cited *supra* note 21 (noting that stories shape perception and assure us that the social world is as we think it is and should be); Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?* 97 *YALE L.J.* 923, 929, 937-38 (1988).

²⁴ See Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 *U. PA. L. REV.* 561 (1984).

²⁵ See *id.* at 566.

²⁶ See Kennedy, *supra* note 1, at 1788-1801.

²⁷ See *id.* at 1795 (asserting that widespread application of the idea would be disastrous).

²⁸ See *id.* at 1762-65. Bell, in his *Chronicle of the DeVine Gift*, urges that elite law schools have an unspoken ceiling on the number of faculty of color they will hire, no matter how qualified. See D. BELL, *supra* note 17, at 140-61.

²⁹ See Kennedy, *supra* note 1, at 1765-66.

³⁰ See *id.* at 1762-63.

³¹ *But cf. id.* at 1767 ("My comments should not be read to suggest that legal academia is free of racial prejudice.").

³² See *id.* at 1762 n.71, 1763 nn.72, 73, 1768 nn.90, 92 (citing Kaplan, *Hard Times for Minority Profs*, *Nat'l L.J.*, Dec. 10, 1984, at 28, col. 1).

³³ See Kennedy, *supra* note 1, at 1770-78, 1788-1801.

their numbers will not change rapidly over time.³⁴ The pool analogy thus has a powerful apologetic aspect.³⁵

For many people of color, the pool metaphor is strikingly inapt. Liberation movements and their actors are more like a wild, coursing river.³⁶ It may at periods in history be still, dammed, with progress slowed. But sooner or later, the river will burst its bounds, spreading itself across the land.³⁷ Even if the pool metaphor were apt, there would still be reason to question its normative power: after all, law schools, which control the size of the pool, should scarcely be excused from acting by virtue of the condition they have created.³⁸ We know that faculties frequently narrow the size of the minority pool artificially by the way they define academic openings.³⁹ Yet, when filling urgently needed slots, law faculties feel free to draw candidates from many sources; the pool becomes a river, or an ocean even, with many tributaries and sources.⁴⁰

The pool metaphor thus de-energizes the search for professors of color and allows us to be satisfied with slight or nonexistent gains. To be sure, the new Critical Race Theorists use metaphors, too — standing, silencing, scholarly imperialism. But unlike Kennedy, our metaphors are meant to stimulate, not contain, debate; we recognize that metaphors are more starting points for thinking about certain realities than they are the final word on how that reality looks.

As I have shown, there are sharp differences of substance and approach between Kennedy and the Critical Race Theorists. I doubt all these differences can be bridged, but this does not mean that fruitful discussion cannot take place. Among the issues both parties should discuss are the legitimacy of certain standards of argument and

³⁴ Moreover, the material in a pool is fungible — one gallon of water is much like any other. To be fair, Kennedy does not make this latter claim — quite the contrary. See *id.* at 1775–76, 1779–82 (insisting, on fiercely anti-essentialist grounds, that people of color are individuals who must be treated on their own terms). But the metaphor enables some law faculties to treat candidates of color interchangeably.

³⁵ On the apologetic aspect of racial myths and stories, see Delgado, cited above in note 21, at 2421–22.

³⁶ See V. HARDING, *THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA* (1981).

³⁷ For a classic exposition of this idea, see *id.*

³⁸ Law schools control the size of the pool by their decisions on minority admissions, by decisions regarding whom to groom for teaching, and by their decisions whom to hire as faculty members, how to determine eligibility, and how to treat these faculty members once hired. Cf. Bell & Delgado, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV 349 (1989) (suggesting that harsh or inconsistent treatment of junior faculty of color contributes to attrition and rapid turn-over).

³⁹ Consider, for example, a search for a person of color who has five to seven years of teaching, who teaches tax and trusts and estates, and who can coach the moot court team.

⁴⁰ For example, in searching for tax professors, many law schools are willing to relax traditional criteria, such as publication record or top-of-the-class ranking.

scholarship and the power of contested metaphors, such as the minority pool. Kennedy needs to acknowledge that these standards and metaphors are not fixed; rather, we create them, although the structures of power and tradition that grow up around them once they are created make them seem natural, fixed, and immutable. By taking such an uncompromising and polar position vis-à-vis the new Critical Race Theorists, Kennedy has focused attention on the matters that separate him — and liberal scholarship generally — from us. In so doing he has placed on the scholarly agenda questions of power, legitimacy, and voice that should have been there long ago, and in this sense he has done us all a favor.