

SCHOLARLY PARADIGMS: A NEW TRADITION BASED ON CONTEXT AND COLOR

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INTRODUCTION

This essay addresses two issues: (1) whether neutral scholarly paradigms or traditions exist, and (2) assuming their existence, whether minority scholars should embrace them. These two issues, which I have addressed indirectly in my recent scholarship, have been the primary focus of my academic interest.¹ I believe many scholars have lost sight of these questions in the debate over the existence and worth of the "voice of color." This debate can be reduced further to the issue of whether there is *one* predominant scholarly paradigm or tradition by which to evaluate the merit of all scholarly works, or whether there are multiple evaluative scholarly paradigms which should be employed to evaluate "non-traditional" scholarship.

There is an ongoing debate over the existence and use of "voice" in legal scholarship by scholars of color.² Some scholars of color assert that they speak with a unique, distinctive voice that is privileged to speak to certain—for want of a better term—"color-related" issues.³ Professor Randall Kennedy of Harvard Law

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

2. To some extent, the debate over the existence of a voice of color parallels the debate over the existence and use of the feminine voice. Indeed, many of the same issues raised by the claim that there is a voice of color are implicated in the debate over the feminine voice. See generally Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

3. See, e.g., Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 333-42 (1987) (discussing the distinct consciousness of people of color, shaped by racial identity); Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 97-98 (1990) (responding to Professor Randall Kennedy's criticism of the use of nonwhite voice and claiming, "[i]t is rather, that all people of color speak from a base of experience that in our society is deeply structured by racism").

School intensified the debate over the existence of the voice of color with the publication of *Racial Critiques of Legal Academia*,⁴ in which, among other things, he challenged the existence of the voice of color and its privilege to speak to certain race-related issues. The publication of Professor Kennedy's controversial article has prompted scholarly discourse about this issue,⁵ including a colloquy in *Harvard Law Review*⁶ and a reply to this present essay.⁷

The relevance of the debate over the existence and use of the voice of color to the issue addressed by this essay should be obvious. The debate over the existence and use of the voice of color, or for that matter, the feminine voice,⁸ is one about the appropriate paradigm to be used by scholars in the legal academy in evaluating the merit and value of scholarship produced by other scholars, including scholars of color intending to speak in the voice of color. In essence, those who reject the existence of voice do so premised on an academic paradigm that evaluates scholarship based on a norm of neutrality and uniformity. This approach minimizes and devalues the identity of the scholar.

Scholars of color claim an important *difference*⁹ from the majority of their peers in the academy. Scholars of color, claiming to speak in the voice of color, believe that their identity and the distinctiveness of that identity provide them with a unique perspective that allows the voice of color to speak (i.e., to be articulated by certain scholars of color). Their claim to voice and empowerment is based on the recognition that their identity as authors of color is inherently valuable. This concept is at odds with the traditional

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

5. See, e.g., Delgado, *supra* note 3; *In Favor of Context*, *supra* note 1; *The New Voice*, *supra* note 1.

6. *Colloquy, Responses to Randall Kennedy's Racial Critiques of Legal Academia*, 103 HARV. L. REV. 1844 (1990). The individual responses appearing as part of this colloquy are: Scott Brewer, *Introduction: Choosing Sides in the Racial Critiques Debate*, 103 HARV. L. REV. 1844 (1990); Milner S. Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855 (1990); Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864 (1990); Richard Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872 (1990); and Leslie G. Espinoza, *Masks and Other Disguises: Exposing Legal Academia*, 103 HARV. L. REV. 1878 (1990).

7. Robin D. Barnes, *Scholarly Discourse*, 16 VT. L. REV. 933 (1992).

8. See Harris, *supra* note 2 (Black women experience many "selves," including feminine self, exposed to racism that white women cannot experience.).

9. J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987) (concluding that deconstruction demonstrates the difference between the privileged and the excluded).

scholarly evaluative paradigm that consciously attempts to ignore the identity of an author when evaluating the worth of scholarship.

Dissonance and divergence occur when an attempt is made to apply the traditional evaluative academic paradigm to the works of scholars of color claiming to speak in a distinct voice. These effects appear when the academic paradigm rejects the individuality and distinctiveness (the contextual framework) of the author or speaker as an evaluative criteria in favor of a merit-based criteria. The merit-based criteria, allegedly premised on neutrality, is, in reality, based on a consensus determination of merit by a dominant group that historically has excluded people of color and others who are not members of that dominant group. I contend that the academic paradigm for evaluating the existence or worth of what I deem "traditional" scholarship, aimed at and interpreted by reader-interpreters employing the consensus-based norm, is one that negates the existence and use of the voice of color. I believe this is properly so. On the other hand, that same evaluative paradigm cannot be used to evaluate scholarly writings when the expressed or implied authorial intent is premised, in whole or in part, on a perspective based on the author's identity and life horizon, to use Gadamerian terminology.¹⁰

I contend in part I of this essay that the evaluative academic paradigm employed by "traditionalists" is too narrowly circumscribed to evaluate the merit of works prepared by scholars of color who implicitly or explicitly speak in the voice of color. I claim in part II that there is an interpretive paradigm, based on the perspectives of the author and reader, that can and should be employed when the author is speaking in the voice of color. This paradigm defines the concept of the voice of color in a manner that is non-stigmatizing and is capable of useful categorization. Finally, in part III, I make an analogy concerning developments in the field of epistemology. Epistemological theory lends credence to the view that no neutral evaluative paradigm exists, somehow standing independently from the consensus-driven evaluative paradigms employed by the evaluators. Epistemological theory also indicates that objective truth does not exist. In other words, there is no single, correct evaluative paradigm upon which to base a determina-

10. William N. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 346 (1990) (citing HANS-GEORG GADAMER, *TRUTH AND METHOD* (G. Barden & J. Cumming trans., 2d ed. 1975)).

tion of scholarship as good, bad, or mediocre. As with independent truth claims, the objective standard of evaluation must give way to a subjective or contextual standard.

I. DEFINING THE OBJECTIVE EVALUATIVE PARADIGM

I begin with a description of the concept of a paradigm as established by Thomas Kuhn in *The Structure of Scientific Revolutions*¹¹ and paraphrased in the following way by Melvin Eisenberg:

[A] paradigm is a model, principle, or theory that explains most or all phenomena within its scope, but is sufficiently open-ended to leave room for the resolution of further problems and ambiguities. At the time of its formation, a paradigm looks both backward and forward. Looking backward, the paradigm permits and indeed requires reconstruction of prior explanations. Looking forward, the paradigm will be applied and extended, by further articulation and specification, to resolve additional problems and ambiguities and to uncover new or previously disregarded phenomena.¹²

Most importantly, a paradigm is not a static, unchanging vehicle applied as a constant to each situation. Inherent in the design of a paradigm is that it is ever-changing, ever-adapting to accommodate new developments. Thus, any paradigm, including a scholarly paradigm, is, by definition, inherently flexible in order to deal with situations for which the paradigm has been developed. I believe that a valid paradigm for the evaluation of scholarship exists as long as it is recognized that such a paradigm is based on what has been termed "ultimately contingent" and "provisionally finite" scholarship.¹³

11. THOMAS KUHN. *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

12. Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 751 (1982) (footnote omitted) (paraphrasing KUHN, *supra* note 11).

13. The following commentary by Professor White is relevant:

There is, however, an important distinction lurking here: the distinction between scholarship as *ultimately contingent*, in the sense that it is shaped by paradigms within a professional community and beliefs within a larger culture, and scholarship as *provisionally finite*, in the sense that certain works appear, are evaluated, and provide opportunities for concrete disagreements by persons who share meta-theories but differ on issues of a less exalted kind. . . . [O]ne cannot address the question of how scholarship is received by communities without addressing the scholarship that in fact appears. On some occasions new scholarship may be wholly cognizable within the tacit interpretive framework of a community; on other occasions it may not be. But on all occasions, the merits of a work of scholarship cannot be

This ultimately contingent and provisionally finite paradigm, existing for the evaluation of scholarship, is defined by a professional consensus of what constitutes meritorious work. In other words, without a professional consensus of what is good and meritorious (i.e., without an evaluative norm), indeterminacy will result from following Kuhnian logic to its "direful end."¹⁴ In order for meaningful scholarship to exist, there must be a critical standard imposed by the collective body of scholars to judge that work. The evaluative paradigm does not exist independently of the academic community as an absolute standard, isolated from the interpretive community.¹⁵ The standard is shaped by, and is largely a function of, the metatheories (or value judgments) of the interpretive community. Tacit presuppositions of the academic community shape the evaluative paradigm and determine the merit accorded to scholarship. Consequently, the paradigm for determining meritorious scholarship is inextricably intertwined with the metatheories or value judgments agreed to and accepted by the community. Thus, the consensus standards on which the scholarly interpretations are based are created by the academic community.

As I have explained elsewhere,¹⁶ the term "interpretive community" originates from literary theorist Stanley Fish.¹⁷ Professor Fish believes that "tacit presuppositions" characterizing an interpretive community and informing its actions are impervious to conscious change or choice.¹⁸ Radical indeterminacy is avoided be-

determined independently of an assessment of the work itself. Judgments about scholarship cannot be said to be wholly determined; they are susceptible to reevaluation by exposure to the scholarship being judged. Indeed it may be the appearance of seminal scholarship that stimulates the formation of mini-communities ("schools" of thought), rather than the presence of communities that predetermine what scholarship will be seminal.

G. Edward White, *The Text, Interpretation, and Critical Standards*, 60 TEX. L. REV. 569, 577-78 (1982).

14. *Id.* at 570.

15. Throughout this essay I use the term "interpretive community" to refer to the collective body that is the legal academy which serves an evaluative as well as interpretive function with regard to articles authored by legal scholars and others.

16. See *In Favor of Context*, *supra* note 1, at 153 (discussing Professor Fish's use and definition of the terms "interpretive communities" and "tacit presuppositions").

17. See STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* (1980); Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987) [hereinafter *Uses of Theory*].

18. Thus Professor Fish writes,

[Judges and legal theorists are] merely registering what they see and proceeding in ways that seem to them to be obligatory and routine, and they do these things not because they have applied this or that epistemology, but because within the beliefs and assumptions that constitute their perception

cause the community cannot choose to accept or reject these tacit presuppositions. Thus, under Fish's view, tacit presuppositions serve as constraints on interpretation.

To the contrary, I believe that the interpretive community has the cognitive capacity to recognize and embrace different scholarly paradigms. This is a capacity that Professor Fish rejects based on his definition of tacit presuppositions. By suggesting that tacit presuppositions are, to some degree, freely chosen, I run the risk that my concept of tacit presuppositions is no different than any other type of subjective preference that one can assume or reject at will. This view, however, leads to the radical indeterminism that Professor Fish seeks to escape and, in turn, undermines the idea of a stable conception of merit. At minimum, it jeopardizes the concept that there is some form of community consensus. In other words, radical indeterminism is consistent with the notion that academic merit can be based on a paradigm that can be uniformly applied to judge scholarship.

To avoid this outcome, I argue, instead, that there are evaluative standards (tacit presuppositions) employed by the academy (the interpretive community) that are explicit enough to allow for conscious change. These partially revealed evaluative standards avoid indeterminacy because they depend on a stable, though evolving, consensus of the legal community. As Professor White has demonstrated, rejection of objectivity *and* subjectivity as interpretive theories does not result in negation of the interpretive community or the tacit presuppositions upon which interpretive theories are based. Indeed, Professor White demonstrates that as new paradigms emerge, based on old paradigms, tacit presuppositions are simultaneously employed and consciously changed based upon the conception of provisionally accepted truth.¹⁹

and their sense of possible courses of action, *there is nothing else they could do.*

Uses of Theory, *supra* note 17, at 1785 (emphasis added).

19. Professor White writes:

But suppose the first possible meaning of objectivity is a more modest one: what has been demonstrated to be a right answer for a community at a point in time and space. . . . If every community paradigm has its "puzzles," to use Kuhn's language, there will be questions to which the community urgently seeks answers, and if I am correct that the quest for the answers must take place within the common language of the community, then prospective answers to urgent questions must be *shown* to be right. . . . And it is clear that for a time some answers *are* shown to be right, at least in the sense that they are provisionally accepted and used as a basis for inquiring about other

Like Professor White, I contend that there are evaluative standards that the interpretive community has provisionally accepted and that these standards are explicit enough to allow the interpretive community to change them. By adopting a Kuhnian approach, focusing on the evolutionary nature of paradigm approaches,²⁰ I contend that the evaluative standards of the interpretive community, although stable, are constantly evolving based on a consensus of the legal community.

I start with the supposition that, at best, the existence of the paradigm is one that can be defined only by reference to published scholarship. It is important to note, however, that scholarship is also changed by exposure to other scholarship in an evolutionary framework. I contend that there is a predominant scholarly paradigm that exists for the evaluation of scholarship and that this traditional paradigm employs "neutral" or, I prefer the term, "objective," criteria for the evaluation of new scholarship.

The metatheory underlying the predominant paradigm is a "neutral" principle that is supported by the concept of universalism. This neutral principle is at odds with the concept of voice. Specifically, the principle opposes the notion of a voice of color which embraces norms and values antithetical to the concept of universalism. The universalist concept is guided by "the canon that truth claims . . . are to be subjected to *preestablished impersonal criteria*,"²¹ and can be analogized to the search for an objective truth,²² untainted by bias and subjective factors like the color of the author's skin.²³ Further, the neutral academic paradigm pur-

questions. . . .

All objective truth is, in this usage, merely currently provisionally accepted truth. But while the usage is modest, it is not identical to no truth at all or to the aggregate of prejudice. This is because when members of an interpretive community are persuaded (or have demonstrated to them) that a question has been answered successfully, they cannot be said to have arrived at a consensus of subjective beliefs. They retain their widely divergent beliefs on most of the rest of life; they merely agree that for a time an answer is right.

White, *supra* note 13, at 578-79.

20. See *supra* notes 11, 12 and accompanying text.

21. Kennedy, *supra* note 4, at 1773 (citing ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 607 (rev. ed. 1968)).

22. See *infra* part III (discussing the irrelevance of truth, objective or otherwise, in this endeavor) and note 40.

23. Indeed, the complete quote expressly negates the existence of color as a factor in measuring claims:

Universalism finds immediate expression in the canon that truth claims,

portedly can differentiate meritorious work from bad or mediocre work. Those who employ this paradigm claim that such differentiation is not only appropriate, but also equitable and unprejudiced, because the paradigm is not contingent on the author's identity or personal characteristics. In short, the claim is made by those employing what I term the majoritarian, consensus-driven paradigm that neutral standards exist for evaluating the worth of scholarly endeavors, and that these neutral standards can separate good from bad, worthy from unworthy. Not only is this standard majoritarian in that its base is consensus-driven, it is also hierarchical in that it segregates the best, the elite, from the rest.²⁴

Perhaps surprisingly, I firmly believe that scholars of color should embrace that neutral, objective evaluative paradigm when their writing employs and embraces the metatheories²⁵ upon which the neutral, objective paradigm is based. In this context, the universalist, "acolored," standard is appropriate for judging the work of a scholar of color who prepares a work or text that makes no claim to privilege based on the author's race. When an author speaks in the "neutral" voice and not in the voice of color, the work may be evaluated according to the neutral paradigm. Consequently, the scholar of color can speak to the legal academic community without reference to the scholar's color or race on issues that have nothing to do with the issue of color or race and be judged according to the objective, evaluative paradigm employed by the interpretive community.

whatever their source, are to be subjected to *preestablished impersonal criteria*: consonant with observation and with previously confirmed knowledge. The acceptance or rejection of claims . . . is not to depend on the personal or social attributes of their protagonist; his race, nationality, religion, class and personal qualities are as such irrelevant. Objectivity precludes particularism.

MERTON, *supra* note 21, at 607.

24. I have termed the standard as majoritarian and hierarchical, two terms, which at first glance, appear to be coupled in an oxymoronic manner. See *The New Voice*, *supra* note 1, at 2035.

25. Professor White defines "meta-theories" as tacit value judgments on which scholarly interpretations are based.

Kuhnian logic leads one to the proposition that scholarly interpretation cannot be starkly separated from either scholarly evidence or from the "meta-theories" (tacit value judgments) on which scholarly interpretations are premised. . . . Kuhnian logic adds a new dimension to criticism, for as soon as one unravels a scholar's meta-theory, and then reexamines the scholar's evidence, one can see how the meta-theory was so compatible with certain interpretations of evidence that they were virtually preordained.

White, *supra* note 13, at 570.

There are many important reasons why the scholar of color should embrace that neutral evaluative standard when not speaking in the voice of color. To some degree, all scholars, irrespective of color, share values and life experiences. Yet, because each scholar's experience will necessarily be somewhat different, even if insignificantly, generalizations of those experiences have to be made in order to avoid the indeterminacy that would result if individual experiences are truly valued and privileged.

For instance, it is easy to see why scholars of color and majoritarian scholars may evaluate such things as the doctrine of cy pres similarly and be able to evaluate the merits of work addressing cy pres from a neutral evaluative paradigm.²⁶ The life experiences and values of scholars of color and majoritarian scholars may not be sufficiently different to conclude that either group brings a different or unique perspective to the issue of cy pres. Consequently, the scholar of color may speak in the dominant discourse, in an "acolored," majoritarian voice in which no claim is made to a unique perspective based on that scholar's color.

On the other hand, when the scholar of color speaks to any racial issue, such as affirmative action, one can predict that she may see and evaluate that issue differently than her majoritarian colleagues. Her viewpoint will be greatly informed as a result of her different experiences in our society as a person of color. The neutral, consensus-driven paradigm for evaluating such scholarship is too narrowly circumscribed to evaluate the merit and worth of the work of scholars of color when speaking in the voice of color. A new paradigm must be employed—one that recognizes the existence and the worth of the voice of color. This new paradigm must not supplant, but must supplement the majoritarian paradigm.

II. DEFINING THE SUPPLEMENTARY CONTEXTUAL EVALUATIVE PARADIGM

The problem with the hierarchical majoritarian paradigm is that even though it is evolutionary, as I have defined it, embracing new scholarship,²⁷ it is premised on universalism, which is too narrowly circumscribed to embrace claims by those who contend that

26. See Alex M. Johnson, Jr. & Ross D. Taylor, *Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts and Dynamic Interpretation to Cy Pres and America's Cup Litigation*, 74 IOWA L. REV. 545 (1989).

27. See *supra* notes 11-12, 19 and accompanying text.

unique voices may be employed in academic scholarship. It is too narrowly circumscribed because it rejects the identity or individual characteristics of the advocate, thereby rejecting any notion of value or merit in the uniqueness of the scholar of color, speaking in the voice of color. The metatheories of the majoritarian, elitist evaluative standard are premised on a neutrality that refuses to countenance the identity of the advocate or speaker.

The evaluative paradigm employed by the academic community is historically universalist because the interpretive community has been largely, if not exclusively, white and male. It therefore makes logical sense that the evaluative paradigm employed by the majority to evaluate majoritarian scholarship will disregard the "differentness" of scholars because the identity of scholars—their life experiences—have not been significantly different. Even if the traditional evaluative paradigm used by the majority recognized the author's identity in evaluating the scholar's work, that factor would be worthless because, until very recently, all scholars had essentially similar experiences, resulting in relatively interchangeable identities.

As the academy has expanded, albeit at a snail's pace, to admit into the professoriate scholars who are not white males, the same neutral evaluative standard has been employed. As society has become more pluralistic and diverse, so too has academia. Yet the evaluative paradigms employed to evaluate the worth of all scholarship produced by a diverse, pluralistic academy remain static and based on a view of the professoriate that no longer holds true.²⁸ The paradigm employed by scholars rejecting the existence of voice, is premised on a definition of merit that can best be de-

28. This dichotomy between societal evaluative paradigms which value diversity and the academy's evaluative paradigm which suppresses diversity has not gone unnoticed by others in the academy. See, e.g., William E. Nelson, *Standards of Criticism*, 60 *Tex. L. Rev.* 447, 478 (1982) ("[T]he assumption that scholarly standards can emerge out of a consensus of individual scholars with quite different ideological and aesthetic preferences retains respectability today."). However, Professor White writes:

But I cannot resist noting that [Professor] Nelson's effort to distinguish between ideological pluralism and a professional consensus on what constitutes good scholarship has a discernible (and to me revealing) character. It is the distinction of a scholar who seeks to reaffirm the validity of *hierarchical professional standards* while at the same time suggesting that *hierarchical social values* are no longer permissible in today's society; all ideological positions deserve equal respect.

White, *supra* note 13, at 585.

scribed as "thin."²⁹ This conception of merit does not take into account the fact that the life experiences and values of scholars of color—as persons of color are relevant to a determination of what is worthy or meritorious. Employing a thin definition of merit, one that rejects the attributes that create distinctiveness, is inappropriate: the evaluative paradigm is based on a conception of merit that is universalistic and not pluralistic. The determination that the existence of voice is "ameritocratic" is an acceptance of the view that it has no merit.

In my view, the proponents of voice-articulated scholarship express a new mode of examining and questioning previously unquestioned assumptions and theories. I believe that there is an emerging paradigm that recognizes and values the voice of color, as well as other voices, including the feminine voice. I view this emerging paradigm as supplementing the traditional paradigm rather than supplanting it. The emergent, supplementary paradigm proceeds from the view that the so-called "neutral" standard for determining meritorious scholarship is inextricably intertwined with majoritarian metatheories on which the scholarly interpretations are based.³⁰ The use of metatheories to create an evaluative paradigm works best when the interpretive community agrees upon the tacit presuppositions.³¹ On the other hand, when the tacit presuppositions of the interpretive community are diverse and pluralistic, the possibility exists that any paradigm that recognizes and values the diversity and pluralism inherent in our society will result in indeterminacy.³²

The supplementary paradigm that I embrace, recognizing the voice of color, begins with the premise that the text must be used as a source of meaning, and that the meaning is predicated on authorial intent. Further, authorial intent is, by necessity, influenced by the interpretive community to which the author belongs.³³ Scholars of color, who belong to at least two communities—the

29. Clifford Geertz's book, *The Interpretation of Cultures*, contains a description and discussion of "thin" versus "thick" theories as applied to anthropological or cultural studies. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 3-30 (1973).

30. See *supra* note 25 and accompanying text.

31. White, *supra* note 13, at 570.

32. As expressed by Professor White: "[When the possibility exists that we] have no objective criteria for determining distinguished scholarship and no basis of agreement for deciding how we can go about formulating such criteria, we are close to conceding that what we do has as much significance as sound and fury." White, *supra* note 13, at 569.

33. See *supra* notes 25-26 and accompanying text.

community of color and the academic community—can draw upon their identity and membership in the community of color to make claims and deliver special meanings in their work.

Pursuant to my conception of this paradigm, the employment of voice is not precisely a matter of the speaker's intent or the reader's interpretation, but instead a matter of the author's context. The author employing voice is making a claim to a perspective that is not shared and, in certain situations, cannot be shared. The voice is necessarily different because of the scholar's membership in a different interpretive community and the scholar's exposure to different life experiences.

Elsewhere, I have detailed precisely how the scholar may employ her unique voice to speak to certain issues. The voice of color is loudest when the reader is aware of the author's claim to a different perspective and is willing to privilege the author to speak in that voice.³⁴ Assuming that I am correct and that unique voices exist, can be articulated, and are heard and interpreted by the reader, I still have not addressed the *need* for a supplementary paradigm that recognizes the voice of color or any other previously unregarded voice. My final task in this part of the essay is to demonstrate that such a supplementary paradigm is necessary and beneficial because of the information and insight provided by those with different life experiences. To do so, I return to my earlier works in which I demonstrated the benefits that flow from a recognition that a voice of color exists.³⁵

The voice of color which I have posited is one which enriches the academy because of the insight provided by the distinctive perspective of the scholar of color on certain issues.³⁶ The standard by which such voice-articulated scholarship must be judged is one which focuses on how well the voice is understood. The value of such scholarship lies in its distinct perspective, its impassioned subjectivity; its merit, therefore, must depend on its effectiveness in educating the majority about that very distinctiveness.

Moreover, when a scholar of color speaks in the voice of color it should not only be other scholars of color who apply the evaluative standard to judge the worth of that scholarship. Limiting the

34. See *In Favor of Context*, *supra* note 1, at 151-53.

35. *Id.* at 158. See also notes 11-24 and accompanying text.

36. See *supra* notes 34-35 and accompanying text.

judgmental function to scholars of color would defeat the primary purpose of authors employing the voice of color. As I see it, the primary target audience of the voice of color is not other scholars of color, who may or may not have shared the same life experiences.³⁷ The primary audience consists of majoritarian scholars who can learn from the unique perspective presented by scholars of color.

At one level, the ongoing debate over the existence of voice centers on control over the vocabulary of legal discourse.³⁸ Scholars of color demand that their unique voice and vocabulary be added to that of majority scholars. Majority scholars, some of whom resist that demand, may prefer that the existing vocabulary and the existing power structure remain the same. The success of the voice of color can only be measured by its impact on that vocabulary and not by its impact on other scholars of color.³⁹

I contend, therefore, that the traditional standard or paradigm represents merely one manner of interpreting and evaluating scholarship that scholars of color *should* embrace when their works draw on their different perspectives. However, that paradigm for evaluating scholarship assumes, a priori, the nonexistence of different experiences and lifestyles. Yet, the culture and metatheories upon which scholarly interpretations are based are no longer limited to a single overarching paradigm. The view that there exists but one truth, and, therefore, one perspective, must be rejected. I address this proposition in part III.

37. See *In Favor of Context*, *supra* note 1, at 151-53 (discussing life experiences and how those experiences shape and influence the scholar's work).

38. In this respect, the debate is very similar to the current debate in law and literature between "Posnerians" (for want of a better term) and proponents of Critical Legal Studies:

The unstated issue in the academic controversy between the law and economics movement and the law and literature/hermeneutics movement seems to be the question of control of the vocabulary of legal discourse. As David Carlson has pointed out, control over the vocabulary governs access to the prestigious law reviews, control over panels at leading conferences and "even access to political power." As any clever trial lawyer knows, language governs our ideas, and works have an uncanny way of policing our perceptions.

Judith Schenk Koffler, *Forged Alliance: Law and Literature*, 89 COLUM. L. REV. 1374, 1389-90 (1989) (footnote omitted).

39. Indeed, if the audience of the voice of color was limited to other scholars of color, its power as a paradigm shifting theory would be negated. See *supra* notes 11-13 and accompanying text. Quite the contrary, the voice of color addressed solely to other scholars of color would result in the ghettoization of such scholarship in that such works would be deemed by majoritarian standards as being of limited value and of value only to other scholars of color.

III. APPLYING EPISTEMOLOGICAL THEORY

In her article, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*,⁴⁰ Professor Joan C. Williams describes the development of the new theory of epistemology and the rejection of the traditional theory of knowledge. The traditional theory was based on a search for certain and objective truths, while the new theory recognizes the relativism of "truth."⁴¹ The use of an evaluative paradigm premised on universalism—"the canon that truth claims . . . are to be subjected to *preestablished impersonal criteria*[]"⁴²—can be analogized to the search for objective truth,⁴³ untainted by bias and subjective factors such as the racial identity of the scholar.⁴⁴ This evaluative paradigm presupposes the existence of the value of "truth," requiring a scholar to be disinterested (a value of universalism) when assessing the worth of other scholars. In large part, this interpretive paradigm is quite similar to the paradigm employed by the old epistemology of knowledge by virtue of its search for impersonal, objective truths. But the traditional interpretive paradigm, like the traditional theory of epistemology, is also too narrowly conceived and constrained to recognize the worth of other voices and their benefit. This results because the meritocratic paradigm requires a priori a rejection of context, perception, and subjectivity.

Thus, the neutral, traditional paradigm is premised on a claim that context and perception must yield to "objective truth." The traditional paradigm employed by the majority of the professoriate is premised on a value—objective truth—that, in this context, is inapplicable and inappropriate.⁴⁵ Traditional, or what I have char-

40. Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429 (1987).

41. *Id.* at 444-54.

42. Kennedy, *supra* note 4, at 1773 (citing ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 607 (rev. ed. 1968)). See *supra* notes 21-23 and accompanying text.

43. As my colleague, Professor Lynn Baker, correctly points out, evaluating scholarship is not about "truth" at all. At best, it is about a form of "consensus" that is independent of "truth" notions.

44. See *supra* note 23.

45. My rejection of the meritocratic standard in this context does not mean that I embrace the norm that all scholarship is judgmentally indeterminate. On the contrary, given the claims made by scholars of color, I believe it is wrong to judge and reject their claims based on an interpretive framework that negates the existence of their color. On the other hand, I have no quarrel with my "conventional," acolored scholarship (e.g., Johnson & Taylor, *supra* note 26) being judged by the "critical standards" that I embraced in writing the articles for that particular audience employing those traditional standards. See, e.g., *In*

acterized as old epistemology,⁴⁶ was premised on the existence of absolute, objective truth.

New epistemology, however, rejects a belief in absolute, objective truths in favor of a type of certainty or absolutism that is best characterized as a psychological phenomenon occurring "as a by-product of pervasive and systemic agreements between people."⁴⁷ In the new epistemology no single reality exists independently of the observer's interpretation.⁴⁸ As a result, the new epistemology rejects abstract and objective truths in favor of sensitivity to context,⁴⁹ and has been embraced by feminist scholarship.⁵⁰ Professor Williams asserts that contrary to claims of feminists, reliance on the contextual is not uniquely a function or by-product of feminism, but is part of the new epistemology that rejects transcendental objective truths in favor of context, emotion, and intuition as tools of thought.⁵¹

Rather than embracing traditional epistemology, I employ the new epistemology "which rejects a belief in objective truth and the claims of certainty that traditionally follow."⁵² My position leads to adoption of the contextualist message. I base my supplementary

Favor of Context, *supra* note 1, at 137 n.1. For a discussion of critical standards and the concomitant use of evaluative critical standards while accepting the existence and worth of scholarship, including the work of scholars of color who claim to be speaking in the voice of color, see *supra* part II.

46. "Epistemology" is the term used to describe the branch of philosophy that inquires into the nature and validity of knowledge. See Williams, *supra* note 40, at 430 n.5 (citing RODERICK M. CHISHOLM, *THE THEORY OF KNOWLEDGE* 1-4 (1966) (discussing the basic concerns of epistemology)).

47. Williams, *supra* note 40, at 453 (citing STANLEY CAVELL, *THE CLAIM OF REASON: WITTGENSTEIN, SKEPTICISM, MORALITY AND TRAGEDY* 30 (1979) and LUDWIG WITTGENSTEIN, *ON CERTAINTY* ¶ 47, at 8 (G.E.M. Anscombe & G.H. von Wright eds., D. Paul & G.H. von Anscombe trans. 1969)).

48. Williams, *supra* note 40, at 452. "Since certainty and infallibility are a function, not of a relationship to outside reality, but of an established role within a given language game, if one plays a different game, or changes the rules of the original one, one may well abandon old certainties for new ones." *Id.* at 454.

49. See Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 805 (1989).

50. *Id.* at 797.

51. *Id.* at 805.

Important figures in developing the new epistemology's view of truths as necessarily partial and contextual include the fathers of post-Newtonian physics (Albert Einstein and Max Planck), the linguists Benjamin Whorf and Ferdinand de Saussure, and Wittgenstein, who rejected the "picture theory" that Truth is an objective picture of reality in favor of the view that a multiplicity of truths exist as an integral part of culture and context.

Id. at 806 (citing Williams, *supra* note 40, at 439-53).

52. Williams, *supra* note 40, at 430-31 (footnote omitted).

interpretive paradigm on the belief that the subjective context of author and reader will determine whether the author speaks with the distinctive voice of color.

Those who contend that there is but one evaluative paradigm challenge scholars who claim to speak in a different voice which requires the application and use of a different evaluative paradigm. These challengers are best characterized as adherents to the search for objective truths—representatives of the old epistemology. This traditional view employs one singular construct by which to judge the existence and worth of all scholarship irrespective of authorial intent and reader perspective, thereby divorcing the personal identity of the author-scholar from the products of that author-scholar so that “all that is relevant is the relative merits of the work competing for recognition.”⁵³

This traditional standard further presupposes an interpretive community in which the identity of the author-scholar is irrelevant to those interpreting the work. If the interpretive community is based historically on a hegemony of that community by one dominant group, with certain identifying homogenous characteristics, (i.e., white males) then the personal identity of the author-scholar is, by definition, irrelevant because the readers belong to the same interpretative community.

Yet, the claim made by scholars of color, writing in the voice of color, is that they not only belong to a community comprised of legal academics and can write and speak in that voice in a manner that can be interpreted by that community without reference to the identity of the author-scholar, but they also belong to different communities premised on their race and background. Scholars of color claim a membership and experience in communities to which majority scholars can never belong. Further, membership in these atypical communities provides insight and knowledge for which the majority scholar-reader must employ a different interpretive strategy to gain insight and knowledge.

Hence, when the claim is made by an author-scholar that she speaks with the voice of color, the context from which that author-scholar draws her identity is relevant to the worth of the work. The author is demanding that the reader recognize that identity and employ a different interpretive strategy. If that new interpre-

53. Kennedy, *supra* note 4, at 1772 (footnote omitted).

tive strategy, like the new epistemology, is contextualist, the existence of a distinctive voice of color, privileged to speak to certain issues, is valid.

I take it that all would agree that a text standing alone does not have an autonomous meaning independent of any particular interpretation or reading; indeed, "[a] text only comes to be in a reading, that is, in an act of understanding and interpretation."⁵⁴ Furthermore, all interpretation of text is subjective. Subjectivity is part of legal interpretation. In other words,

[t]o think of the text and its meaning as objective and the interpretation of that meaning as subjective is to presuppose an artificial cognitive-normative distinction and to distort the phenomenon of understanding. Since the text comes to be only in an act of understanding, the distinction between the way it is "in itself" before being read and the way it appears in an interpretation is a false reification of the process of understanding.⁵⁵

This interpretive heuristic focusing on context and interpretation in the search for meaning finds full explanation in the study of hermeneutics.⁵⁶ The current theory of hermeneutics can be divided into two camps: those called the intentionalists and those that I will characterize as the interpretivists. The intentionalists, led by E. D. Hirsch and Emilio Betti,

[f]ollow an older tradition by distinguishing a first operation, the cognitive act of understanding or explicating a text's meaning, from a second, the normative interpretation of a text's significance. The second operation is then distinguished in turn from a third, the reproductive application of that sense to a specific situation, one that is similar in some respects but different in others. . . . They think there must be,

54. David Couzens Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 135, 143 (1985).

55. *Id.* at 151-52 (citing HANS-GEORG GADAMER, *TRUTH AND METHOD* 276-77 (1975)).

56. Much of the following discussion, focusing on legal interpretation and hermeneutical theory, is based on Professor Hoy's pioneering work. Hoy defines hermeneutics as follows:

Hermeneutics is the field of philosophy most concerned with investigating the nature of understanding and interpretation. Hermeneutic philosophers usually engage in constructing theories that will be sufficiently general to account for all kinds of interpretation, and thus of understanding as a single phenomenon, just as epistemologists aim at giving an account of knowledge per se.

Id. at 136.

in principle, only one right reading of any given text, and they specify that what makes a reading the right one is whether it captures the intention of the author or authors.⁵⁷

This intentionalist view, then, focuses on the author's intent and the discernment of that intent by the reader-interpreter. Thus, intentionalists believe that the text has an objective meaning based on the author's intent, that is explicable by the reader-interpreter.

Contrastingly, interpretivists, led by Hans-Georg Gadamer, reject the intentionalist view that equates textual meaning solely with authorial intent.⁵⁸ Instead, Gadamer and his followers focus on the contextual, the "[c]ontext that determines the possible parameters of the sentence or expression. Unlike the intentionalist theory that bases objectivity on the possibility of determining the intention, this theory links objectivity with determining the appropriate context."⁵⁹ Moreover, Gadamer believes that text is adequately determinate to limit the range of possible contexts and "that the context itself conditions the reader's grasp of the text, and not the other way around."⁶⁰ Thus, "[u]nderstanding is always already interpretation . . . and interpretation is always already application."⁶¹

Most importantly, the Gadamerian contextual view also can be viewed as evolutionary in the sense that "the context is historical in that it changes over time with changes in the conditions influencing various readings."⁶² Thus, interpretation is not static but dynamic. It is always influenced by the context of the interpreter as well as the author's original context.

I could continue to plumb this vein of reasoning that interpretation is neither static nor totally objective, but dependent on a dynamic interaction between author and reader; however, a thorough explanation of hermeneutics and epistemology is not the focus of this essay. My point is simply this: building on the new, contextually focused theory of epistemology and the Gadamerian contextualist theory of hermeneutics,⁶³ I propose an interpretive

57. *Id.* at 137.

58. *Id.*

59. *Id.* at 138 (citing THOMAS KUHN, *THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE* xii (1977)).

60. *Id.*

61. *Id.* at 139.

62. *Id.* at 138.

63. Although I am predisposed to believe that Gadamer's theory of hermeneutics that

paradigm that identifies and privileges the voice of color.⁶⁴

CONCLUSION

As one who firmly believes in the employment and the use of voice in legal academic scholarship, some might find it odd or counterintuitive that I also continue to support the traditional scholarly paradigm that contends that there are "neutral" criteria for evaluating the merits of scholarship. By supporting the neutral paradigm, I do not mean to accept the notion of certain, objective truth. Indeed, I believe that any paradigm, including the traditional paradigm employed by the professoriate, is premised on a consensus that is ultimately contingent and limited by its own community. When a scholar, irrespective of color, intends to speak to the professoriate in a neutral voice, her work should be judged according to that neutral, evaluative, consensus-based standard. When, however, that same scholar speaks in a voice that is infused with and generated by life experiences that differ from other members of the interpretive community, especially on issues affected by different life experiences, there is value in that voice. It should and must be heard by the academy. Moreover, in order to avoid indeterminacy, categorizations of the voice should be based on the ideological perspectives presented by the different voices.

Finally, these two paradigms—the neutral and objective versus the impassioned and subjective—are, I believe, not necessarily as opposite and conflicting as they might first appear. Rather, I

links objectivity with determining the appropriate context is more consistent with the theory of understanding and interpretation than the intentionalist theory that focuses on the author's intent, I note in passing that if one adopts the Hirsch-Betti intentionalist view of hermeneutics, my claim that scholars of color speak with the voice of color when they intend to speak with the voice of color would be even more potent. See *supra* note 60 and accompanying text.

64. This paradigm is objectionable to some commentators. See Kennedy, *supra* note 4, at 1786-87 (quoting Louis Lusky, *The Stereotype: Hard Core of Racism*, 13 *BUFF. L. REV.* 450, 451 (1964)).

My central objection to the claim of racial distinctiveness propounded by Professor Matsuda and others of like mind [who extol the existence and use of the voice of color] can best be summarized by observing that it *stereotypes* scholars. . . . Matsuda thus substitutes for the traditional, i.e., negative stereotype, a *positive* stereotype. But as Louis Lusky once noted, "any stereotype results in a partial blindness to the actual qualities of individuals, and consequently is a persistent and prolific breeding ground for irrational treatment of them."

Id.; see also *In Favor of Context*, *supra* note 1, at 137.

view these two paradigms as complementary. Both represent a way of analyzing scholarship based on authorial intent and reader perception. Yet, it must be acknowledged that authorial intent and reader perception are not uniform, nor is reader interpretation. Just as there is a place in the academy for neutral, objective scholarship, there is also a place for impassioned commentaries and assertions that are not divorced from the scholar's identity and experiences, but are, in fact, strengthened by them.