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Foreword Symposium: Fourth Annual Mid-Atlantic People of Color Legal Scholarship Conference: Law and Literature: Examining the Limited Legal Imagination in the Traditional Legal Canon

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FOREWORD

*Sheila Foster**

The Fourth Annual Mid-Atlantic People of Color Legal Scholarship Conference, which took place at Rutgers Law School in Camden on February 12-14, 1998, poignantly captured the theme around which the conference was organized. The theme of the conference was "Law and Literature: Examining the Limited Legal Imagination in the Traditional Legal Canon." True to the theme of the conference, many presenters sought to expand our collective imagination through poetry, fiction, and narrative. The presentations were intellectually stimulating and provocative. Indeed, there was a literary quality to some of the presentations. Perhaps most importantly, the conference itself, in the tradition of the Regional People of Color conferences, provided us with the necessary sustenance that can only be found in a community of scholars united by a particular undertaking.

The dual focus of our undertaking is reflected in both the title of the conference and the papers included in this issue of the *Journal*. First, conference participants were concerned about the "limited legal imagination" reflected in the traditional legal canon. Of particular focus was the question of which voices, perspectives, and experiences have become central to the canon, and which are marginalized. Second, participants focused on "law and literature," invoking literary fiction and poetry to explore the justice of legal rules and legal decisionmaking. Many scholars at the conference persuasively made the case that literature, and literary techniques (like narrative), can broaden the scope of legal discourse by bringing voices and perspectives which might otherwise go unrecognized, unheard, or unappreciated.

Angela Kupenda, whose paper is not included here,¹ provided a useful framework for thinking about the contributions that literature can make to legal analysis. Kupenda makes the excellent juxtaposition of law, life, and literature in her work. She says that of the three, literature is the most honest and inclusive. Literature can describe reality of the most oppressed lives with brutal honesty. Laws, on the other hand, tend to ignore the realities and

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1. See Angela Mae Kupenda, *Law, Life and Literature: A Critical Reflection of Life and Literature To Illuminate How Laws of Domestic Violence, Race and Class Bind Black Women Based on Alice Walker's Book "The Third Life of Grange Copeland,"* 42 HOWARD L.J. 1 (1998).

truths for many of us. While life experiences are authentic and equally moving, we tend not to be as honest in them because we are often afraid to tell the painful truth of our own lives. Literature thus consists both of "life," a person's story, and also of "art," a form of expression. Hence, literature can help fill the gap left by the incomplete legal narratives that we learn in law school. In doing so, underrepresented lives can find their way into legal decisionmaking

Sherman Clark's contribution nicely situates the discussion in this issue by providing a thoughtful argument for the utilization of literature to the lawyerly art of persuasion.² Persuasion, he argues, depends upon imagination—in particular, an "imaginative capacity to see the world from the perspective of others." He calls this imaginative capacity "sympathetic engagement." Clark attempts to sketch out a functional description of what it means to persuade others on an issue most closely connected to one's sense of self and community membership. His attempt focuses on race, but has in mind other characteristics, like gender and class. He posits that black lawyers' and academics' failure to persuade others on issues of race may be attributable to "the tendency to dismiss and caricature rather than engage with and comprehend those we seek to persuade."

Reading literature, particularly that which brings to the reader different world views other than their own, may be one of the best ways to develop the capacity for sympathetic engagement, Clark argues. Certain literary works may also model for us the very process of persuasion. He illustrates this quite effectively through a particular passage in *Macbeth*, pointing to Lady Macbeth's persuasion of Macbeth not to go through with the murder of Duncan. Lady Macbeth's persuasive techniques reveal the extent to which persuasion "is *not* a process of meeting and defeating arguments." Rather, Lady Macbeth's argument illustrates that we need to, instead, set forth arguments, examples, analogies, and other tools of rhetoric that demonstrate how our desired outcome does in fact have home in that person's world. This, in turn, depends upon a thoroughly imagined understanding of the world view in which the argument must resonate, which literature can provide us.

Michele Cammers Goodwin uses Charlotte Bronte's *Jane Eyre* to explore the social, legal, and political climate of the Victorian era and, more particularly, to place in proper context the treatment of women, people of

2. Sherman J. Clark, *Literate Lawyering: An Essay on Imagination and Persuasion*, 30 RUTGERS L.J. 575 (1999).

color, and the mentally ill during this period.³ Bronte's *Jane Eyre* captures, according to Goodwin, "the intersection of law, literature and life" in mid-nineteenth-century England. Goodwin focuses on a character often overlooked in the novel, and about which very little has been written. The character, Bertha Mason Rochester, is "the rejected, perhaps insane, black woman in the attic." The neglect of Bertha's character in the scholarly literature on *Jane Eyre* may reflect, says Goodwin, a larger social disengagement with issues affecting women, particularly those of color, labeled mentally ill. The attitudes expressed about Bertha's character in the novel reflect views shared by many during the Victorian Age regarding the intersection of race, gender, and mental illness. By exploring this intersection in the novel, Goodwin also challenges feminist interpretations of the novel, particularly the "over-identification with Jane as victim while overlooking the black woman in the attic."

Amassing an impressive history of the "symbiosis" between law, poverty, and madness, Goodwin illustrates how "social status is connected with perceptions about madness and how poverty and neglect have an intimate association with mental illness." Both the characters Jane and Bertha in *Jane Eyre* represent the disillusioned and disenfranchised, untouched by the benefits of the legal system. However, in romanticizing a sweet and courageous Jane and juxtaposing her against the "depraved" Bertha, feminist scholars have simply created an "other," essentializing the ideal woman as possessing certain racial and class aspects. Goodwin seeks to liberate the feminist reading of the novel from its essentialist narrative. She does this by bringing attention to the character Bertha, in the hope of stimulating further discourse about the intersection of race, class, and gender in the treatment of the mentally ill.

George Martinez examines the particular literary technique of narrative through philosophical lenses.⁴ Narrative legal scholarship, particularly when invoked on behalf of underrepresented groups and issues, has recently come under great scrutiny from various parts of the legal academy. Martinez attempts to articulate the importance of narrative for "outsider" scholars and issues by drawing upon the philosophical implications of the debate over narrative scholarship. He argues that the use of narrative invokes numerous philosophical issues. First, relying upon Jean-Francoise Lyotard's notion of the "differend," Martinez attempts to demonstrate how minorities in a legal

3. Michele Cammers Goodwin, *The Black Woman in the Attic: Law, Metaphor and Madness in Jane Eyre*, 30 RUTGERS L.J. 597 (1999).

4. George A. Martinez, *Philosophical Considerations and the Use of Narrative in Law*, 30 RUTGERS L.J. 683 (1999).

system might lack a forum and a language to express how they have been injured. Narratives provide minorities with such a language, allowing them to communicate their harms to a system which often has not recognized those injuries. In this way, says Martinez, “narrative is the language of the other.” The use of narrative is also philosophically important for outsiders, Martinez asserts, for a second reason. Narrative provides a way for minorities to achieve “authenticity.” Relying upon Martin Heidegger’s work on inauthentic human beings, Martinez argues that minorities may be acting inauthentically when we act upon norms of behavior that are not our own, even if they are in the mainstream. In legal scholarship, then, narrative may provide a way for minorities to be authentic in our intellectual life because it provides a way to move away from standard practices of scholarship.

Finally, Martinez also responds to various arguments used to undermine narrative’s usefulness in legal scholarship and decisionmaking. He addresses the argument that narrative represents an “externalist” approach to law and judicial decisionmaking. This approach is contrasted with the “internalist” approach, which posits that legal decisionmaking can only be evaluated by criteria or modalities “internal” to legal doctrine and practices. Narrative scholarship, the argument goes, is illegitimate because it is outside of, or external to, the normal modes of legal reasoning. Martinez disputes this critique of narrative scholarship on two levels. He quarrels both with the notion that legal decisionmaking is a function solely of internal doctrine or modes of reasoning, as well as with the perceived uselessness of narrative to solving legal problems. Martinez also addresses the argument that narrative is hostile to the Enlightenment ideal of reason. Martinez’s response is to recognize what he claims legal realists long ago recognized: the danger of giving too much importance to the role of logic or reason in law and not enough importance to intuition. If intuition rightly has a place in legal decisionmaking, then narrative is firmly within that tradition.

e. christi cunningham invokes Ron Arias’ *The Road to Tamazunchale* to illustrate the “death of race as we know it.”⁵ She asks us to imagine, through the main character of Fausto, what it would be like to let go of the malignant aspects of race in our lives and move on to something larger, something that binds us all together. If race is partially a social construct, a fantasy, cunningham reasons, then race can be reconstructed, re-fantasized. Like the character Fausto, who migrates from fantasy to reality in his final dying

5. e. christi cunningham, *The “Racing” Cause of Action and the Identity Formerly Known as Race: The Road to Tamazunchale*, 30 RUTGERS L.J. 707 (1999).

days, people of color also traverse the reality and fantasy of race. This traversal is, in cunningham's mind, the first step in the process of dying, of letting go of one reality and moving to another. The dissonance that we have around race—race as both a social construction or fantasy and race as domination or reality—illustrates the trauma of race in our lives. This trauma “is evidenced,” she explains, “by self-identification that rages against racism yet clings to race which makes it possible.” Part of the trauma of race is the commodification of identity, the process of valuing and devaluing identity, not merely a process of categorizing.

In order to heal from the trauma of race, cunningham argues, we must isolate and eliminate the parts of race that are malignant and have infected our identity. Hence, “killing the foreign body and nurturing the remaining portions of the self is the healing challenge.” We should strive to outgrow the limitations that racial constructs have placed on our identity, cunningham concludes, and focus on that which truly binds us together. Narratives, which allow us to construct our own stories, can help us in this process. We achieve full humanness, not reduced simply by racial constructions, by interpreting and understanding ourselves and our worlds and weaving this understanding into our stories. Only then can we build true and lasting communities.

Leonard Baynes explores aspects of the legal analysis and discourse surrounding affirmative action through the prism of Rudyard Kipling's poem *The White Man's Burden*.⁶ Much of the legal analysis of the constitutionality of affirmative action programs involves a weighing and balancing of the burden on nonminorities by courts reviewing such programs. Baynes looks at the “White Man's Burden” in the context of the Federal Communication Commissions (FCC) broadcast telecommunications policy. Baynes argues that by making the “White Man's Burden” such a central part of its affirmative action jurisprudence, the Court essentially undertakes an evaluation of whether white male privilege should be eliminated. This evaluation is ironic, given the fact that in the poem, *The White Man's Burden*, Kipling advised whites that “they had a certain paternalistic duty—as the superior race—towards those of the inferior brown and black races.” This duty, or sense of, “Noblesse Oblige” (to whom much is given, much is required) is now passe, as many whites reject the idea that people of color face the type of socio-economic barriers in need of special class remedies.

6. Leonard M. Baynes, *An Investigation of the Alleged “White Man's Burden” in the Implementation of an Affirmative Action Program in Telecommunications Ownership*, 30 RUTGERS L.J. 731 (1999).

Indeed, argues Bayne, the concept of "Noblesse Oblige" has been replaced with the idea of white male victim. In the end, the Court's shift to a heightened standard of review in the affirmative action context evidences the desire, Bayne argues, to remove as many burdens as possible to white male privilege, while giving short shrift to the burdens that minorities face (particularly in the broadcast industry), and failing to take into account the persistent advantage that majority broadcasters have had in gaining access to government-owned broadcasting spectrums.

The above contributions to this issue of the *Journal* are thoughtful, engaging, and timely. Each wonderfully demonstrates the value and legacy of the Regional People of Color Legal Scholarship conferences, held in six different parts of the country each year.⁷ Much like the theme of the 1998 Mid-Atlantic Conference, these gatherings nurture emerging voices and experiences of groups still underrepresented in the legal academy. Rutgers is proud to be a part of this continuing effort and accomplishment.

7. The six regions which hold annual conferences are: Midwestern, Mid-Atlantic, Northeastern, Western, Southeastern, and Southwestern.