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# Critical Race Theory as Praxis: A View From Outside the Outside

RANETA J. LAWSON\*

*Me: Grandmama, I'm writing about critical race theory as praxis.*

*Grandmama: I once knew a gal who had that praxis real bad . . .  
nothin' the doctors could do for her. You be careful.*

*Me: Thanks Grandmama, I will.<sup>1</sup>*

## INTRODUCTION

As my thoughts turn to critical race theory as praxis, in addition to the imaginary exchange I might have with my grandmother, I am reminded of two actual colloquies that further illuminate my reflections. One such dialogue took place at the 1993 Annual Meeting of the Association of American Law Schools ("AALS"). At the conclusion of a panel presentation entitled, *Who Speaks for People of Color? Authenticity, Essentialism, Representation and Legal Scholarship*,<sup>2</sup> several audience members raised the issue of substantive progress for people of color or, more appropriately, the lack thereof. Essentially, those brave souls dared articulate the notion that the scholars of color on the panel were voicing concerns that were identical to those that were expressed by scholars of color over a decade ago at an AALS meeting. The principal difference between this panel discussion and past presentations was, according to one audience member, the frequent use of polysyllables at this gathering.

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\* Associate Professor of Law, Creighton University School of Law. J.D., *cum laude*, University of Toledo, 1988; B.A., *cum laude*, University of Toledo, 1985.

1. This fictional conversation is not unrealistic. Although I love my Grandmother dearly, I am certain she would not know what a praxis is. I hasten to add that she has lived a very full 82 years without this quantum of knowledge.

2. This particular panel discussion occurred on January 6, 1993, during a meeting of the Minority Groups section.

The second dialogue of which I am reminded occurred nearly a decade ago. As an undergraduate student, at the University of Toledo, I excelled academically and was invited to participate in the annual honors awards ceremony at the end of the academic year. The ceremony was a university event, and therefore all faculty and students were invited to observe. I asked a friend who had not been invited to participate in the ceremony if he nevertheless planned to attend. He replied, "No, it's just a bunch of smart people patting each other on the back for being smart."

Collectively, the three dialogues above inform my reflections toward a praxis of critical race theory. This essay is not intended as an attack on critical race theory or the scholarship that it has produced. Instead, as the themes of my colloquies suggest, I take issue with the potential for alienation of various audiences and the resultant stagnating effect on substantive racial progress in the academy, the legal profession, and the community at large. This essay begins with an affirmation of critical race theory as a beneficial "voice" in the academy. Part I develops and analyzes the categories of critical race theory scholarship that trace its functional evolution. Further, Part I argues that praxis demands meaningful expansion of the theory beyond the boundaries of the intelligentsia. Part II focuses on the future of critical race theory. First, the various audiences that might realize quantifiable benefits from awareness and practical application of critical race theories and scholarship are considered. An assessment of the potential for tangible progress resulting from broader understanding and meaningful incorporation of critical race theories into the legal profession and the minority community follows.<sup>3</sup>

## I. CRITICAL RACE THEORY: EVOLUTION AND FUNCTION

There is no dearth of scholarship interpreting and re-interpreting, constructing and de-constructing, or legitimizing and de-legitimizing critical race theory.<sup>4</sup> According to one of its pioneering scholars,

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3. This essay will use the term "minority community," since it reflects the political and economic status of African Americans, Hispanic Americans, Asian Americans, and Native Americans in this country. See CORAMAE R. MANN, *UNEQUAL JUSTICE: A QUESTION OF COLOR* 4 (1993).

4. Because the quantity of scholarship is so vast and diverse, the term "critical race theory" defies a single definition. One scholar has observed that "[a]s a form of oppositional scholarship, critical race theory challenges the universality of white experience/judgment as the authoritative standard that binds people of color and normatively measures, directs, controls,

Richard Delgado, critical race theory originated during the mid-1970s and was a direct result of the perception that many of the achievements of the Civil Rights Movement of the 1960s were being “rolled back.”<sup>5</sup> Critical race scholarship thus emerged with the scholarly works of Derrick Bell and Alan Freeman as a means of positing new tactics and theories to “understand and come to grips with the complex interplay among race, racism, and American law.”<sup>6</sup> Since that time, critical race theory scholarship has produced several books and in excess of two hundred articles.<sup>7</sup> In a recently published annotated bibliography, Delgado and Jean Stefancic attempt to catalog every scholarly work that addresses one or more of the major critical race theory themes.<sup>8</sup> Delgado and Stefancic succinctly label and summarize those themes as follows:

1. *Critique of liberalism.* Most, if not all, CRT [Critical Race Theory] writers are discontent with liberalism as a means of addressing the American race problem. Sometimes this discontent is only implicit in an article’s structure or focus. At other times, the author takes as his or her target a mainstay of liberal jurisprudence such as affirmative action, neutrality, color blindness, role modeling, or the merit principle. . . .

2. *Storytelling/counterstorytelling and “naming one’s own reality.”* Many Critical Race theorists consider that a principal obstacle to racial reform is majoritarian mindset — the bundle of presuppositions, received wisdoms, and shared cultural understandings persons in the dominant group bring to discussions of race. To analyze and challenge these power-laden beliefs, some writers employ counterstories, parables, chronicles, and anecdotes aimed at revealing their contingency, cruelty, and self-serving nature. . . .

3. *Revisionist interpretations of American civil rights law and progress.* One recurring source of concern for Critical scholars is why American antidiscrimination law has proven so ineffective in redressing racial inequality — or why progress has been cyclical, consisting of alternating periods of advance followed by ones of retrenchment. Some Critical scholars address this question, seeking

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and regulates the terms of proper thought, expression, presentment, and behavior.” John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2160 (1992).

5. Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

6. *Id.*

7. *Id.*

8. *Id.*

answers in the psychology of race, white self-interest, the politics of colonialism and anticolonialism, or other sources. . . .

4. *A greater understanding of the underpinnings of race and racism.* A number of Critical writers seek to apply insights from social science writing on race and racism to legal problems. For example: understanding how majoritarian society sees black sexuality helps explain law's treatment of interracial sex, marriage, and adoption; knowing how different settings encourage or discourage discrimination helps us decide whether the movement toward Alternative Dispute Resolution is likely to help or hurt disempowered disputants. . . .

5. *Structural determinism.* A number of CRT writers focus on ways in which the structure of legal thought or culture influences its content, frequently in a status quo-maintaining direction. Once these constraints are understood, we may free ourselves to work more effectively for racial and other types of reform. . . .

6. *Race, sex, class, and their intersections.* Other scholars explore the intersections of race, sex, and class, pursuing such questions as whether race and class are separate disadvantaging factors, or the extent to which black women's interest is or is not adequately represented in the contemporary women's movement. . . .

7. *Essentialism and anti-essentialism.* Scholars who write about these issues are concerned with the appropriate unit for analysis: Is the black community one, or many, communities? Do middle- and working-class African-Americans have different interests and needs? Do all oppressed peoples have something in common? . . .

8. *Cultural nationalism/separatism.* An emerging strain within CRT holds that people of color can best promote their interest through separation from the American mainstream. Some believe that preserving diversity and separateness will benefit all, not just groups of color. We include here, as well, articles encouraging black nationalism, power, or insurrection. . . .

9. *Legal institutions, Critical pedagogy, and minorities in the bar.* Women and scholars of color have long been concerned about representation in law school and the bar. Recently, a number of authors have begun to search for new approaches to these questions and to develop an alternative, Critical pedagogy. . . .

10. *Criticism and self-criticism; responses.* Under this heading we include works of significant criticism addressed at CRT, either

by outsiders or persons within the movement, together with responses to such criticism. . . .<sup>9</sup>

Throughout the bibliography, Delgado and Stefancic employ a numbering system that assigns the major critical race themes to the scholarly works.<sup>10</sup> While Delgado's numbering system is organized around substantive themes, this article proposes an alternative categorization of critical race scholarship that reflects its evolution and function and facilitates analysis of critical race theory as praxis.<sup>11</sup> Many of the scholarly pieces have multiple themes and easily lend themselves to classification in multiple categories, so there may be significant overlap between both the categorization and the scholarship described within those categories.

#### A. Foundational and Demonstrative Critical Race Scholarship

The overwhelming majority of critical race scholarship falls within this category.<sup>12</sup> Scholarship in this category, in much the same structural vein as "traditional" legal scholarship, identifies a persistent problem of racism, sexism, or classism, explores the roots of the problem, often through jurisprudential retrospective, and either proposes a solution or concludes that acceptable solutions are unattainable.<sup>13</sup>

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9. Delgado & Stefancic, *supra* note 5, at 462-63 (citations omitted). Each of the scholarly works in the Delgado/Stefancic bibliography either explicitly or implicitly articulates one or more of the major Critical Race Theory themes through structural or focal content. A review of the list immediately demonstrates that critical race legal scholarship is anything but uniform.

10. Delgado & Stefancic, *supra* note 5, at 461.

11. Of course, this alternative categorization is not intended to suggest that the Delgado/Stefancic methodology is either flawed or inadequate. Indeed, in some instances my categories overlap with the Delgado/Stefancic system. This categorization instead delineates the functional evolution of critical race scholarship.

12. The Delgado/Stefancic bibliography is intended as a source for examples of critical race scholarship that are representative of these categories. See Delgado & Stefancic, *supra* note 5.

13. For scholarship representative of this category see Lisa C. Ikemoto, *Furthering the Inquiry: Race, Class, and Culture in the Forced Medical Treatment of Pregnant Women*, 59 TENN. L. REV. 487 (1992) (demonstrating that race, class, and culture are sources of discrimination in the area of court-ordered medical treatment for pregnant women); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990) (exploring the source and power of arguments concerning "innocent white victims" in affirmative action debate); Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393 (1989) (examining and criticizing the American political system for being satisfied with token black representation); Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 VILL. L. REV. 767 (1988) (arguing that white superiority has historically resulted in the sacrifice of black interests); Richard Delgado, *Critical Legal Studies and the Realities of Race - Does the Fundamental Contradiction Have a Corollary?*, 23 HARV. C.R.-C.L. L. REV. 407 (1988) (demonstrating how the "race-charged" quality of the world affects the way minorities strike various balances); Gerald Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 SAN DIEGO L. REV. 1043 (1988) (discussing the history of race reform in Supreme Court opinions); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimina-*

For example, in an article that addresses the forced medical treatment of pregnant women, Lisa Ikemoto describes how gender as a socially constructed, historically rooted category “seizes the discourse” in this area and develops standard formulae for exploring these issues.<sup>14</sup> Ikemoto critically questions the basic premises of these standards and, more specifically, demonstrates how describing and addressing “issues surrounding reproductive choice as a gendered issue without regard to race and class precludes us from understanding the nature of patriarchy and, in fact, perpetuates it.”<sup>15</sup>

In another example of foundational and demonstrative scholarship, Thomas Ross explores the source and power of arguments concerning “innocent white victims” in the affirmative action debate.<sup>16</sup> According to Ross, the “rhetoric of innocence” embodies and reveals the unconscious racism in all of us that partially accounts for the “tragic impasse we reach in our conversations about affirmative action.”<sup>17</sup> Ross proposes that “we . . . each acknowledge the racism that we cannot entirely slough off” as a means to overcome this impasse and to engender discussion of “what we ought to do about it.”<sup>18</sup>

Similarly, one of Derrick Bell’s articles identifies how the court system reflects a belief in white superiority which has led to the creation of a property interest in “whiteness.”<sup>19</sup> Bell argues that this un-

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*tion Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (analyzing how anti-discrimination law and Supreme Court opinions serve to perpetuate an unjust social system).

14. See Ikemoto, *supra* note 13, at 488. According to Ikemoto, the de facto standard used to “identify, prioritize, and address subordination is the experience of white middle class women.” Ikemoto, *supra* note 13, at 488. Thus, a “gender-only inquiry [into issues of reproductive choice] might ameliorate the subordination of white, middle class women.” Ikemoto, *supra* note 13, at 510.

15. Ikemoto, *supra* note 13, at 487. Ikemoto contends that because a gender-only inquiry could possibly eliminate only one tier of hierarchy, “[o]ther forms of oppression will continue to emerge unless we face oppression as a concept and a complex all at once.” Ikemoto, *supra* note 13, at 510.

16. See Ross, *supra* note 13, at 298.

17. Ross, *supra* note 13, at 299. Using affirmative action as a backdrop, Ross describes how the rhetoric of innocence has two related forms. His first example is “the innocent white victim,” such as the white applicant to medical school, who is presumed to be not guilty of a racist act that denies the minority applicant a position. Ross, *supra* note 13, at 300-01. Second, the rhetoric of requiring proof of actual and particular racial discrimination allows questioning and denial of the actual victim status of the black beneficiary. Thus, the rhetoric has two effects in the context of affirmative action plans — “[t]hey hurt innocent white people, and they advantage undeserving black people.” Ross, *supra* note 13, at 301.

18. Ross, *supra* note 13, at 299.

19. Bell, *supra* note 13, at 768. According to Bell, the “right is recognized and upheld by courts . . . like all property rights under a government created and sustained primarily for that purpose.” Bell, *supra* note 13, at 768.

derlying notion of white superiority not only sustains whites who lack power, but has historically resulted in the sacrifice of blacks' interests to further Whites' interests.<sup>20</sup> As examples of the sacrifice of black interests, Bell contends that the continued resistance to "affirmative action plans, set asides, and other meaningful relief for discrimination-caused harm, is based in substantial part on the perception that black gains threaten the main component of status for many whites: the sense that as whites, they are entitled to priority and preference over blacks."<sup>21</sup>

Lastly, one of Richard Delgado's scholarly pieces articulates how a structural feature of human experience separates people of color from friends of the majority race.<sup>22</sup> According to Delgado, this structural feature is simply stated: "white people rarely see acts of blatant or subtle racism, while minority people experience them all the time."<sup>23</sup> This structural feature has two consequences. The first consequence is experiential: the "most sympathetic, left-leaning whites . . . are constantly having to learn and relearn what racism is."<sup>24</sup> The second consequence is political and affects the way minorities strike various balances between formal protections and nonformal community.<sup>25</sup> Delgado argues that because informal settings "increase the risk of dismissive or racist treatment," members of minority groups often opt for the protection of formal structures when choosing between community and security.<sup>26</sup>

In sum, this category of scholarship epitomizes critical race theory by identifying, exploring, and resolving problems through the prism of race. This particular perspective yields alternative or revisionist interpretations of institutions or normative standards that account for the presence of previously disregarded hegemonic forces such as race, sex and class. Thus, this category of critical race scholarship might be labelled "foundational and demonstrative," as it establishes critical race theory as a legitimate method of scholarly inquiry and provides evidence that conventional legal, social, and cultural reality can be informed and transformed by an infusion of race-conscious perspective.

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20. See Bell, *supra* note 13, at 776.

21. Bell, *supra* note 13, at 776.

22. See Delgado, *supra* note 13, at 407.

23. Delgado, *supra* note 13, at 407.

24. Delgado, *supra* note 13, at 408.

25. Delgado, *supra* note 13, at 410.

26. Delgado, *supra* note 13, at 411.

## B. Transformative Critical Race Scholarship

The transformative critical race scholarship category emphasizes narrating and storytelling to contextualize and ultimately alter or “destroy[ ] mindset — the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place.”<sup>27</sup> Transformative critical race scholars work along a spectrum ranging from those that employ narrative techniques to provide or enhance context, to those in which narrative is only marginally relevant to the author’s topic or analytical framework.<sup>28</sup> Critics of this storytelling approach question its evaluative criteria and its merit.<sup>29</sup> Notwithstanding this controversy, narrative and

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27. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989). As a strong advocate of storytelling, Delgado observes:

Most who write about storytelling focus on its community-building functions: stories build consensus, a common culture of shared understandings, and deeper, more vital ethics. Counterstories, which challenge the received wisdom, do that as well. They can open new windows into reality, showing us that there are possibilities for life other than the ones we live.

*Id.* at 2414. In this article, Delgado illustrates counterstorytelling by articulating five versions of the same event, a black lawyer applying and being rejected for a teaching position at a famous university.

For other scholarship representative of this category, see DERRICK A. BELL, JR., *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992) (using allegorical tales to illustrate issues surrounding racial justice); Angela D. Gilmore, *It is Better to Speak*, 6 BERKELEY WOMEN’S L.J. 74 (1990-1991) (describing feelings of disconnection and dissonance because of multiple status as a lesbian black woman); Lani Guinier, *Of Gentlemen and Role Models*, 6 BERKELEY WOMEN’S L.J. 93 (1990-1991) (discussing the role of multiple consciousness in relationships with colleagues and clients); Charles R. Lawrence, III, *A Dream: On Discovering the Significance of Fear*, 10 NOVA L. REV. 627 (1986) (describing a dream in which the significance of fear is explained to a condescending white colleague); Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984) (providing a fictionalized account of a mother and son hailing a taxi in Manhattan to demonstrate how society attaches certain understandings to recurring situations).

28. For sources employing narrative techniques, see *supra* note 27. Transformative scholarship is, however, not without its critics. See Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991). When discussing the use of narrative in an article written by Marie Ashe, Abrams notes that “[g]rasping the relation between her narratives and her prescriptions is . . . truly strenuous.” *Id.* at 1040 (discussing Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on “Reproduction” and the Law*, 13 NOVA L. REV. 355 (1989)). Abrams further explains that: “[I]t seems reasonable to ask of narrators who are, in fact, legal scholars that their stories be framed in such a way as to shed light on legal questions.” *Id.* at 1030. See also Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 824 (1993) (“Community-building may be valuable, but it is an enterprise quite distinct from increasing understanding of the law.”).

29. Describing the call for evaluative standards, Delgado argues that:

The call for standards comes mainly from members of the academic mainstream. Typically, they point out that the new scholarship is nontraditional in tone and content and urge the promulgation of standards. Such standards will enable the academic community to determine the quality of examples of the new work and to make intelligent decisions regarding the authors’ promotion and tenure. These calls can be seen as a type of “inward turn” in that they aim to bring outsider scholarship within the academic mainstream by placing it within the evaluative paradigm that includes all authors, traditional and nontraditional alike.

storytelling were conceived as a means to transform established belief systems.<sup>30</sup>

For example, in two books, Derrick Bell masterfully uses allegorical tales to illustrate issues surrounding racial justice.<sup>31</sup> Through a fictional character, Geneva Crenshaw, Bell examines the myths surrounding social justice, including the notion of an egalitarian, color-blind Constitution and the continued utilization of litigation as a source of hope and as a means for achieving equality.<sup>32</sup>

In another unique storytelling approach, Charles Lawrence employs dream methodology in a short narrative in which the significance of fear is explained to a white colleague.<sup>33</sup> In the dream, Lawrence responds to his colleague's question about fear by explaining that it must be understood from the point of view of both the oppressor and the oppressed.<sup>34</sup> Each experiences fear on three different levels. For the oppressor, there is fear that the oppressed will "rise up and kill him"; fear that the oppressor will be "found out" when the oppressed discover the sham of meritocracy; and fear of self-discovery when the oppressor is confronted with his own insecurity and inadequacy and learns that he is nothing without the oppressed.<sup>35</sup>

For the oppressed the three levels of fear are: fear of physical violence from the oppressor; fear of rejection by the oppressor when the oppressed have been told and believe that they will be welcomed by the oppressor if he can prove himself worthy; and fear that the oppressor will again strike out and attempt to subdue the oppressed once the oppressed discover the sham of white supremacy.<sup>36</sup>

Lawrence concludes that the fears of the oppressed and the oppressor are identical. Lawrence's dream and its symbolism illustrate the core underpinnings and interactions of American society. As illustrated, this sub-genre of critical race scholarship uses "voices" to pro-

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Richard Delgado, *The Inward Turn In Outsider Jurisprudence*, 34 WM. & MARY L. REV. 741, 747 (1993).

For a decidedly harsh critique of the narrative approach see Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992). Tushnet argues that much of the narrative scholarship is sloppy and impressionistic and suffers from stylistic flaws that undermine its effectiveness as legal scholarship. *Id.* at 260-77.

30. See *supra* note 27 and accompanying text.

31. See generally Bell, *supra* note 27. See also DERRICK BELL, JR., AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987).

32. See Bell, *supra* note 31.

33. See Lawrence, *supra* note 27, at 628.

34. See Lawrence, *supra* note 27, at 630.

35. See Lawrence, *supra* note 27, at 632.

36. See Lawrence, *supra* note 27, at 631.

vide context and to understand and transform established belief systems. It is thus labelled “transformative.”

### C. Divisive and Diversionary Critical Race Scholarship

As critical race theory evolved, it was perhaps inevitable that it would generate criticism from within and without the ranks of critical race scholars. Randall Kennedy authored one of the most widely cited critiques of critical race scholarship.<sup>37</sup> In his article, Kennedy critiques three principal critical race scholars, Derrick Bell, Richard Delgado, and Mari Matsuda, for elevating race into a positive credential and substituting the perspective or experience of the author for merit.<sup>38</sup> Kennedy’s criticism invited counter criticism, which invited reply to counter criticism, all played out in many of the nation’s best law journals.<sup>39</sup> For example, Milner Ball describes Kennedy as belonging to one world, and Bell, Delgado, and Matsuda as belonging to another.<sup>40</sup> According to Ball, Kennedy’s world is a “cosmopolitan intellectual community,” “[a] meritocracy in which merit stands for achieved honor by some standard that is indifferent to the social identity of a given author.”<sup>41</sup> In the final analysis, Ball judges Kennedy wrong because racial prejudice is not a severable element, and because “too often, [the] standards espoused by Kennedy have served as a mask for the operation of established power to be wholly innocent.”<sup>42</sup>

Similarly, Robin Barnes argues that Kennedy’s insistence on an empirically provable, neatly categorized definition of a minority per-

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

38. *Id.* at 1760-78, 1788-1807.

39. See Jerome McCristal Culp, Jr., *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, 41 DUKE L.J. 1095 (1992) (arguing that Posner’s refusal to engage the works of scholars of color perpetuates the subjugation of black people and black viewpoints and is inexcusable); Milner S. Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855 (1990) (arguing that Randall Kennedy’s criticism is narrow and premature, and that it potentially stifles debate); Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864 (1990) (arguing that Randall Kennedy’s insistence on quantifiable proof of a minority perspective may terminate review of substantive critical race theory claims); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (criticizes the scholarship of Robin West and Catharine MacKinnon for assuming the commonality of all women); Alan D. Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295 (1988) (cautioning those in the critical race theory movement not to alienate potential allies by becoming unreasonably defensive).

40. See Ball, *supra* note 39, at 1856.

41. Ball, *supra* note 39, at 1860.

42. Ball, *supra* note 39, at 1860.

spective leads him to invalidate the experiential knowledge advanced in the narratives that minorities have developed to articulate the experience of our shared history and quest for solutions.<sup>43</sup>

Criticism of any school of thought is fundamentally beneficial, as it provides clarification, definition, focus, and direction. Criticism, however, can become a divisive force if those whose ideas are criticized react defensively and expend a great deal of intellectual energy counterattacking.<sup>44</sup> One byproduct of this pattern of attack and counterattack is that the overall scholarly exchange becomes insular and vitriolic. Moreover, the focus then shifts to identifying allies and enemies in an effort to ultimately lay claim to the "higher ground." The crucial test for an emerging school of thought is its ability to acknowledge, tolerate, and even embrace dissenting voices.

In this regard, Alan Freeman has cautioned critical race scholars not to alienate potential allies by becoming unreasonably defensive.<sup>45</sup> Freeman observed that the impulse to "privilege their own pain" leads groups and individuals to direct their political action in accordance with their priority.<sup>46</sup> Freeman warns that while claims of priority may have persuasive force, they can lead to "hostility, defensiveness, posturing and the assured self-destruction of political movements."<sup>47</sup>

Because this category of critical race scholarship conspicuously grapples with the challenge of dissenting voices, it is appropriately labelled "divisive and diversionary."

#### D. Instructive Critical Race Scholarship

One subset of critical race scholars contends that the academy as a whole must incorporate the values and visions of the critical race movement.<sup>48</sup> These scholars also argue that the evaluative criteria

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43. See Barnes, *supra* note 39, at 1870.

44. See, e.g., Richard Delgado, *Brewer's Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 2 (1991) (taking issue with Scott Brewer's suggestion that Delgado and Randall Kennedy work toward common goals and questioning whether such goals even exist).

45. See Freeman, *supra* note 39, at 386.

46. See Freeman, *supra* note 39, at 385. For example, when asserting priority, Native Americans often raise arguments with respect to historical genocide, while Blacks similarly lay claim to a legacy of slavery. See Freeman, *supra* note 39, at 386.

47. Freeman, *supra* note 39, at 386.

48. See Taunya L. Banks, *Teaching Laws with Flaws: Adopting a Pluralistic Approach to Torts*, 57 MO. L. REV. 443 (1992) (demonstrating through specific case analysis how race, class, and gender can be addressed in the context of case law); Frances L. Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511 (1991) (urging incorporation of race conscious material into teaching and scholarship); Kimberle W. Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1 (1989) (analyzing difficul-

used in the faculty hiring, promotion, and tenure process should be race-conscious.<sup>49</sup> In one article, Duncan Kennedy presents “political and cultural cases for large-scale affirmative action” in faculty hiring.<sup>50</sup> Kennedy’s political case is based upon the notion that subordinated communities should have access to the resources that are necessary to exercise effective political power.<sup>51</sup> Kennedy’s cultural case is derived from the belief that an infusion of minority legal scholars “would improve the quality and increase the social value of legal scholarship.”<sup>52</sup>

A large share of the scholarship in this category is devoted to discussions and proposals for the development of suitable standards for internally evaluating “outsider” or critical race scholarship.<sup>53</sup> One notable piece by Stephen Carter argues that the proper standard for academic tenure in law schools should not be the “perspective from which an article is written or the subject that a scholar chooses to tackle,” but whether it “fulfill[s] the essential purpose of adding to human knowledge.”<sup>54</sup>

Finally, some works offer guidance on incorporating issues like race, gender, and class themes into the law school curriculum and pedagogy.<sup>55</sup> For instance, Taunya Banks advocates a “pluralistic approach to law teaching,”<sup>56</sup> which includes “consciously choosing to structure [a] course to include multiple perspectives—race, culture,

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ties facing minority students in the classroom and urging development of a critical pedagogy to provide “voice” to outsider perspectives); Derrick A. Bell, Jr., *Humanity in Legal Education*, 59 OR. L. REV. 243 (1980) (arguing that academia should aim to strengthen character, increase sensitivity to humanitarian concerns, and deepen moral values).

49. Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705 (arguing that since law schools are political institutions, all races and ethnic groups are entitled to share in the institutions’ resources); Derrick A. Bell, Jr., *Application of the “Tipping Point” Principle to Law Faculty Hiring Policies*, 10 NOVA L. REV. 319 (1986) (advising that law schools hire a representative number of minority faculty up to a psychological “tipping point”); Charles R. Lawrence, III, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 20 U.S.F. L. REV. 429 (1986) (proposing that problems of minority hiring be remedied by voluntary quotas and vigorous recruiting).

50. Kennedy, *supra* note 49, at 707.

51. Kennedy, *supra* note 49, at 707.

52. See Kennedy, *supra* note 49, at 707.

53. See *supra* note 29 and accompanying text. See also Alex M. Johnson, Jr., *Scholarly Paradigms: A New Tradition Based on Context and Color*, 16 VT. L. REV. 913 (1992) (arguing that multiple paradigms should be used to evaluate the works of scholars of color speaking in the voice of color); but see Stephen L. Carter, *Academic Tenure and “White Male” Standards: Some Lessons from the Patent Law*, 100 YALE L.J. 2065 (1991) (urging that scholars not be judged according to their voice, but by whether they bring novel ideas to legal scholarship).

54. Carter, *supra* note 53, at 2068-69.

55. Banks, *supra* note 48; Crenshaw, *supra* note 48.

56. Banks, *supra* note 48, at 446.

class and gender.”<sup>57</sup> Through a culture, class, and gender analysis of the case *O'Brien v. Cunard S.S. Co. Limited*,<sup>58</sup> Banks’s article offers a specific example of how greater perspective and understanding of case authority can be attained by a pluralistic approach.<sup>59</sup>

This category of critical race scholarship speaks inherently to the academy and makes no apparent pretense as to broader application. While this category of scholarship is transformative in nature, its effect is primarily limited to the academy, so it might be appropriately labelled “instructive.”

### E. Critical Race Scholarship as Praxis

Approximately twenty percent of the scholarship identifies “real world” situations that plague minority communities, filters these situations through the prisms of race, gender, and class, and proposes progressive solutions that transcend theory.<sup>60</sup> The solutions advanced are comprehensive and highly adaptable to practical application. The most striking examples of this scholarship arise in criminal law. For instance, Dwight Greene articulates how gender and race bias result in selective prosecution of mothers of color for delivering drugs to newborns.<sup>61</sup> Greene proposed a Prosecutorial Research, Information and Reporting Board to assist in minimizing the effects of bias in this area.<sup>62</sup> In another article, Sheri Johnson demonstrates that black defendants have higher conviction rates than similarly situated whites when tried by white jurors.<sup>63</sup> Johnson further critiques the inadequa-

57. Banks, *supra* note 48, at 446.

58. *O'Brien v. Cunard S.S. Co. Ltd.*, 28 N.E. 266 (Mass. 1891).

59. See Banks, *supra* note 48, at 449-54.

60. Dwight L. Greene, *Abusive Prosecutors: Gender, Race and Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737 (1991) (describing the plight of mothers of color prosecuted for delivering drugs to their unborn children and advocating an information and reporting board to minimize the effects of bias in this area); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) (proposing that Title VII be used to combat accent discrimination in the workplace); Taunya L. Banks, *Women and AIDS—Racism, Sexism, and Classism*, 17 N.Y.U. REV. L. & SOC. CHANGE 351 (1989-1990) (discussing discrimination against minority women who may be infected with the HIV virus and cautioning against mandatory or involuntary screening); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing that unconscious racism requires courts to consider cultural symbols to determine whether the meaning attached to an act is racially discriminatory); Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985) (proposing strict scrutiny standard to protect defendants of color from racially biased juries).

61. See Greene, *supra* note 60, at 778-88.

62. See Greene, *supra* note 60, at 794-801.

63. See Johnson, *supra* note 60, at 1616-51.

cies inherent in the system and suggested a “strict scrutiny” standard to protect defendants of color.<sup>64</sup> These two examples illustrate scholarship that reaches beyond the academy, offering meaningful guidance to practitioners and minority communities that could conceivably produce tangible results. Because it is result-oriented with practical application, this category is appropriately labelled “critical race theory as praxis.” The following section argues that the future of critical race theory lies in this category of scholarship because of its ability to expand beyond the boundaries of the academy into a practical and comprehensive guide.

## II. THE FUTURE OF CRITICAL RACE THEORY— CONJOINING THEORY AND PRACTICE

### A. The Importance of Audience

An analysis of critical race theory as praxis must explore its potential to address and to influence audiences beyond the confines of academia. This section evaluates the categories developed in Part I in terms of the potential for broader audience appeal.

The foundational and demonstrative category of critical race scholarship has limited appeal as praxis. Its primary function is to establish critical race theory as a legitimate method of scholarly inquiry.<sup>65</sup> Its principal and intended audience has been the “insiders” of academia. Thus, much of this scholarship is highly theoretical and involves detailed jurisprudential and historical analysis.<sup>66</sup> This category has dominated the critical race theory movement and, given its purpose and intended audience, has attained measurable success.<sup>67</sup>

As a praxis, however, this strength is also this category’s fundamental weakness. Precisely because it has had to attract the attention of others within the academy, much of this scholarship necessarily possesses a distinctly theoretical and intellectual bias. Consequently, from the perspective of practitioners and minority communities, foundational and demonstrative critical race scholarship is likely to be discounted as “mental gymnastics” and “just a bunch of smart people patting each other on the back for being smart.”

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64. See Johnson, *supra* note 60, at 1651-91.

65. See *supra* note 13 and accompanying text.

66. See *supra* note 13 and accompanying text.

67. See *supra* note 13 and accompanying text.

Transformative critical race scholarship, although perhaps targeting the same audience as the foundational and demonstrative category, nevertheless has greater appeal as a praxis. To the extent that storytelling builds community and solidarity, it has the capacity to “educate, provoke, and inspire.”<sup>68</sup> As a litigation technique, narrative can provide “voice” to those who are traditionally objectified or disadvantaged by stereotypes and institutional bias.<sup>69</sup> Practitioners who routinely work with disadvantaged client communities can explore the usefulness of storytelling as a means to elicit and empower “rarely heard perspectives from subordinated communities.”<sup>70</sup> The obvious benefit to minority communities is the empowerment that flows from contextualizing and naming one’s own reality. As praxis, therefore, transformative critical race scholarship offers the practitioner and the minority community an analytical framework for enhanced voice, context, and perspective.

The divisive and diversionary critical race scholarship offers limited appeal as praxis. As noted above, one benefit of criticism and dissent is a refinement of theories and principles.<sup>71</sup> In the critical race movement, the primary audience and usual targets for such critiques and counter critiques have been academicians.<sup>72</sup> Unfortunately, much of the dialogue has fallen to the level of intellectual bickering and defensiveness that stagnates progressive thought.<sup>73</sup> It is difficult to locate a praxis in these exchanges; therefore, the potential for influence beyond academia is slight.

Because the instructive category offers specific guidance to the academy, the primary audience for the instructive category again has been academicians.<sup>74</sup> By virtue of its audience and message, this category of critical race scholarship may appear to possess inherent limits as praxis. This category’s influence may, however, reverberate throughout the legal profession and the minority community on several levels. To the extent that law schools incorporate critical race theory into their curriculum and pedagogy, future practitioners will have a race-conscious analytical framework with which to assess the

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68. Margaret M. Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L.J. 749, 757 (1992).

69. See *infra* text accompanying note 77.

70. Russell, *supra* note 68, at 758.

71. See *supra* notes 37-47 and accompanying text.

72. See *supra* notes 37-47 and accompanying text.

73. See *supra* notes 37-47 and accompanying text.

74. See *supra* notes 48-59 and accompanying text.

lessons of history. This framework should instruct that America is a multicultural, “multivoice” society, and encourage mutual exploration and understanding across the boundaries of race, sex, or class. If incorporated, instructive critical race scholarship as a praxis could have a multiplier effect on the legal profession and society in general.

## B. Critical Race Theory as Praxis

Given the goals of the critical race theory movement,<sup>75</sup> it must expand its scope beyond the boundaries of academia. The final category, critical race theory as praxis, offers tremendous promise for such expansion and for the future of critical race theory. Critical race theory as praxis transforms theory into practice, and, thus, its primary audiences are practitioners and members of minority communities.<sup>76</sup> For example, an article written by Margaret Russell exemplifies this application of the insights of critical race theory to problems experienced by racially subordinated groups.<sup>77</sup>

Russell applies critical race theory principles to the increasingly frequent use of “gang profiles” to screen out “undesirables” from public accommodations and private businesses.<sup>78</sup> She employs narrative to furnish “voice” for the young men of color who traditionally bear the brunt of such gang profiles.<sup>79</sup>

To demonstrate the centrality of race and the complex dynamics embodied in facially neutral rules, Russell then urges the reader to imagine that the racist incidents resulting from gang profiles were stripped of references to race or ethnicity or alternatively to envision that the incidents involved white individuals.<sup>80</sup>

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75. The next sub-section will discuss this emerging trend.

76. See *supra* notes 5-6 and accompanying text.

77. See Russell, *supra* note 68, at 751. Russell explains the relationship between theory and practice as follows:

The relationship between critical theories and lawyering for social change is in many respects inherently dialogical and interdependent: a thoughtful approach to progressive practice has the potential to engender valuable theoretical and pedagogical insights; genuinely critical scholarship, in turn, can reveal the complexity of issues about which legal precedent and professional discourse are narrow, stultified, or simply nonexistent.

Russell, *supra* note 68, at 750-51.

78. See Russell, *supra* note 68, at 752.

79. See Russell, *supra* note 68, at 759. Russell details the experiences of young men of color as they attempt to enter Great America, an amusement park in Santa Clara, California. Young men of color were routinely approached by security guards, informed that they could only enter if they separated into groups of two or three, questioned as to nationality, ethnicity, and gang affiliation, and ejected from the park if their answers and appearance indicated gang membership. See Russell, *supra* note 68, at 759-62.

80. See Russell, *supra* note 68, at 762.

Russell maintains that the pragmatic objective of “race-switching” techniques is “to underscore the profoundly debilitating effect of racism on the apparent rationality of our perceptions and attitudes.”<sup>81</sup> Thus, “[r]ace-conscious practice incorporates this insight as a critical component of educative and persuasive advocacy.”<sup>82</sup> Russell concludes that the progressive practitioner should look to the developing body of critical race theory to contextualize and “embrace a broader and more eclectic vision of lawyering for social change.”<sup>83</sup>

Russell’s article exemplifies how critical race theory provides a rich foundation for those who must fashion creative arguments in the pursuit of racial justice.<sup>84</sup> A renewed challenge to subtle yet entrenched racial animus requires progressives to move beyond theory to pragmatic, forceful, and imaginative arguments capable of communication to multiple audiences. The future of critical race theory is dependent upon its ability to expand its audience base into new spheres of influence, including courts, politicians, the bar, and the general public. Such expansion necessarily requires comprehensive and comprehensible approaches that address “real world” concerns in a manner that transcends and transforms theory into practice-oriented rejoinders to the “rolling back” of civil and human rights.

## CONCLUSION

This article has articulated the functional evolution of critical race theory. While the categories developed here are not exhaustive and may be subject to significant overlap, they lend insight into the past and direction for the future of critical race theory as praxis. As I reflect upon the need to broaden the audience base, I am reminded of a master of marketing ideals to diverse audiences, the late Justice

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81. Russell, *supra* note 68, at 763.

82. Russell, *supra* note 68, at 763.

83. Russell, *supra* note 68, at 767. Donald E. Lively also articulated the need to adopt more creative approaches for completing the business of racial justice. See Donald E. Lively, *Reformist Myopia and the Imperative of Progress: Lessons for the Post-Brown Era*, 46 VAND. L. REV. 865 (1993). As Lively explains, in comparison to past challenges to racial disadvantage and injustice, “recent initiatives to reckon with the nation’s legacy of racism fall short both with respect to vision and breadth.” *Id.* at 888.

84. According to Lively, such creativity encompasses not only constitutional litigation but also the persuasive marketing of ideas. *Id.* at 893. Lively further observes that:

[c]reative thought, if it is to be bridled with real achievement, must factor in considerations other than legal theory and analytical prowess . . . . Regardless of how aptly a strategy for legal change is conceived and developed, it may be largely for naught if sufficient attention also is not devoted to elevating levels of social awareness.

*Id.*

Thurgood Marshall. When asked by journalists why he was retiring from the Supreme Court, Justice Marshall replied simply, "I'm old. I'm getting old and falling apart."<sup>85</sup> With that statement, as he had done throughout his illustrious career, Justice Marshall crafted a message that was simple, yet responsive and rich with complexity. To those who knew of his tireless efforts to attain racial justice, this concise message conveyed the sense that a great warrior was retiring his sword and shield. Ideally, the continued functional evolution of critical race theory will yield a similar legacy of simultaneous simplicity, richness, and complexity.

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85. Neil A. Lewis, *Marshall Urges Bush to Pick "the Best,"* N.Y. TIMES, June 29, 1991, § 1, at 8.