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Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice

by
MARGARET M. RUSSELL*

In this world-weary period of pervasive cynicisms, nihilisms, terrors, and possible extermination, there is a longing for norms and values that can make a difference, a yearning for principled resistance and struggle that can change our desperate plight.1

Introduction

Lawyers working for social change have always yearned to “make a difference” in people’s lives as well as in the legal systems in which they must operate. From the underground railroad to the civil rights movement, from struggles for suffrage to coalitions for reproductive choice, progressive lawyers have grappled with the structural and ideological contradictions of their roles as both insurgents and gatekeepers of the status quo. Given the longstanding existence and apparent irresolvability of these contradictions, the heightened anomie of the postmodern progressive legal movement is perhaps all the more striking: activist lawyers of today not only wonder whether they can “make a difference,” but also question what such a “difference” means in the context of a legal system intractably marred by maldistributions of access, resources, and influence. In this search for new theoretical dimensions of progressive lawyering, practitioners are joined by scholars aiming to

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broaden the jurisprudential canons within which issues of social justice historically have been discussed.

In this regard, the relatively recent emergence of jurisprudence in the areas of critical legal studies (CLS),\(^2\) feminist theory,\(^3\) and critical race theory\(^4\) presents significant opportunities for legal practitioners and activists who work toward the furtherance of social justice. The relationship between critical theories and lawyering for social change is in many

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I wish to note at this point that certain strands of critical race theory, feminist jurisprudence, and CLS are so thematically intertwined that works drawing upon various combinations of these theories resist singular or easy categorization. Examples of such convergences can be found in recent critiques emphasizing the need to consider the experiences and perspectives of women of color and lesbians in feminist legal theory. See Austin, supra note 3; Crenshaw, *Demarginalizing the Intersection of Race and Sex*, supra note 3; Grillo, supra note 3; Harris, supra note 3; Ruthann Robson & S.E. Valentine, *Lovers, Lovers, Lovers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMP. L. REV. 317 (1990); Scales-Trent, supra note 3.


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. Increasingly, those who regard themselves as activists and scholars in the academy openly acknowledge and embrace a commitment, shared with practitioners, to achieve political and social transformation through the law. As Professor Harlan Dalton has observed with respect to the growing community of activist legal scholars of color, we are all “practitioners in one way or another, people committed to pursuing an active program to change the situation of our people.”

Given these nascent possibilities for renewed collaboration between practitioners and academicians, it is important to remember that we should construct and sustain a progressive community not only at the intersection of theory and practice, but at the multiple crossroads created from our disparate critical orientations.

In this Essay I explore the relevance of insights from the emerging field of race theory to an analysis of problems experienced on a recurrent basis by members of racially subordinated groups. I focus particularly on the application of these theoretical principles to an

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6. See, e.g., Dwight L. Greene, Drug Decriminalization: A Chorus in Need of Master- rap’s Voice, 18 HOFSTRA L. REV. 457 (1990) (arguing that the formulation of national drug policy should include the perspectives and strategies of communities directly affected by rampant drug abuse and law enforcement excesses); Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 MICH. L. REV. 1 (1991) (discussing battering within the context of the prevalence of societal violence against women and calling for the recognition of “separation assault” as a doctrinal concept in domestic abuse cases).


8. Professor Kimberlé Crenshaw has described critical race theory as follows: It shares with liberal race critiques a view that law has provided an arena for challenging white supremacy. Critical race theory goes beyond the liberal critiques, however, in that it exposes the facets of law and legal discourse that create racial categories and legitimate racial subordination.

... The normative stance of critical race theory is that massive social transformation is a necessary precondition of racial justice. Kimberlé Williams Crenshaw, A Black Feminist Critique of Antidiscrimination Law and Politics, in THE POLITICS OF LAW 195, 213-14 n.7 (David Kairys ed., 2d ed. 1990) [hereinafter Crenshaw, A Black Feminist Critique].
understanding of one of the most serious discriminatory practices faced by minority communities today: the proliferation of appearance-based "gang profiles" used with increasing frequency by law enforcement agencies, public accommodations, and private businesses in order to screen out "undesirables." In my view, ostensibly neutral institutional practices such as "profiling" in fact reflect deeply embedded stereotypes of people of color, and perpetuate the misguided notion that complex social problems—in this case, the involvement of some young people of color in street gangs and street violence—can be resolved primarily through punitive measures.

This Essay is divided into four parts. In the next Part I discuss ways in which critical theory and practice in the area of race relations are not only intertwined, but mutually responsive and beneficial. In particular, I posit that critical race theory can be viewed as the continuation of a radical tradition of theory as progressive practice, and that some of its emerging tenets and methodologies hold considerable promise for practitioners committed to lawyering for racial justice. In Part II I apply these observations to the problem of "gang profiling"; I focus especially on the case of the Great America amusement park in California, which implemented but later was persuaded to abandon a "gang profile" policy that operated to exclude (almost solely) young African-American and Latino males on the ground that they "looked" dangerous. Finally, I conclude with a brief assessment of the role of critical race theory in the larger struggle for social change in the law.

I. The Practice of Theoretics: Race Consciousness and the Rule of Law

A central theme of critical race critiques is that liberal ideologies such as formal equality, colorblindness and procedural justice often conceal, or at least fail to take into account, structural dynamics in the law which perpetuate systemic racial subordination. These underlying structural flaws, which include persistent poverty, unconscious racism and sexism, function in turn as silent yet powerful reinforcements in the maintenance of legal and economic barriers to true racial equality.

Accordingly, race theorists assert, those committed to fundamental social and political change should lend their energies not only to the "practice" of lawyering and organizing, but to the "practice" of theoretical deconstruction and reconstruction as well. I briefly discuss below

9. For detailed descriptions of gang profiles from a law enforcement perspective, see infra notes 65-68 and accompanying text.
two aspects of this "practice of theoretics": visions of "theory as practice" in critical race literature; and evolving methodologies by which these visions find implementation as tools for practice.

A. Visions of Theory as Practice

...I am myself—a Black woman warrior
poet doing my work—come to ask you,
are you doing yours?10

The "work" of which Audre Lorde writes is that of poetry and education in the furtherance of liberation. As a scholar and poet who is also—and, she emphasizes, inextricably—African-American, lesbian, and feminist, Lorde reveals in passages such as the above a vision of her work as a fusion of theory and praxis. She observes:

In the forefront of our move toward change, there is only poetry to hint at possibility made real. Our poems formulate the implications of ourselves, what we feel within and dare make real (or bring action into accordance with), our fears, our hopes, our most cherished terrors.11

In Lorde's view, then, the forcefulness of poetry derives not only from its aesthetic power but from its instrumental potential as well.

Similarly, much of the work of critical race scholars proceeds both from the explicit commitment to "move toward change" and from the assessment that law occupies a central role in defining and circumscribing the possibilities "made real"12 for people of color. In accordance with Lorde's declaration that "[p]oetry is not a luxury,"13 critical race scholars would add that legal theory should not be either; rather, legal theory can serve an essential purpose in analyzing and dismantling pervasive attitudes of racial oppression and hatred.

This conceptualization of theory as practice finds direct antecedents in African-American political and literary traditions. These traditions are premised upon the recognition that African-American intellectual work and cultural production are fundamentally radical acts in a society

Lorde also notes:
It is a vital necessity of our existence. It forms the quality of the light within which we predicate our hopes and dreams toward survival and change, first made into language, then into idea, then into more tangible action. Poetry is the way we help give name to the nameless so it can be thought. The farthest horizons of our hopes and fears are cobbled by our poems, carved from the rock experiences of our daily lives.
Id. at 37.
12. Id. at 39.
13. Id. at 37.
which historically has defined African-Americans as subhuman and incapable of self-definition. In explaining the distinctive role of autobiography as an African-American literary genre, Professor Henry Louis Gates observes that many noted black authors have published their life stories early rather than late in their careers; he attributes this phenomenon to the necessity felt by the African-American intellectual to "shape" a public self in language as an act of resistance against a culture which systematically sought to erase that self. 

Professor Gates comments:

Deprived of access to literacy, the tools of citizenship, denied the rights of selfhood by law, philosophy, and pseudo-science, and denied as well the possibility, even, of possessing a collective history as a people, black Americans—commencing with the slave narratives in 1760—published their individual histories in astonishing numbers, in a larger attempt to narrate the collective history of "the race." If the individual black self could not exist before the law, it could, and would, be forged in language, as a testimony at once to the supposed integrity of the black self and against the social and political evils that delimited individual and group equality for all African-Americans.

Joining that tradition, critical race theory seeks to draw upon the insights and experiences of individuals subjected to discrimination in order to forge a race conscious "legal self."

In furtherance of this overarching vision of theory as practice, critical race scholarship presently reflects a wide-ranging array of approaches. While noting that a particular piece may reflect an amalgam of different objectives, I wish to note at this point two distinctive strands of the literature. One approach focuses on the documentation of specific policies and practices in the legal arena that fail to take into account the experiences and perspectives of people of color, and proposes doctrinal and policy reforms to ameliorate these shortcomings. The nexus between this critical approach and progressive lawyering is relatively easy to discern; the insights offered by such works are both descriptive and prescriptive, and can serve as a fairly well delineated overview of or blueprint for future litigation, lobbying, and organizing efforts.

A second approach explores the extent to which seemingly reified legal categories and boundaries are in fact socially constructed and there-

15. Id. at 4 (emphasis in original).
fore mutable. A primary example of this strand is the literature on what Professor Kimberlé Crenshaw has termed the "intersectionality" of race and gender—that is, the ways in which mainstream jurisprudence not only fails to accommodate claims of discrimination differentially experienced by women of color, but also resists the implications of these differences for norms otherwise assumed to be universal, neutral, and apolitical. The practical implications of this theoretical strand are perhaps less immediate and concrete than those of the more "policy-oriented" approach, but they are proffered in the literature as equally important steps in the resolution of recurrent legal dilemmas. And, as mentioned above, much critical race scholarship draws upon both approaches in order to discuss a specific legal problem and the broader historical and political context in which it occurs.

Finally, in discussing visions of theory as practice, it is appropriate to note the parallel development of race theorists' efforts to broaden the canons of legal scholarship and similar movements in other academic disciplines. As Henry Louis Gates, bell hooks, and other scholars in the humanities have sought to question traditional boundaries of their fields of inquiry, critical race scholars seek to reformulate the categories and doctrines through which lawyers (and nonlawyers) comprehend the law. While warning that abstractions and essentialized thinking about race, without continuous attention to and connection with real community concerns, could easily degenerate into a fashionable infatuation with "discourses about difference," these writings acknowledge and explore the need for a new theoretical base around which people committed to racial equality can mobilize. Elements of this emerging fusion of the-

17. See, e.g., Gotanda, supra note 4; Harris, supra note 3; see also Judy Scales-Trent, Commonalities: On Being Black and White, Different and the Same, 2 YALE J.L. & FEMINISM 305 (1990).

18. Crenshaw, Demarginalizing the Intersection of Race and Sex, supra note 3.

19. See, e.g., Matsuda, Voices of America, supra note 16 (first using social science literature to argue that perceptions of accent comprehensibility are socially constructed and filtered through personal bias; then proposing modifications of Title VII doctrine in accent discrimination cases to address perceptual shortcomings).


21. bell hooks, Postmodern Blackness, in hooks, YEARNING, supra note 20, at 23.

22. Comments hooks:
Committed cultural critics—whether white or black, scholars or artists—can produce work that opposes structures of domination, that presents possibilities for a transformed future by willingly interrogating their own work on aesthetic and political grounds. This interrogation itself becomes an act of critical intervention, fostering a fundamental attitude of vigilance rather than denial.
ory and practice can be found in the language of scholars such as Professor Richard Delgado, who submits a "plea for narrative" as a critical aspect of antiracist work; Professor Patricia Williams, who urges the hard labor of "boundary-crossing" to combat racial and ethnic stereotypes; and Professor Angela Harris, who observes that an essential part of her role in the academy is "education work" to foster empathy for minorities.

B. Methodologies of Theory as Practice

While generalizations about critical race methodologies would at this point be premature, the literature to date has reflected at least two strong themes which bear mention as part of the theoretics/practice dialectic: the use of narrative or "storytelling" to deepen the reader's awareness of and empathy with voices historically excluded from legal discourse; and explicit reference to diverse scholarly traditions and disciplines as valuable sources of insight into discrimination that cannot be explained through legal analysis alone. A brief discussion of the relationship between these methodologies and progressive practice follows.

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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.


25. Angela P. Harris, On Doing the Right Thing: Education Work in the Academy, 15 Vt. L. Rev. 125, 125-26 n.3 (1990). Drawing upon Professor Williams' "boundary-crossing" metaphor, Professor Harris opines that minority faculty at majority institutions have a special obligation to challenge bigotry despite the fact that "[t]he practical, emotional, and moral burdens of doing education work are heavy." Id. at 134.


27. In emphasizing the need for an interdisciplinary, historical approach to the law, critical race theory shares in certain respects a perspective earlier promulgated by the law and society movement. See, e.g., Lawrence M. Friedman, The Law and Society Movement, 38 Stan. L. Rev. 763 (1986).
(1) Narrative

In a general sense, narratives have occupied a central role in the legal system for as long as disputes have been recorded. Regarding the coalescence of this heightened interest in storytelling into a form of narrative jurisprudence, Professor Kim Lane Schepple notes, "[P]erhaps it's that law has always been concerned with narratives, with the individual plaintiff and the individual defendant in the individual case, so that theoretical attention to narrative was bound to emerge eventually."28 Critical race scholarship's use of narratives broadens the heuristic scope traditionally accorded to legal storytelling by engaging in what Professor Cornel West terms "analytical storytelling"29—the work of "politically engaged narrators who tell analytically illuminating stories about how the law has impeded or impelled struggles for justice and freedom."30 Of course, the history of legal storytelling—whether by a trial lawyer in closing argument or by a judge in a written opinion—has long revealed narrative's capacity to educate, provoke, and inspire; however, the difference between the traditional and the modern approach is that the latter explicitly focuses on analytical storytelling as a methodology of theory as practice.

For example, consider Professor Delgado's description of the catalytic role of storytelling:

We believe that stories, parables, chronicles and narratives are potent devices for analyzing mindset and ideology—the bundle of pre-suppositions, received wisdoms, and shared understandings against a background of which legal discourse takes place. . . . [T]he main cause of Black and brown subordination is not so much poorly crafted or enforced laws or judicial decisions. Rather, it is the prevailing mindset through which members of majority race justify the world as it is. . . . The cure is storytelling . . . to quicken and engage conscience.31

29. Cornel West, The Role of Law in Progressive Politics, in THE POLITICS OF LAW, supra note 8, at 468, 474.
30. Id. at 473. Professor West notes:
The role of progressive lawyers is not only to engage in crucial defensive practices—liberal practice vis-à-vis the courts—but also to preserve, recast, and build on the traces and residues of past conflicts coded in laws. This latter activity is guided by a deep historical sensibility that not only deconstructs the contradictory character of past and present legal decisions or demystifies the power relations operative in such decisions; it also concocts empowering and enabling narratives that cast light on how these decisions constitute the kind of society in which we live and how people resist and try to transform it.
31. Schepple, supra note 28, at 2075 (quoting a letter from Richard Delgado to Kevin Kennedy, June 1, 1988).
Narrative is also used in critical scholarship as a method for eliciting and empowering rarely heard perspectives from subordinated communities. For example, a scholar's documentation of a battered woman's decision to "tell my story and use my name"32 accords respect to that woman's voice. Similarly, when Professor Regina Austin draws upon the real-life story of Crystal Chambers in exhorting African-American female scholars to study and resolve African-American women's legal problems,33 she seeks to authenticate these women's priorities and experiences. In much the same way that a seasoned practitioner reminds herself of fleeting but profound moments with individual clients as a way of combating the fatigue and alienation of long-term practice,34 a scholar employs narrative methodology to remind both herself and her readers that urgent human needs lie beneath abstract legal theories.35

(2) Interdisciplinary Perspectives

It is, perhaps, by now truistic that all good lawyers are generalists. Drawing from a hybrid of common sense, knowledge, experience, borrowed expertise, and sheer gumption, lawyers who work for social change are no exception. In fact, as our judiciary, government, and social institutions continue to drift seemingly inexorably toward conservatism and retrenchment, progressive practitioners must rely even more on ideas, skills, and strategies developed in other arenas to remedy injustices that the current legal system is unable or unwilling to address.

In a related manner, a central theme of much critical race scholarship is an explicit intention to draw upon diverse disciplines and theoretical traditions in order to question and reconfigure the conventional boundaries of debate about race, racism, and the law. Several scholars have embraced this interdisciplinary approach both to express and ame-

32. Mahoney, supra note 6, at 1 n.*.
33. In Sapphire Boundl, supra note 3, Professor Austin uses the story of Crystal Chambers, a pregnant African-American woman discharged from her position as counselor in a girls' club in Nebraska, to illustrate her assertion that the dominant culture stigmatizes independent African-American women with the pejorative label of "Sapphire."
lorate their disillusionment with predominant civil rights ideologies; Professor Derrick Bell's use of historical, sociological, and literary materials in his "chronicles" about race is one example of this eclectic method. Another prominent example is Professor Charles Lawrence's use of psychoanalytic literature to develop a theory of the role of unconscious racism in the perpetuation of widespread societal discrimination. In these works and others, interdisciplinary methodologies serve to elucidate the pervasive influence of racism in this nation's culture. Such insights can lead in turn to a more expansive and eclectic vision of lawyering, particularly in an era in which interactions with the courts are increasingly unsuccessful.

In the next Part I apply several of the principles discussed above to the problem of "gang profiling," a rapidly growing phenomenon in both public and private settings. As explained below, gang profiling reflects deeply inscribed stereotypes about people of color, particularly young African-American, Latino, and Asian males. In many cases these gang profiles actually operate as "appearance" profiles, the effect of which is to label people of color as "dangerous" on the basis of their physiognomies. I begin with the stories of a number of young men who have been victimized by the discriminatory use of appearance profiles.

II. The Theoretics of Practice: Understanding and Challenging Gang Profiles

As the above section indicates, a theoretical approach to progressive lawyering requires that particular attention be accorded to the untold narratives of individual clients and client communities disadvantaged by legal and institutional practices. Therefore, it is helpful to begin this exploration of gang profiling with the individual stories of those who have borne the brunt of their implementation.

A. The Great America Incidents

On the Fourth of July in 1990 eight seventeen- and eighteen-year-old Latino males from San Mateo and Redwood City, California decided to go to Great America, an amusement park in Santa Clara, California. Before reaching the park, the youths divided into several groups; four of them—Jerry Ramirez-Claire, Rigo Rodriguez, Adrian Morales, and

36. Bell, supra note 4.
37. Lawrence, supra note 4.
38. The following account of the Great America incidents may be found in Plaintiffs' First Amended Complaint, Garcia v. Great America, No. 712978 (Santa Clara County Super. Ct. 1991) (on file with author).
David Garcia—paid their admission fees, parked their cars, and prepared to enter.39 As they approached the gates on a well-traveled public path alongside a fence, they were surrounded by Great America security guard cars, which blocked all avenues of departure. Park officers approached the four, accused them of being gang members, and informed them that they could enter the park only if they separated into groups of two or three. The youths divided into pairs but were stopped a few steps later by more officers. This time the questions were more insistent: What race were they? Where did they come from? San Mateo? Redwood City? East Palo Alto?40 The officers decided that the young men’s answers and appearance indicated gang membership, threatened them with arrest for trespass, and demanded that they leave the park. The four left.41

That same day seventeen-year-old Roger Prieto and nineteen-year-old Anthony Scozzari also visited Great America.42 Unlike the four before them, however, Prieto and Scozzari were permitted to pay the admission price and enter the park. After several hours in Great America, Prieto and Scozzari decided to try the White Water Rapids, a popular roller-coaster type of ride that often drenches its riders with huge splashes of water. As Prieto exited the ride, his pants soaked and sagging, he and Scozzari were approached by a park official. Again, a litany of questions ensued: What’s your nationality? Where do you live?43 Based on their answers and Prieto’s “sagging pants” (ostensibly an indicator of gang membership), the park official accused them of belonging to a Mexican gang and ejected them from the park.44 As the young men departed, they were approached by more officers, who arrested, handcuffed, and battered them. Scozzari was particularly brutally treated; an officer bent his fingers so far back that they made cracking noises, grabbed Scozzari by the hair, and slammed his entire body onto the cement ground.45 Scozzari and Prieto were then taken to a mobile police station on the grounds of the park, where they were charged with trespass, further harassed, and placed in a holding cell.46 Such incidents were not a Fourth of July anomaly. Great America’s

39. Id. at 12-13.
42. Id. at 14.
43. Id.
44. Id.
45. Id. at 14-15.
46. Id. at 15.
gang profile policy had been in effect for some time, and park officials readily acknowledged their practice of ejecting people whose appearance, in their view, "indicated" gang membership.\textsuperscript{47} Later that year, on September 30, 1990, park guards stopped Chiyuka Carlos, Michael Dawson, and Laban Wade, three young African-American males who had traveled to the park to attend a concert. The young men were singled out from the crowd, ostensibly because their attire—identical “Joe Boxer”-style pajamas with a green billiard ball print, and deliberately mismatched tennis shoes—fit the park’s gang profile. When Carlos, Dawson, and Wade asked what they had done wrong, the officers’ remarks became derisive and threatening, suggesting that they would have to leave because they were similarly attired black men and that that was enough.\textsuperscript{48} That same day, Nkrumah Prescod and Orange Richardson IV were thrown out of the park as well because of their styles of clothing and because, according to the park officers, they were “niggers” who “don’t know how to act.”\textsuperscript{49}

These stories are only a sampling of the harassing incidents endured by young men of color, often on a daily basis, because of formal and informal gang profiles. Such profiles are being adopted with increasing frequency by public law enforcement agencies, schools, and private entities such as stores and amusement parks. In 1991 a group of seventeen youths brought suit in California state court to challenge Great America’s gang profile. In addition to the above-named youths, the plaintiffs included: a fourteen-year-old Latino male who was stopped because of his manner of dress, interrogated about his race and national origin, searched, handcuffed, arrested, and taken to juvenile hall for suspicion of gang membership;\textsuperscript{50} and an eighteen-year-old Filipino and Latino male who was detained, asked about his nationality and gang affiliation, and ejected from the park after officials made a “permanent record” of his name, race, and address.\textsuperscript{51} Of the seventeen plaintiffs, only one was white: a nineteen-year-old male who had been ejected twice from Great America with his African-American and Latino friends, the

\textsuperscript{47} Although Great America readily conceded the existence of an informal “gang profile” policy, it has never disclosed with any specificity the criteria of which such a policy was comprised. A few isolated items of apparel have been mentioned as “gang signifiers”—e.g., “acid-washed jeans” and “overalls”—but a comprehensive description of the policy has never been proffered. Interview with David Drummond, Co-counsel for Plaintiffs (Jan. 12, 1992) (notes on file with author).

\textsuperscript{48} Great America Challenged for Excluding Minority Youths, supra note 40, at 2.

\textsuperscript{49} Complaint, supra note 38, at 24-25.

\textsuperscript{50} Id. at 3, 18-19.

\textsuperscript{51} Id. at 3, 19-20.
second time with a warning that he had better stop "hanging around with the wrong crowd." As a result of negotiations between the plaintiffs and Great America during 1990 and early 1991, the park agreed to terminate its policy. However, the plaintiffs' remaining claims seek damages from Great America and the City of Santa Clara, and damages and injunctive relief from the Santa Clara County Sheriff's Department for its alleged role in assisting Great America in the formulation of the gang profile policy.

B. The Race-Based Nature of Gang Profiles

Imagine for a moment that the incidents recounted above had been stripped of all references to racial and ethnic identity: "de-race" the names, descriptions, and epithets used and replace them with ethnically "unidentifiable," color-neutral terms. Then ask yourself whether the stories resonate differently because of this (literally) facial alteration and, if they do, why this might be so. Then try to clear your mind again and envision that these incidents are once again "raced," but that this time they all involve white individuals. Again, do the stories evoke different insights? If so, why?

This mini-exercise in shifting perceptions is offered as an illustration of an underlying objective of critical race theory: to identify race as a central rather than marginal factor in defining and explaining individual

52. Id. at 5, 16-18.


In addition to the Great America case, there have also been challenges to the gang profile policy at Six Flags Magic Mountain amusement park in Valencia, California. In 1988, for example, a Latino family filed suit against Magic Mountain, alleging that they were stopped in the parking lot after a security guard looked into their vehicle and called out, "Hey, there's a bunch of Mexicans in that van." Park guards ordered the family members out of the van, searched them, and ejected them from the park because their fourteen-year-old son was wearing a black Le Tigre shirt. Also in 1988 nine African-American males in a multiracial Christian youth group were singled out by guards from a crowd of predominantly white teenagers at Magic Mountain; they were harassed, questioned, and searched for drugs and weapons. When the detention yielded no incriminating evidence, the young men were finally allowed into the park with the rest of their group. Interview with Carol Sobel, Staff Counsel, American Civil Liberties Union (ACLU) of Southern California (Jan. 28, 1992) (notes on file with author). Both cases were settled and the formal gang policy was discontinued.

54. I attribute this concept to Professor Kendall Thomas, who notes that race is a social construction and that individuals are "raced" through the pervasive and ineluctable assignation of ideological and cultural meanings to racial and ethnic status. Professor Kendall Thomas, Comments at Panel on Critical Race Theory, Conference on Frontiers of Legal Thought, Duke Law School (Jan. 26, 1990) (tape on file with author). "De-race"-ing is no doubt an impossible conceptual task, for reasons explained in the text accompanying this note and notes 55-59. However, the futility of the attempt may prove instructive in seeking to understand that racism is deeply embedded in our legal culture.
experiences of the law. By acknowledging racism as the overarching affliction of the American legal system, we may begin to explore the more complex dynamics embodied in facially neutral rules, institutions, and attitudes. Toward that end, attention to differences of racial perspective is not just helpful, but necessary.55

In this regard, the usefulness of race consciousness and racial contextuality is amply illustrated in Professor Patricia Williams’ discussion of the 1987 trial of Bernhard Goetz, the white “subway vigilante” who shot four African-American teenagers in a New York subway after they approached him for money.56 Noting the context of anti-African-American racial animosity in which the trial occurred and was publicized, Professor Williams uses a “race-switching” vignette to suggest that Goetz’s acquittal and public absolution were dependent upon his whiteness. Closely tracking the details of Goetz’s videotaped confession but inverting the setting and the races of the individuals involved, Professor Williams writes:

A lone black man was riding in an elevator in a busy downtown department store. The elevator stopped on the third floor, and a crowd of noisy white high school students got on. The black man took out a gun, shot as many of them as he could, before the doors opened on the first floor and the rest fled for their lives. The black man later explained to the police that he could tell from the “body language” of the students, from “shiny eyes and big smiles,” that they wanted to “play with him, like a cat plays with a mouse.” Further, the black man explained, one of the youths had tried to panhandle money from him and another asked him “how are you?” “That’s a meaningless thing,” he said in his confession, but “in certain circumstances, that can be a real threat.”57

Because of the pervasive and unspoken role of racial perspective in our legal culture, Professor Williams’ race-inverted version of Goetz’s confession would never “make sense” in the way that his actual rendition did.58 The pragmatic objective of such “race-switching” techniques is to underscore the profoundly debilitating effect of racism on the apparent rationality of our perceptions and attitudes. Race-conscious practice incorporates this insight as a critical component of educative and persuasive advocacy.

55. A similar argument may be advanced using gender, class, sexual orientation, and other socially constructed categories as a basis for rule critique. For examples of such critiques in the areas of critical legal studies, feminist theory, and lesbian and gay jurisprudence, see supra notes 2-4.

56. WILLIAMS, THE ALCHEMY OF RACE, supra note 4, at 73-78.

57. Id. at 76.

58. Id. at 76-77.
In this vein, it is possible to address the racial implications of institutional gang profiles by examining the historical and political context in which they have proliferated. In recent years, communities across the United States have reported a surge in gang activity, particularly among young people in urban areas.\(^5\) Considered by many to be a primary source of drug dealing, drug-related crimes, and street and school violence, youth gangs have received an enormous amount of attention from law enforcement agencies and the media. Although the relevant literature from both social scientists and law enforcement specialists differ considerably in their assessments of the causes, growth, and extent of gang violence in recent years,\(^6\) gangs have emerged in the current political context as a major focus of law enforcement strategies. Juvenile law expert Susan Burrell notes:

The primary approach is a war model. Los Angeles Police Chief Darryl Gates has compared his officers to a military force, and the gangs to a hostile defending force. “It’s like having the Marine Corps invade an area that is still having little pockets of resistance . . . We can’t have it . . . We’ve got to wipe them out.”\(^6^1\)

With disturbing consistency, the battlegrounds for such law enforcement invasions have turned out to be the nation’s minority communities, and “the enemy” has been defined more broadly to encompass in effect “suspicious-looking” young men of color. For example, Burrell reports that the Los Angeles Police Department’s “Operation Hammer” is a far-ranging “sweep” program which in 1988 resulted in the arrests of over 24,000 individuals, of whom nearly half were found by police not to be gang members.\(^6^2\) Such antigang sweep tactics are employed in other ur-

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59. For a compelling recent study of contemporary urban gangs in the United States, see MARTIN SÁNCHEZ JANKOWSKI, ISLANDS IN THE STREET: GANGS AND AMERICAN URBAN SOCIETY (1991). Professor Jankowski observes: 

[G]angs emerge not as a result of disorganization and/or the desire to find order and safety, but as a consequence of a particular type of social order associated with low-income neighborhoods in American society. Low-income areas in American cities are, in fact, organized, but they are organized around an intense competition for, and conflict over, the scarce resources that exist in these areas.

Id. at 22.


ban communities as well. Burrell further recounts the experience of an African-American youth who reported being stopped and searched repeatedly on the streets of Oakland: "You can't even stand on the street here. . . . It's like South Africa. If you don't have I.D., they take you to jail."63

Although the youths subjected to such searches may experience them as arbitrary and race-based, law enforcement agencies assert that particularized "gang identifiers" form the basis for their selection of individuals and groups. Interestingly, however, these "gang identifiers" are conceptualized and developed specifically along racial and ethnic group lines.

For example, in a manual circulated by the Contra Costa County Deputy Sheriffs' Association,64 California youth gangs are categorized on the basis of race and ethnicity; in turn, each racial or ethnic gang is characterized by specific items of clothing, slang, and other cultural identifiers. The listing for "Hispanic Gangs" includes the following "gang-identified" apparel: "Campo Hat" (blue denim cap); "Watch Cap" (dark knit cap pulled down to cover the ears with a small roll at the bottom); "Bandana" (different colors, folded lengthwise, and tied in the back); "Hat" ("stingy" brims or baseball caps, sometimes with a nickname written on the bill); "Pendleton Shirt" (buttoned at the collar and cuffs, remaining front buttons unfastened). Other clothing listed as "Hispanic gang identifiers" are T-shirts, undershirts, khaki pants, blue jeans, tennis shoes, and shiny leather shoes.65

Listings for other groups are equally wide-ranging and problematic. Consider the "known gang identifiers" for "Asian Gangs": Fila Brand sports clothing; military fatigue shirts or black jackets; camouflage military clothing in combination with black or other dark clothing; baggy clothing; and business suits or other "conventional clothing."66 The manual describes "Black Gangs" in the following manner: "There are two basic types of gang clothing. First is the type that will lead the observer to the conclusion that the individual belongs to a gang without specifically identifying which gang. . . . The second type of gang clothing specifically identifies a gang."67 Nowhere in the manual is there an explanation of how an observer might discern the difference between gang

63. Id. (quoting Cooper, Caught in the Crossfire, S.F. EXAMINER, Image Magazine, Aug. 13, 1989, at 7-8).
64. CONTRA COSTA COUNTY DEPUTY SHERIFFS' ASS'N, STREET VIOLENCE/GANGS, GROUPS AND CULTS (1990) (on file with author).
65. Id. at 45.
66. Id. at 61, 63.
67. Id. at 51.
members dressed in the above fashions and similarly garbed non-gang members.

As the above passages demonstrate, not only clothes but race and ethnicity are essential components of law enforcement decisions regarding gang membership. This ready conflation of race and ethnicity with culpability is particularly disturbing given the fact that young people of color are often deemed “suspicious” for wearing apparel that usually goes unnoticed when worn by their white peers.68 Through the unquestioned syllogism that appearance is equivalent to danger, gang profiles foster the illusion that concrete community concerns can be addressed by broad incursions into the individual liberties of those who happen to have the “wrong” physiognomies and demographic characteristics.69

C. Addressing Community Concerns

With the realization that institutional gang profiles are being used to define “undesirability” on the basis of racial and ethnic background, how might a progressive practitioner draw upon the insights of critical race theory to support community efforts to combat both gang violence and the erosion of individual rights? I suggest three ways to begin such a dialogue.

First, it is important to use our legal skills to make explicit the role of racism, both conscious and unconscious, in institutional assessments of what and who pose the greatest threats to community safety and dignity. Using the Great America incidents as a paradigmatic “dilemma” of the tension between community concerns about safety and community commitment to freedom, it is possible to insist that the resolution of such a dilemma must not include the abandonment of individual liberties of people of color. By challenging gang profiles as ideological as well as legal and institutional constructs, the practitioner can use theory in the service of long-range systemic change.

A second and related approach is to draw upon narrative more extensively as a methodology for education and advocacy. Often, the so-

68. Consider, for example, the implications of subjecting all youths, or white youths only, to a broad profile including popular items of apparel such as baggy pants, caps, and Pendleton shirts.

69. Recently, a group of civil rights organizations in Northern California lobbied successfully for the elimination of a so-called “Asian mug book” that had been used by the San Jose Police Department to investigate gang violence in the Asian community. The “mug book” consisted of photographs solely of Asian individuals (a number of whom had not been charged with a crime) which were displayed to complainants for purposes of “identifying” suspects. Donna Yamashiro, Staff Attorney, Asian Law Alliance, Remarks at Panel on Anti-Asian Bias, Santa Clara University (Apr. 20, 1992) (notes on file with author).
called "solutions" to community problems proposed by lawyers, law enforcement agencies, and other institutional actors are seriously lacking in responsiveness to the concerns of the communities themselves. In this regard, active and analytical storytelling can elicit perspectives rarely taken into account in more conventional forms of litigation, policymaking, and organizing. Increased attention to client narratives such as those of the Great America plaintiffs can serve to focus priorities in addressing legal problems.

Finally, the progressive practitioner can look to the developing body of race theory scholarship for a more contextualized and interdisciplinary approach to legal problem-solving. With the increasing conservatism of federal and state courts, practitioners must embrace a broader and more eclectic vision of lawyering for social change. Whether the issue is gang profiles or an even farther-reaching question of community dynamics, it is imperative for the practitioner to realize that familiar legal terrain may need to be supplemented or even supplanted by new strategies.  

Conclusion: Toward a Convergence of Theory and Practice

The "Theoretics of Practice" conference provided an opportunity for students, practitioners, and scholars to address the shared longing of which Cornel West has written—the "longing for norms and values that can make a difference . . . that can change our desperate plight." The growing community of critical race scholars shares that yearning as well, and seeks to foster an integration of theory and practice to address the desperate plight of racism's victims. Such a goal is neither simple nor singular, for the manifestations of racial prejudice in our culture and in our legal system are manifold and deeply rooted. Therefore, it is perhaps better to explore not one but many convergences among our respective communities, in the hope of achieving an ultimate vision of lawyering for social change that is eclectic, inclusive, and truly liberatory.

70. In recent months, for example, a number of school districts throughout the country have attempted to address the nationwide crisis of school violence by instituting antigang "dress codes" for elementary and high school students. See, e.g., Oakland Unified School District Dress Code (1991) (on file with author). Although the impetus for such codes is understandable, their more restrictive provisions suggest that they may eventually function as institutionalized "gang profiles" in the school setting. Given the urgency of community determination to eliminate school violence and the likelihood that young students of color will suffer disproportionately from the administration of dress codes, it is likely that a community-oriented practitioner would not seek solutions primarily through litigation. Rather, she might want to meet with a variety of community groups (students, parents, teachers, administrators) and seek extralegal solutions to this complex web of problems.
