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Cover Page Footnote

Professor of Law and Co-Director, Stein Center for Law and Ethics, Fordham University School of Law. I extend my gratitude to Russell Pearce for initiating the idea for the conference and helping to bring it to life through our many brainstorming sessions. I also deeply appreciate the commitment and generosity of Dean William Treanor and Associate Dean Mathew Diller in supporting the work of the Stein Center and this conference.

SYMPOSIUM
CRITICAL RACE LAWYERING
FOREWORD

*Sheila R. Foster**

INTRODUCTION

Two years ago, a group of Fordham law students approached some of my colleagues and I inquiring why there was not a course on critical race theory (“CRT”) listed in the Spring schedule of classes. The students were ethnically and racially varied, but all had either previously been exposed to CRT or possessed a deep curiosity about what it might teach them. Much of what was driving their angst about the absence of the course on the schedule was the prospect that the third years among them would soon graduate without a deeper understanding of what they considered to be a crucial area of legal thought and analysis. The passion with which these students corralled a group of five or so faculty members to teach the course on “overload” was both inspiring and vindicatory of CRT’s ascent into legal theory and education over the past two decades.¹

Inspiring as this incident was, it has become juxtaposed in my mind with a series of conversations I have had over the years with students exposed to CRT who wonder poignantly about the reach of legal theory (both generally, and specifically in the case of CRT) into their post-graduate professional lives. In different but recurring ways, I have been asked the same questions over and over again. What, exactly, are students to draw from the piercing insights of critical theory that can guide them in their professional roles, identities, and choices? How do the tenets and methodology of CRT translate into

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1. *See generally* Dorothy A. Brown, *Critical Race Theory: Cases, Materials and Problems* (2003); *Critical Race Theory: The Cutting Edge* (Richard Delgado ed., 1995); *Critical Race Theory: The Key Writings That Formed the Movement* (Kimberlé Crenshaw et al. eds., 1995).

tools that legal practitioners can draw upon to improve the conditions of the very subjects about which we have written so eloquently? I have often struggled to come up with a fully satisfactory response to these inquiries.

Most of us writing and teaching in this area would agree that CRT is largely about the framing and analysis of legal (and social) questions concerning race, and racial subjects, in a manner that jettisons existing frameworks and proposes alternative ways of analyzing the same questions and problems. If this is correct, then exposure to the theory itself arguably enables our students to enter the world of practice with a self-consciously critical lens through which to approach issues of racial (in)justice. In doing so we hope they can eventually train our legal system to ask and answer these issues in the ways that legal theorists have taught them, thereby transforming the norms underlying our approach to, and adjudication of, deeply entrenched social and legal problems faced by people of color.

I doubt, however, the self-obviousness of the connection between theory and practice—in particular, the myriad ways that critical theory can be applied to the problems of individuals and communities of color. Too often connecting the dots, so to speak, requires the kind of learning by osmosis for which practitioners rarely have time. While theorists may recognize the barriers to, and the difficulty of, law reform, we may at the same time underestimate or unwittingly discount (perhaps because many of us no longer practice) the craftsmanship necessary to effectively employ legal rules and legal theory to achieve racial equality and/or the analytical tools required to navigate around (or jettison altogether) the rules that we adjudge to have created (or further exacerbated) existing racial inequalities. And even when we identify novel, transgressive approaches to achieving racial justice within the legal system, we may overlook deeper ethical implications of such solutions. In short, many of us have been too deeply ensconced in the theory to pay much attention to the “praxis.”²

The Symposium on Critical Race Lawyering held here at Fordham University School of Law on November 5, 2004 was designed as a meditation on the relationship between race theory and legal practice. Beyond the interrogative ways that theorists have critiqued legal doctrines and principles that characterize mainstream legal thought, what else do we have to offer our students (and practitioners exposed to the literature) about how to be “critical race lawyers,” or to engage in “critical race lawyering” where appropriate? Using race as a primary lens of examination, participants set out to think through

2. See Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 Mich. L. Rev. 821, 874 (1997) (suggesting more “reflective action” by scholars, lawyers, and community activists, involving an infusion of on-the-ground practice with aspects of critical inquiry and pragmatism and then a recasting of theory in light of practical experience).

some of the insights that CRT has offered (or could offer) us in the context of our professional roles, advocacy strategies, and lawyering goals. The underlying premise of the symposium was to make explicit the connection between theory and practice, to highlight areas where that connection has already been made by scholars, and to identify areas where more inquiry and creative thinking might further push the theory into action.

In this Foreword, I want to discuss three areas that might define the contours of critical race lawyering and ways in which CRT has, and could continue to, illuminate the connection between theory and practice.

I. PROFESSIONAL IDENTITIES AND ROLES: COMMON, BUT DIFFERENTIATED RESPONSIBILITIES

A starting point in thinking critically about race and lawyering is to acknowledge our enduring racial “separatism.”³ The racial stratification that marks many of our lives invariably influences the motivations and interests of students entering law school and enduringly shapes their professional values, identities, and roles once they leave law school. In other words, race is a powerfully salient factor whose influence we cannot escape largely because of its deep mark on our lives and the lives of those around us. In other words, we experience constant reminders of how much race still matters in almost every context of our personal and professional lives. This observation may be so reflexively obvious that some have become indifferent to it. But it is nevertheless worth emphasizing the ways that race deeply impacts the shape and texture of some of our most common professional dilemmas, particularly for lawyers of color.

My experience as a young litigator at a large law firm many years ago reflects one such dilemma common among attorneys of color in private practice. Shortly after joining the firm, I was placed on a case that in many ways was a novice lawyer’s dream. The firm had taken over a class action case against our client, one of the largest insurance companies in the nation, from another large firm after the unsuccessful litigation of the claim in federal court. Our client had lost the liability portion of the case at trial and now needed our firm to litigate the damages portion. Our firm’s work would involve determining which of the over 1000 plaintiffs in the class actually suffered from the illegal behavior that the trial court had determined our client systematically engaged in. This latter part of the case

3. See, e.g., Sheryll D. Cashin, *The Failures of Integration: How Race and Class Are Undermining the American Dream* x-xix (2004) (noting the fact that five decades after the death of legal segregation, our neighborhoods and schools remain racially identifiable, and describing the tremendous economic and social consequences of that segregation for individuals and communities of color).

promised each of us on the litigation team the type of experience most large firm litigators do not experience for years into their practice. We would be deposing each individual plaintiff, defending the deposition of hundreds of our client's employees, and arguing motions before special federal magistrates on each plaintiff's claim. The experience was invaluable from the standpoint of a first year associate.

The problem, from my vantage point, was that the case was a sex discrimination claim under Title VII of the Civil Rights Act of 1964, as well as perhaps the largest class action sex discrimination claim ever brought under the statute. Our firm's task was to reduce the company's damages by demonstrating the spurious nature of each class plaintiff's—each woman's—discrimination claim. This often involved making a case that she was not really “interested” in being hired by the company because she was otherwise engaged in household or mothering work, or otherwise unavailable for the opportunity from which she claimed to have been deterred or denied. I found many of our litigation strategies problematic in that they seemed to reinforce the very social and institutional barriers that Title VII was designed to dismantle.⁴ Nevertheless, our strategies, to my discomfort, were overwhelmingly successful in denying recovery to many of the women in the class.

But my ethical dilemma posed more personal challenges. As a preliminary matter, I was curiously aware of the fact that the head of our litigation team for this case was a relatively young female partner, as were a significant number of associates placed on the team. I was, however, the only person of color on the team, though the firm had an uncommonly significant number of associates and partners of color, particularly African-Americans.⁵ I speculated that perhaps the healthy representation of women on the litigation team was reflective simply of the fact that some of the best young litigators at the firm were women. Perhaps our client had chosen the firm and/or the litigation partner because of this diversity, a fact that could only signal its egalitarian nature and benefit it in front of the special masters that would determine critical procedural and substantive matters in the case.⁶ The expressive nature of our team's gender (and perhaps

4. See, e.g., Vicki Shultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 Harv. L. Rev. 1749 (1990) (applying a critical analysis of federal courts' acceptance of claims that a particular social group is underrepresented because of their lack of interest, particularly where that group has previously faced overt discriminatory barriers to entry).

5. See, e.g., David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 Cal. L. Rev. 493 (1996).

6. The choice of an attorney who shares the plaintiff's racial or gender identity in discrimination cases is a strategic tactic often employed to make the defendant look

ethnic) makeup was clearly potent, even though I was not sure what exact message it was intended to convey.

My identity as an African-American attorney, however, had its own, unmistakable ethical dimensions. Working on the case constantly evoked the stories I had heard from my parents, grandparents, and extended family members about life in the segregated South and the valiant efforts of everyday African-Americans and their leaders in the civil rights movement to instigate social change and achieve racial equality. One of the shining accolades of their efforts was the passage of the Civil Rights Act of 1964, of which Title VII is the most litigated section. It seemed that the nature of my work on the discrimination case, particularly some of our litigation strategies, was undermining the very law (and social movement) largely responsible for many of the opportunities I now enjoyed as an African-American. I also felt a very strong allegiance to my foremothers' and forefathers' efforts to bring about this law. In my mind, I was a traitor to their efforts and to the cause of racial justice. In other words, I did not feel I had the luxury to check my racial identity at the door. Instead, it and the history that surrounded it were constantly perched on my shoulder interrogating my professional values and choices throughout the case.⁷

Although I expressed my personal and professional concerns and dilemmas to the partner on the case, she had no real guidance on how I might negotiate them, aside from her general sense that I was being naive about the sincerity and veracity of many of the plaintiffs' claims. In other words, she sincerely believed we were engaged in a truth-seeking enterprise, one that would ultimately vindicate our aggressive litigation strategies. I believed, on the other hand, that I was betraying principles and histories that could not be rehabilitated when

less culpable. *See, e.g.*, Paul M. Barrett, *The Good Black: A True Story of Race in America* 166-67 (1999). Barrett describes, in a race discrimination claim by a Harvard-trained black lawyer against his law firm, how

[t]he defense side had grown worried about pale Michael Warner [one of the firm's lawyers] standing in front of a predominantly black Washington jury, questioning [plaintiff's] character and veracity. So [the firm] launched a search for a local black lawyer willing to lend his or her complexion to the defendants' cause.

Id.

7. *See* Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straightjacket of Legal Practice*, 95 *Mich. L. Rev.* 766, 772 (1997). The author notes:

Unlike white attorneys, who have the relatively luxurious comfort of invisibility and transparency in raising issues of race in the lawyering process, Black attorneys must always brace themselves to have *their* racial, professional, and personal identities placed in issue as well. This additional layer of scrutiny and suspicion may in turn raise for the Black attorney difficult professional and personal questions of identity, autonomy, authenticity, and loyalty.

Id.

this truth-seeking mission was completed. In the end, neither she nor I was able to reconcile our competing ethical stances. Ultimately, I resigned from the litigation team, the case, and the law firm, notwithstanding her admonition that I was being “unprofessional.”

I am certain that many of my colleagues at the firm would have agreed with the partner and also considered my objections and abandonment of the case “unprofessional.” Perhaps they would have been right as a matter of professional ethics, at least in the formal sense of that term under the Model Rules of Professional Conduct. But I certainly did not view myself as possessing a realistic, accessible framework in which to resolve our competing claims and conceptions of professionalism.

Many of us intuitively acknowledge through experiences like mine that our current norms of professionalism do not adequately account for the professional and ethical challenges confronting lawyers of color and/or involving the representation of clients of color. This is particularly the case in the criminal justice system.⁸ As critical race scholars have noted, ethical dilemmas faced by attorneys of color are often ones that place our racial identities in conflict with normative ethical standards that demand a “bleached out professionalism”—requiring us to shed our religious, gender, and racial identities and loyalties in the service of universal professional norms like “neutrality” and “objectivity.”⁹

Although the work of these scholars was not available (or at least not known to me) at the time that I was struggling through my professional dilemma, such work would have provided me with an analysis that took my nonprofessional loyalties and obligations seriously and a language through which to resolve my competing allegiances. I would have discovered that, luckily, there need not be such a nonnegotiable conflict between the identities of black and lawyer; that indeed it is possible to retain one’s racial identity and the historical and social obligations attendant to it without unduly constraining one’s professional roles and obligations.¹⁰

8. See, e.g., Anthony V. Alfieri, *Defending Racial Violence* 95, Colum. L. Rev. 1301 (1996); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L.J. 677 (1995); Russell, *supra* note 7.

9. David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 Md. L. Rev. 1502, 1504-05, 1517-25 (1998) (discussing the work of Margaret Russell, Anthony Alfieri, Robin Barnes and others).

10. *Id.* at 1506-07. The author defines a role for an “obligation thesis” that “neither turns black lawyers into racial patriots whose sole responsibility . . . is to be an ‘interpreter and proponent of [black] rights and aspirations,’ nor treats racial obligations as ‘personal’ commitments,” but instead allows for the negotiation of three “semi-autonomous” and, ultimately, “secondary” moral realms: the “professional,” representing the legitimate moral demands emanating from the norms and practices of the legal profession; the “obligation thesis,” representing the legitimate moral claims emanating from a black lawyer’s membership in the black community; and the “personal,” representing the unique desires and commitments

II. LAWYERS AND CLIENTS: REPOSITIONING THE PROFESSIONAL SUBJECT

There are other ways that our professional identities serve as a straightjacket, confining us to learned modes of analysis and static professional roles that are ill-suited to identifying the most effective and innovative solutions to contemporary problems of race. Lawyers are trained to be problem-solvers and, as such, have held an exalted position in bringing to bear solutions to the problems of marginalized communities and individuals. We have often done so by invoking the discourse of rights and rights-based remedies. Legal rights, as critical race scholars have elegantly argued, have historically been an effective and faithfully relied upon form of legal discourse and strategy for African-Americans and other historically subordinated groups.¹¹

At the same time, the uncritical pursuit of rights-based strategies and discourse has sometimes situated lawyers in positions that created conflicts of interest vis-à-vis these communities. Derek Bell long ago criticized civil rights lawyers for subordinating the interests of their clients, black segregated communities, to the interests of elite liberal public interest lawyers.¹² Integration, he argued, may have served certain legal ideals, but ultimately fell short in addressing the material inequalities of the communities themselves. While these lawyers zealously pursued the goal of school integration, they largely ignored suggestions from local communities that school equality would be better served by hiring blacks in top positions in the school system, improving black schools' resources, and including more black parent participation in school policymaking. The need to recognize and respect the legal rights that African-Americans and others have gained has often obscured the need for pragmatic problem-solving approaches to contemporary racial problems. This is particularly true in an environment characterized by the waning of the political will, or taste, for racially conscious or class-based remedies that characterized

that black lawyers have in virtue of their basic humanity. *Id.*; see also Russell G. Pearce & Amelia J. Uelmen, *Religious Lawyering in a Liberal Democracy: A Challenge and an Invitation*, 55 Case W. Res. L. Rev. 127, 154-56 (2004) (explaining that ethics rules permit lawyers to take account of considerations such as religion in client representation).

11. Patricia J. Williams, *The Alchemy of Race and Rights* 149 (1991). The author notes that:

The vocabulary of rights speaks to an establishment that values the guise of stability, and from whom social change for the better must come (whether it is given, taken, or smuggled). Change argued for in the sheep's clothing of stability ("rights") can be effective, even as it destabilizes certain other establishment values (segregation). The subtlety of rights' real instability thus does not render unusable their persona of stability.

Id.

12. Derek A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470 (1976).

the civil rights era of the past four decades.¹³ One need only examine the history of court-arbitrated school desegregation to understand the limits of rights-based strategies and even of lawyers' agency in bringing about structural and social change through the courts. Indeed, the re-segregation of schools that has occurred is in large part due to the functioning of forces (like housing mobility and white flight) that the Court had placed outside of the scope of the legal right recognized in *Brown v. Board of Education*.¹⁴

A central tenet of CRT has been that our current judicial (and political) system is highly deferential to the social, economic, and political agents (or causes) of racial inequality while at the same time ever-scrutinizing of efforts to address that inequality through official race-conscious means.¹⁵ Scholars have recast contemporary racial disadvantage as not the product of conscious, intentional racism but rather a result of historically stable and deep cognitive and structural causes that legal doctrine has become increasingly unwilling to address. This de-centers, in obvious ways, the places and persons to whom we look for solutions for racial subjects living at the vortex of our legal, social, and political reality.

Simply put, the locus of solutions to some of our most entrenched racial problems is increasingly neither found in the courts, nor necessarily with the rights-based approaches that lawyers are apt to take (and sometimes clients request lawyers to pursue). Rather, some of the most innovative solutions to racial injustice and disadvantage are distributed in a variety of places throughout our legal, social, and political systems.¹⁶ While we are used to looking for alternative doctrinal approaches to "righting wrongs" of racially marginalized

13. *Introduction, in Critical Race Theory: The Key Writings that Formed the Movement*, *supra* note 1, at xxxii (noting that our current political era "mark[s] the rejection of the always fragile civil rights consensus and the renunciation by federal, state, and city authorities [indeed, of the American people themselves] that government not only can but must play an active role in identifying and eradicating racial injustice").

14. 347 U.S. 483 (1954); *see, e.g.*, *Freeman v. Pitts*, 503 U.S. 467 (1992); *Milliken v. Bradley*, 418 U.S. 717 (1974).

15. *See, e.g.*, Darren Lenard Hutchinson, "Unexplainable on Grounds Other Than Race": *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. Ill. L. Rev. 615.

16. *See* Gerald P. López, *Rebellious Lawyering* (1993). This client or community empowerment theory of lawyering of course applies to larger social and legal issues beyond those concerning racial subordination. Poverty law scholarship has put front and center the empowerment of marginalized clients in contexts ranging from immigrant workers to welfare recipients to communities fighting disproportionate environmental hazard exposure. *See, e.g.*, Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *Ecology L.Q.* 619 (1992); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 30 *Harv. C.R.-C.L. L. Rev.* 407 (1995); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 *Buff. L. Rev.* 1 (1990).

individuals and groups,¹⁷ we might also think as creatively about approaches to remedies that are grounded in the particulars of the lives and communities for whom we write and theorize.

Critical race scholars engaged in pursuing and examining remedial approaches like racial reparations, truth and reconciliation commissions, and the re-litigation of dormant racial injustices from a critical perspective are fully engaged in the type of creative problem-solving work grounded in the material and collective needs of the racially disenfranchised.¹⁸ These scholars usefully facilitate substantive remedies for harms that cannot be atomized in our legal system through the discourse or adjudication of rights. Instead, they acknowledge the systemic and cumulative nature of racial harms, in line with critical theory, while creating legal structures of accountability for public and private wrongdoing.¹⁹ In doing so, these scholars are timely and wise to take seriously the experience of lawyers and policymakers in other countries with similar, though not identical, histories of racial oppression.²⁰

III. IN THE COURTROOM AND ON THE GROUND: LAWYERING IN THE SHADOW OF LEGAL THEORY

The crux of my students' questions about the reach of legal theory prompts the query that underlies much of what seems to be embedded in the link between theory and practice. That is, how do we employ all of the wonderful critiques and reconstructive analyses that CRT has bestowed upon us in the course of representing the individuals

17. See Leti Volpp, *Righting Wrongs*, 47 UCLA L. Rev. 815, 833-34 (1990) (discussing the efforts of some lawyers in the United States to look beyond civil rights to international human rights laws for solutions to racial problems); see also William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 Harv. C.R.-C.L. L. Rev. 17 (2004).

18. See, e.g., Eric K. Yamamoto, *Interracial Justice: Conflict & Reconciliation in Post-Civil Rights America* (1999) [hereinafter Yamamoto, *Interracial Justice*]; Anthony V. Alfieri, *Retrying Race*, 101 Mich. L. Rev. 1141 (2003); Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 Law & Ineq. 263 (2003); Margaret M. Russell, *Cleansing Moments and Retrospective Justice*, 101 Mich. L. Rev. 1225 (2003); Eric K. Yamamoto et al., *American Racial Justice on Trial—Again: African-American Reparations, Human Rights, and the War on Terror*, 101 Mich. L. Rev. 1269 (2003) [hereinafter Yamamoto et al., *American Racial Justice*].

19. See, e.g., Yamamoto, *Interracial Justice*, *supra* note 18; Alfieri, *supra* note 18; Ifill, *supra* note 18; Russell, *supra* note 18; Yamamoto et al., *American Racial Justice*, *supra* note 18.

20. "LatCrit," or latino critical theory, scholars—a descendant of CRT—have been particularly careful to employ comparative analysis to both analyze and theorize about racial problems and their potential remedial solutions. See, e.g., Tanya Katerí Hernández, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States-Latin America Comparison*, 87 Cornell L. Rev. 1093 (2002); Celina Romany & Joon-Beom Chu, *Affirmative Action in International Human Rights Law: A Critical Perspective of Its Normative Assumptions*, 36 Conn. L. Rev. 831 (2004).

and communities who are the subjects of our analysis? I have faced this question directly in the lawyering work I do, outside of the academy, representing communities and grassroots groups fighting for environmental justice.²¹ The challenge for me has been to translate the insights of critical race theorists into practical strategies that simultaneously circumvent problematic legal doctrines and frameworks while fully taking advantage of the analytical tools at my disposal.

Consider the problem of environmental racism, understood as the disproportionate distribution of environmentally harmful substances (such as lead) and land uses (such as hazardous waste facilities) in communities of color. As with most adverse racially disparate outcomes across a spectrum of social contexts and goods, there is no clear perpetrator or encompassing theory of causation that explains these outcomes. Indeed, as I have argued, these outcomes are best understood as yet another manifestation of the racism and discrimination that exists throughout our social structure—in housing discrimination, political disenfranchisement, and lack of access to health care and other social amenities.²²

Environmental justice scholars and advocates have thus heeded the teachings of critical race scholars that current jurisprudential understandings render invisible many contemporary forms of racial discrimination and shield them from judicial scrutiny. This is especially true for civil rights claims, one of the key tools at our disposal for addressing such discrimination.²³ Rejecting a color-blind approach to assessing the causes of disproportionate impacts of environmental hazards on communities of color, we have steadfastly discounted race-neutral explanations for disproportionately adverse environmental and health outcomes while offering a causal analysis which accounts for the ways in which racially infected social structures produce those outcomes.²⁴

21. See generally Luke W. Cole & Sheila R. Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* (2001).

22. Sheila Foster, *Race(ial) Matters: The Quest for Environmental Justice*, 20 *Ecology L.Q.* 721, 735 (1993).

23. For instance, the intent doctrine in equal protection law conceives racism as a “discrete and identifiable act of ‘prejudice based on skin color’” and, thus, “place[s] virtually the entire range of everyday social practices in America—social practices [that were] developed and maintained throughout the period of formal American apartheid—beyond the scope of critical examination or legal remediation.” *Introduction, in Critical Race Theory: The Key Writings that Formed the Movement*, *supra* note 1, at xxviii. Similarly, “the contemporary ‘jurisprudence of colorblindness’ [is] not only the expression of a particular color-consciousness, but the product of a deeply politicized choice” which operates to “obscure [the law’s] active role in sustaining hierarchies of racial power.” *Id.*

24. See, e.g., Cole & Foster, *supra* note 21, at 70-74 (explaining how race-neutral criteria used by government and industry for siting hazardous waste facilities turn out not to be race-neutral after all, when seen in their social and historical context); Gerald Torres, *Introduction: Understanding Environmental Racism*, 63 *U. Colo. L.*

Armed with this analysis, which the community-based groups I have worked with understand and can articulate without my assistance, it was not always clear to me how I might best (re)present the grievances of these communities in judicial or other policymaking forums that, as critical race scholars have argued, are currently hostile to these claims.²⁵ It is not surprising that claims of environmental racism do not, and have not, fit into existing judicial and legal understandings of race discrimination given their emphasis on clearly identifiable perpetrators and/or conscious bias.²⁶ Given the inadequacy of civil rights and equality doctrines to address the conditions complained of, what skills might the lawyer seeking to assist these communities bring to the table? How might we promote the understanding of their claims as ones involving racial discrimination, as opposed to a “not in my backyard” rejection of unwanted land uses? Did, or could, critical race analysis impart any tools in the absence of the doctrine it has steadfastly discounted as useful to addressing structurally rooted problems like environmental racism?

One of the gifts that CRT has imparted to those who study its methodology is the importance of narrative to understanding the nature of contemporary racial injustice and subordination.²⁷ While the use of narratives describing experiences of racial subjects has been a sharply criticized feature of critical theory,²⁸ in practice narratives represent one of the primary ways in which critical theory has invariably shaped lawyering on behalf of disadvantaged communities and groups. It has done so by giving those of us working on behalf of these communities an empowering tool, not dependent upon limited legal and doctrinal frameworks, that displaces the dominant narratives of racism as discrete, isolated, and/or intentional incidents and outcomes. Narratives allow us to relate the story of our client’s harms in ways that they experience and understand and in doing so to identify the systemic nature of those harms and its causes. These narratives, while often insufficient to give rise to legal causes of action,

Rev. 839, 840 (1992) (noting that scholars are “analyzing environmental policies and activities from the perspective of their subordinating impact on racial groups” along with challenging the “substantive distributional impact of those rules in practice and the substantive blindness in the production of rules that lead to racially subordinating activities,” whether intentional or not).

25. See, e.g., Hutchinson, *supra* note 15; Sheila R. Foster, *Causation in Antidiscrimination Law: Beyond Intent and Impact*, 41 Hous. L. Rev. 1469 (2005) (illustrating the erosion of normative assumptions underlying the proof structures in intentional and disparate impact claims which make these claims unlikely to succeed).

26. See Cole & Foster, *supra* note 21, at 63-65 (reviewing unsuccessful cases).

27. Two classic examples of this form of the theory are Williams, *supra* note 11, and Derek Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (1987).

28. See, e.g., Kathryn Abrams, *Hearing the Call of Stories*, 79 Cal. L. Rev. 971 (1991) (analyzing critical race and feminist narratives and addressing the critiques).

can be very useful in building social movements, as well as raising the profile of, and educating policymakers and the public about, the nature of issues like environmental racism.

This client-centered, narrative approach has guided those of us working in the environmental justice field. Among the central tenets of environmental justice lawyering, and the movement itself, is the idea that “We Speak for Ourselves”—that those impacted by and experiencing environmental racism speak in their own voice. This tenet, of necessity, resituates lawyers to a subordinate, but collaborative, position in the problem-solving exercise. As the literature reflects, lawyers and legal scholars have recounted the stories of these communities as a way of articulating the social, economic and legal forces that have given rise to racially disproportionate outcomes.²⁹ And we have done so in a way that hews faithfully to these communities’ own conceptions of the causes and impacts of the injustice they suffer.

This is not to say that lawsuits and other traditional legal tools, like civil rights litigation, are not useful or employed in this context. To the contrary, civil rights lawsuits can have ancillary benefits even where they are destined or predicted to be unsuccessful. Such lawsuits can be part of the reframing of a dispute as one presumed to have nothing to do with race to one where race is a central feature of the alleged harms.³⁰ But a narrative, client-driven approach displaces the lawyer and overly technical legal solutions as the main remedy

29. See, e.g., Cole, *supra* note 16; Luke W. Cole, *The Struggle of Kettleman City: Lessons for the Movement*, 5 Md. J. Contemp. Legal Issues 67 (1994); Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 Cal. L. Rev. 775, 775 (1998) (recounting the story and struggles of a community-based environmental justice group in Chester, Pennsylvania to “provide a window into the social relations and processes underlying distributive inequities and . . . assist reformers in identifying the types of policy reforms likely to help achieve environmental justice”).

30. For example, in the environmental justice context:

[B]ringing a civil rights lawsuit against local government officials can be very satisfying for the community group involved, because it calls the problem what it is: a violation of civil rights. This “naming names” has many advantages. It is one high-profile way of saying that the official being sued is engaging in unjust practices. This act alone makes such suits worth it to some groups with long-term experiences with decision makers—[filing a suit allows a community to say “officially” what has existed for a long time and builds morale within the group. Additionally, by calling an environmental dispute by a different name—a civil rights dispute—a community group can educate its members, politicians, and other communities. It may help local residents, decision makers, and company officials see the problem differently. More importantly, renaming the problem raises the consciousness of the general public about the issue of environmental racism. By calling a dispute a civil rights struggle, a group may also find allies in more traditional civil rights groups in its region that may not have recognized the civil rights implications of the struggle for environmental justice.

Cole & Foster, *supra* note 21, at 130.

pursued by aggrieved clients. Rather, lawyers become part and parcel of a larger remedial and liberatory project that reveals an array of potential legal and nonlegal strategies to improve the conditions of the community and transform the responsible political and social structures. This approach is one that is not new to critical race scholars,³¹ but one that should be replicated in a broader array of fields and across different social contexts.

CONCLUSION

The Symposium at Fordham University School of Law on CRT set out to continue the task of putting theory into action or practice. The scholars and practitioners in attendance acknowledged the important contribution that critical race theory has made to our professional and ethical development. At the same time, we know that there is more work to be done to situate more centrally its critical impulses and liberating methodology into the lawyering work that is done on behalf of our subjects. Like CRT itself, this undertaking will surely be arduous and contested in a professional world driven by faith in the objectivity and neutrality of legal roles and rules. But the pursuit of this goal—placing our theory in the service of our practice—will open the doors to pathways we have yet to discover—but must—if we are to remain faithful to the project of racial justice.

31. See, e.g., Butler, *supra* note 8. Paul Butler has cleverly advocated the limited, selective use of legal jury nullification techniques to send criminally culpable black men back to their communities which are best able to rehabilitate them. See *id.*

Notes & Observations