Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship

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INTRODUCTION

Over the last decade, a body of scholarship known as Critical Race Theory1 has emerged. Written predominately by scholars of color, it challenges traditional legal orthodoxy and contends that the neutral acontextual approach taken in legal scholarship is seriously flawed.2 Fur-

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1. For a definition of Critical Race Theory and a partial listing of the seminal articles that comprise the same, see infra notes 22, 31 and accompanying text.

2. See Richard Delgado, The Inward Turn in Outsider Jurisprudence, 34 Wm. & Mary L. Rev. 741, 745 (1993); see also infra notes 41-42 and accompanying text (discussing the neutral acontextual perspective employed in traditional legal scholarship).

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thermore, a methodological format known as Narrative has emerged as the preferred genre of scholarship for scholars of color and others producing Critical Race Theory. Some authorities applaud the use of Critical Race Theory and its exposition in Narrative format, although others decry its use.

While a limited debate has taken place over the existence of the Voice of Color, its appropriate use, and its scholarly worth, that debate has foundered on what seems to be hesitancy by majoritarian (Euro-American) scholars to address claims made by Critical Race Theorists. A fear of being attacked as illiberal at best and racist at worst unfortunately may have produced reluctance to criticize or address the contentions of Critical Race Theory. Hence, a debate that had the potential to define, and perhaps even energize, the use of Critical Race Theory fizzled to a halt as a result of limitations caused by the current era of "political correctness." As a result, a certain desuetude has settled on Critical Race Theory. Scholars continue to write articles that are properly classified as Critical Race Theory, some in Narrative and others in the traditional legal methodological format. However, Critical Race Theory has not affected the legal academy as some authors had hoped it would. Instead, Critical Race Theory is on the verge of being marginalized as "outsider scholarship" whose use is exclusively

3. For a definition of Narrative, see infra notes 48-53 and accompanying text.
7. See, e.g., Alex M. Johnson, Jr., The New Voice of Color, 100 Yale L.J. 2007, 2008 (1991); Johnson, supra note 5, at 155-60; Kennedy, supra note 6, at 1760-87, 1810-19; Responses to Racial Critiques, supra note 5, at 1844-86.
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by and for minority, outsider, or subordinated scholars.

Ironically, Richard Delgado's criticism that white scholars who produce articles about affirmative action and civil rights issues cite to each other's articles, but fail to cite, discuss, or recognize the contributions of authors of color to scholarship, can now, with appropriate emendation, be levelled at Critical Race Theorists. Critical Race Theorists who produce articles and employ Narrative cite to each other's articles. However, authors who do not write in the genre of Critical Race Theory or utilize Narrative as an expositional methodology do not cite, discuss, or recognize the articles, except to level criticism at them; the articles are never utilized in a positive fashion. Thus, although there is an ongoing debate about the existence and efficacy of Critical Race Theory and its exposition in the Narrative format, the articles that comprise Critical Race Theory, especially those written in Narrative, are not used by majoritarian scholars to explicate legal issues regardless of whether they pertain to race or race-related issues.

As Professor Kennedy hypothesized might happen to Critical Race Theory, scholars of color may have created a scholarly field in which they are largely, although not exclusively, the only players. This has resulted in the hopefully unintended effect of creating a body of scholarship that appears in the most prestigious journals, but that is of limited utility because of its marginal effect on scholarship and scholars who are not Critical Race Theorists. Although law review editors appear convinced of the worth and value of Critical Race Theory articles, including those that employ Narrative, it is unclear whether majoritarian legal scholars assess the same worth. A more precise charge can be levelled against the use of

excluded from jurisprudential discourse." Id. at 2323 n.15.


13. The claim that the intellectual contributions of scholars of color wrongfully are ignored is characterized as "the exclusion thesis" by Professor Randall Kennedy. Kennedy, supra note 6, at 1745-46. It gave tremendous impetus to the development of Critical Race Theory.

14. Kennedy, supra note 6, at 1787, 1795-96.

Widespread application of Delgado's conception of intellectual standing would be disastrous. First, it would likely diminish the reputation of legal scholarship about race relations. Already, the field is viewed by some as intellectually "soft." To restrict the field on a racial basis would surely—and rightly—drive the reputation of the field to far lower depths. By requesting that white scholars leave the field or restrict their contributions to it, Delgado seems to want to transform the study of race-relations law into a zone of limited intellectual competition.

Second, widespread application of Delgado's conception of standing would likely be bad for minority scholars. It would be bad for them because it would be bad for all scholars. It would be bad for all scholars because status-based criteria for intellectual standing are anti-intellectual in that they subordinate ideas and craft to racial status. After all, to be told that one lacks "standing" is to be told that no matter what one's message—no matter how true or urgent or beautiful—it will be ignored or discounted because of who one is.

Id. at 1795-96 (footnotes omitted); see also Johnson, supra note 5, at 157.

15. Although a few of the scholars who have authored works properly classified as Critical Race Theory are white, most of the authors are minorities. For a recent listing of authors and articles, see Delgado & Stefancic, supra note 4.
Narrative. Although occasional symposia and articles may use Narrative as an expository vehicle, the use of Narrative has been relegated to a type of scholarship which limits its applicability and worth in the greater academy.

The publication of Daniel Farber and Suzanna Sherry's article, "Telling Stories Out of School: An Essay on Legal Narratives" (Telling Stories), represents an important stage of development in the evolution of Critical Race Theory and the use of Narrative in legal scholarship. Telling Stories is representative of the evolutionary stage that Critical Race Theory and Narrative must undergo before the academy accepts that body of scholarship as meritorious and awards them the same worth as traditional legal scholarship. At one level, Telling Stories represents an attempt to rehabilitate the use of Narrative and Critical Race Theory by undertaking a systematic appraisal of Critical Race Theory and the use of Narrative that "tak[es] the movement seriously [by] . . . engaging its ideas." As such, Telling Stories represents an attempt by majoritarian scholars to mine this new and developing field for the nuggets it will yield to those scholars who are not outsiders and therefore not insiders to the development and use of Critical Race Theory and Narrative. For that, the authors are to be commended. Indeed, their attempt to systematically evaluate the use of Narrative in Critical Race Theory is beneficial because it points out the failure of Critical Race Theorists to bridge the gap between authors who claim to be outsiders and readers who, by that definition, are insiders.

In their attempt to legitimate the use of Narrative in Critical Race Theory for insiders, Professors Farber and Sherry proposed an interpretive and evaluative heuristic that is fundamentally at odds with the concepts of the Voice of Color and Narrative. The application of their standards would have the effect of robbing the Voice of Color and Narrative of much, if not all, of their value. Instead of calling for an examination and expansion of the standards that are applicable to traditional legal scholarship, Professors Farber and Sherry attempted to legitimate this new and emerging form of scholarship by merely applying traditional evaluative standards. Professors Farber and Sherry's attempt at legitimation represents an attempt to conform this new form and methodology of scholarship to that of traditional scholarship.


17. Indeed, the same point can be made for Critical Feminist Theory. The term "Critical Feminist Theory" is derived from Professor Debra Rhode's article entitled Feminist Critical Theories, 42 Stan. L. Rev. 617 (1990) (defining and discussing feminist critical theories and their relationship to Critical Legal Studies). For further discussion and definition of Critical Feminist Theory and its relationship to Critical Race Theory, see Johnson, supra note 7, at 2022. However, the focus of this Article is on Farber and Sherry's analysis of Critical Race Theory and the use of narrative in Critical Race Theory.

18. For a discussion of traditional legal scholarship as defined by Professors Farber and Sherry, see infra notes 59-72 and accompanying text.

19. Farber & Sherry, supra note 16, at 807-08.

20. See supra note 11 for an explanation of why "outsider" is used to depict this group.

21. See infra notes 36-39 and accompanying text. Although Farber and Sherry never clearly delineated between the use of Voice and Narrative, which indeed are different in the context of Critical Race Theory, the charges they levelled against narrative may be applicable to the use of the Voice of Color.
However, Professors Farber and Sherry did provide a useful service. They correctly pointed out that Critical Race Theorists have failed to articulate an interpretive and evaluative heuristic for reviewing and judging their own work. This Article, although in part a response to Telling Stories, does not attempt to supply universal evaluative standards that must be applied to Narrative, traditional legal scholarship, or both. Any attempt to provide such standards is part of a much broader body of scholarship and is beyond the scope of this Article. Moreover, a further attempt to apply such standards narrowly and precisely to Critical Race Theory and Narrative is doomed to fail because academia accepts no universal standards by which to judge and evaluate traditional scholarship. However, the fact that universal evaluative standards and criteria do not exist does not mean that the intellectual value inherent in Critical Race Theory and Narrative cannot be explicated. Thus, perhaps the most important task undertaken in this Article is an attempt to demonstrate the value inherent in Critical Race Theory and Narrative while providing insiders with the tools and insight needed to assess the value of such work.

Part I of this Article summarizes Telling Stories, paying particular attention to Professors Farber and Sherry's claim that such outsider scholarship fails to connect with the reader as legal scholarship because it systematically fails to explicate legal principles and analytical reasoning in its methodology. Part II continues the focus on the Farber and Sherry article by addressing an issue that vexes scholars of color employing the Voice of Color: How should such scholarship be evaluated in light of the fact that it is not premised on traditional evaluative standards based on neutral principles. Consequently, Part II is a comparative section that focuses on the interpretive and evaluative standards set forth by Professors Farber and Sherry and the applicability of those standards to Critical Race Theory and the use of Narrative.

Within this discussion, this Article delineates the objectives many authors seek to accomplish through the use of Narrative and explains why writing in a form other than Narrative fails to achieve these objectives. This Article then details the shortcomings of Professors Farber and Sherry's attempt to develop evaluative standards and assess the applicability of those standards to Narrative and Critical Race Theory. In doing so, preliminary, tentative standards by which to interpret and evaluate scholarship written in Narrative are proposed and evaluated, but no attempt is made to provide definitive evaluative standards to legal scholarship because none exist.

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24. As a scholar of color who has recently written in the Narrative form for the first time, I include myself among these authors. To review my first piece written in Narrative, see Johnson, supra note 10.

25. Although I contend that different interpretive and evaluative standards must be used to judge the two different types of scholarship, I make no normative claim that either the scholarship, or the interpretive and evaluative standards used to judge the two forms of scholarship, are better or worse. They are simply different.
Part III, by focusing on the process theory approach taken by Professors Farber and Sherry, demonstrates that precise application of the narrow standards they suggested has the practical effect of destroying the inherent value and utility of Critical Race Theory and the Narrative format. In that respect, scholars can interpret Telling Stories as an assault, perhaps unintentional, on the merits of such scholarship. Unrefuted, Telling Stories may result in the demise of what some characterize as outsider or alternative scholarship.  

Part IV attempts to define with rigor and specificity the content of Critical Race Theory, generally, and the Voice of Color, specifically. Although authors classify over two hundred articles and books as within the realm of Critical Race Theory, some majoritarian scholars appear to want, and need, an easy guide or reference that explicates the principal points of Critical Race Theory in the traditional style of scholarship. These scholars apparently want something more than a bibliography or dictionary applicable to Critical Race Theory. Rather, they desire something akin to a guide written in their own language. This portion of the Article serves as a bridge for those scholars wishing to access Critical Race Theory, but who are unable to do so because, thus far, no one has succeeded in grounding the salient aspects of Critical Race Theory into a comprehensible heuristic.

26. “Outsider” or “alternative” scholarship encompasses Critical Race Theory as well as Critical Feminist Theory and the Narrative in both. I prefer to characterize this scholarship as alternative as opposed to outsider because outsider connotes a status to the authors who prepare such scholarship that belies the duality of perspective that such scholars possess. These scholars, who represent the academic elite of the subordinated persons on whose behalf they speak, are both insiders and outsiders. They are inside to the extent that they have chosen to participate in the environment of legal academia with all the attendant risks inherent in a situation in which one chooses to work within a system that one is either opposed to or fundamentally at odds with. The scholars are also outside to the extent that the perspective presented is one that, due to cultural factors, is indeed hostile and antithetical to the foundational base of the system in which they have chosen to participate. This duality creates an alternative perspective and form of scholarship that is too complex to be simply denominated as outsider scholarship.

27. See Delgado & Stefancic, supra note 4, at 462-63. Authorities further classify these two hundred articles and books into the following ten categories: (1) critique of liberalism; (2) storytelling/counter-storytelling and “naming one’s own reality”; (3) revisionist interpretations of American civil rights law and progress; (4) a greater understanding of the underpinnings of race and racism; (5) structural determinism; (6) race, sex, class, and their intersections; (7) essentialism and anti-essentialism; (8) cultural nationalism/separationism; (9) legal institutions, critical pedagogy, and minorities in the bar; (10) criticism and self-criticism; responses. Id. at 462-63.

Although much of my previously published work in Critical Race Theory is classified as falling into categories 1, 5, 9, and 10, my most recent article, Bid Whist, Tonk, and U.S. v. Fordice, falls into categories 1, 3, and 8.

28. In this sense, this portion of the Article may mimic Mark Kelman’s Guide to Critical Legal Studies (1987), a work that apparently was prepared for an audience unfamiliar with the important characteristics of Critical Legal Studies. See generally Mark Kelman, Guide to Critical Legal Studies (1987); Rhode, supra note 17, at 617 (defining and discussing feminist critical theories and their relationship to Critical Legal Studies).

29. At least no one has framed a comprehensible heuristic for these scholars.
Moreover, although the definitional aspects of Narrative are rather obvious and not worthy of extended definition, this Article addresses a subsidiary issue raised by the use of Narrative: its appropriate place in legal scholarship. By focusing on the content of the Voice of Color and, relatedly, the use of Narrative, this Article demonstrates that Narrative and the Voice of Color employed in Critical Race Theory have value and power. Furthermore, by expanding the interpretive and evaluative standards set forth by Professors Farber and Sherry, this Article demonstrates why Narrative must have a place in legal scholarship. Finally, this Article connects Narrative and its appropriate use to legal principles and legal theory, demonstrating that the Narrative form powerfully explicates legal issues.

As the official spokespersons in society have changed from homogenous and univocal to pluralistic and multivocal, the academy has likewise changed, albeit slowly, to mirror societal change.30 Academic discourse does and will continue to reflect the transformation to a pluralistic and multivocal professoriate. Scholarship premised on universalism and the articulation of a homogenous voice is supplemented with scholarship that includes not only disparate voices, but also new, methodological forms of scholarship that better express the multivocal voices currently contained in the academy.

I. THE FARBER/SHERRY TYPOLOGY

Legal scholarship is undergoing a revolution, a revolution that is as unique as it is common and predictable. As natural law gave way to legal realism and as normative insights, provided by law and economics and a host of law and other disciplines, replaced legal realism in jurisprudence, traditional legal scholarship has come under attack by a group of scholars known as Critical Race Theorists.31 These scholars espouse a novel approach to addressing legal issues in our society.

Although both Critical Race and Critical Feminist Theories trace their origins to Critical Legal Studies, they differ in their approaches, as dictated by the unique concerns of each. Any attempt to define the evolving bodies of scholarship of either or both is itself worthy of a separate article. However, in order to lay some foundation for the reader unfamiliar with critical theories, the lengthy quotation below attempts to provide a general definition of each theory. It is specific enough to be comparative, yet general enough to include, for example, the magnitude of articles that authorities have heretofore characterized as Critical Race Theory.32

Critical legal studies heavily influenced a number of later movements, including radical feminism and Critical Race Theory. Both borrowed from CLS its skepticism of law as science, its questioning whether text contains one right meaning, and its distrust of law’s

30. See Johnson, supra note 5, at 155.

31. Critical Race Theorists are aligned, in part, with (i) scholars who advocate a jurisprudential perspective (some would say nihilist approach to legal scholarship) known as Critical Legal Studies and (ii) scholars who analyze the manner by which our legal system takes account of gender, and who are known as Critical Feminist Theorists.

32. See supra note 22 (listing articles characterized as Critical Race Theory).
neutral and objective facade. Feminist legal scholars challenged law's deeply inscribed patriarchy, showed that gender and sex roles are constructed, not natural, and named and condemned such practices as sexual harassment in the workplace, spousal abuse, and violent pornography. Both feminists and Critical Race scholars have challenged law's dominant mode of detached impartiality, offering in its place scholarship that is more contextualized and based on Narrative and experience. They have also sparked a renewed interest in pedagogy, exploring such issues as whether the legal curriculum is biased and whether law school teaching silences women and minorities.

Critical Race Theory sprang up with the realization that the civil rights movement of the 1960s had stalled and needed new approaches to deal with the complex relationship among race, racism, and American law. Derrick Bell and others began writing about liberalism's defects and the way our system of civil rights statutes and case law reinforces white-over-black domination. Many writers within CRT believe that a major stumbling block to racial reform is the majoritarian mindset—the group of "truths," myths, and received wisdoms that persons in the dominant group bring to discussions about race. To analyze and displace these power-laden myths, CRT writers employ parables, narratives, and "counterstories." Others explore racial separatism and nationalism, questioning whether persons of color will ever obtain justice through assimilation into white society.33

It is not unusual that law and legal scholarship constantly evolve and adapt to societal (exogenous) and internal (endogenous) changes. Hence, Critical Race Theorists are embarking upon a well-trodden path in their attempt to destabilize that which scholars currently deem traditional jurisprudential philosophy. What is revealing, however, is that Critical Race Theorists, similar to those that have come before, have advanced a jurisprudential approach that explicitly challenges the analytical form or methodology of traditional scholarship as well as its content.34

It is a development that calls upon those in legal academia to question the evaluative norms employed in assessing the value of scholarship, especially nontraditional scholarship. In Telling Stories, Professors Farber and Sherry addressed the revolutionary aspects of Critical Race Theory and the expositional use of Narrative as a vehicle to present destabilizing claims to the academy. Their article, although sympathetic to the political position of Critical Race Theorists, is quite critical of the use of Narrative. To a lesser degree, they were critical of claims made by scholars of color and feminist

33. Delgado, supra note 2, at 744-45.
34. In this respect, the approach taken by Critical Race Theorists is slightly different from the approach taken by legal realists who employ or rely on social science methodologies to challenge legal formalism. For a discussion of this challenge, see Robert Stevens, Law School: Legal Education in America From the 1850s to the 1980s, 131-54 (1983). Critical Race Theorists are not attempting simply to change the information provided to the decision maker, but calling into question the alleged neutrality and identity of the decision maker.
scholars that they speak in “the Voice” or “the Voice of Color.”

Upon a cursory reading of the article, it appears complimentary to Critical Race Theory and the use of Narrative. For example, Professors Farber and Sherry claimed “stories make a legitimate contribution to legal scholarship, defined broadly as writing that increases our understanding of the legal system.” Make no bones about it, though, this is a not-so-thinly veiled attack on Critical Race Theory and its use of Narrative. Professors Farber and Sherry made claims that have the effect of destroying any worth of Critical Race Theory as expressed through Narrative. First, by stating that Euro-American majoritarian scholars can write Narrative and speak in Voice (although not the authentic Voice of Color), they seemed to destroy the exclusivity of the field held by persons of color. Second, they claimed that storytelling in the Voice of Color adds nothing to traditional scholarship. Finally, they claimed that Narrative is not legal scholarship unless it contains legal analysis and reasoning. Such claims, if true, have the effect of destroying any promotion, tenure, or other benefit flowing from a determination of the worth of such endeavors.

A. Summary of Traditional Articles

Although not a focal point of Telling Stories, much of Professors Farber and Sherry’s analysis proceeded from the baseline notion that there is a traditional method of legal scholarship which “focus[es] on abstract deductive reasoning from high-level principles or general rules.” Their definition of traditional scholarship was rather spartan because they assumed that everyone is familiar with the traditional, garden-variety law review article over which little controversy or debate exists regarding its characterization as scholarship.

This Article proposes to supplement their definition with Randall Kennedy’s definition of meritocratic legal scholarship: scholarship that is capable of being judged by preestablished impersonal criteria that is indifferent to the color of the scholar. A debate could center on whether

35. See Johnson, supra note 7, at 2015 (summarizing when scholars speak in the Voice of Color).
37. This is not true because subordinated persons have never claimed exclusivity with either or both the use of Narrative or Voice, but do claim exclusivity with respect to the Voice of Color.
38. This is not accurate because of the perspectival, subjective approach taken by scholars of color speaking in the Voice of Color.
39. Again, not quite correct because their definition of scholarship is too narrowly focused and inappropriately applied to the scholarship produced by Critical Race Theorists speaking in the Voice of Color in the Narrative format.
40. Farber & Sherry, supra note 16, at 820.
41. I am putting aside for the moment the issue of whether there are universally accepted and defined evaluative norms that determine whether a traditional law review article is good or meritorious scholarship.
42. See Kennedy, supra note 6, at 1772-73 (stating that only the merit of the work is relevant); see also Johnson, supra note 7, at 2017 n.42 (discussing an objective truth based on preestablished impersonal criteria).
this is an objective or subjective standard, but that is not the point. The point is that the author of traditional articles makes no call to privilege, empowerment, or enlightenment, if you will, based on the author's identity or experiences. The identity and past experiences of the author simply are not relevant in assessing the merit of the work because the work can be judged independently of the identity of the author.

B. Summary of Critical Race Theory

Professors Farber and Sherry alleged that Critical Race Theory has no uniform definition. Indeed, one of their main contentions was that Critical Race Theory lacks content. On one hand, they noted that some authorities have claimed that the Voice of Color (which they equated with Critical Race Theory) is solely a matter of authorial intent.43 They acknowledged that, in part, Critical Race Theory may be perspectival in nature and operation, providing new and multivocal perspectives of minority groups. Yet, they went on to claim that “there has been no demonstration of how these new perspectives differ from the various perspectives underlying traditional scholarship.”44 Professors Farber and Sherry further alleged that Critical Race Theory seems to be based on content: “It embodies a certain view [liberal or radical] of race and gender relations (and occasionally other hot political topics).”45

Finally, Professors Farber and Sherry noted that most Critical Race Theorists attribute the Voice of Color to the experience of domination and marginal status. The authors equated that phenomenon to a definition of Voice based on “political terms.”46 They then concluded by taking an agnostic view on the existence of the Voice of Color, stating that although no one has proven its existence, there may be a weaker version of the Voice of Color that “can sometimes provide a perspective that is not as easily accessible to white men. The new voice is not an entirely new hue, but simply a different shade.”47

C. Summary of Narrative

Professors Farber and Sherry levelled their harshest criticism at Narrative. Initially, one should note that not all Critical Race Theory or Critical Feminist Theory is Narrative. Nor, as Professors Farber and Sherry implied, is all Narrative Critical Feminist Theory or Critical Race Theory.48 Narrative is a methodological form of scholarship that Euro-American

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43. Farber & Sherry, supra note 16, at 814. The authors referred primarily to my work in which I actually addressed how Critical Race Theory is expressed, not what it is. See Johnson, supra note 5, at 157.
44. Farber & Sherry, supra note 16, at 814.
45. Id. at 816.
46. I do not understand this claim, but will return to it below. See infra notes 150-70 and accompanying text (discussing claim that Voice is based on political forms).
47. Farber & Sherry, supra note 16, at 819.
48. See id. at 807-08.
males have cited for generations. Its use currently may be in vogue by scholars of color and feminist scholars, but by no means was it historically their province.

In any event, Professors Farber and Sherry focused on the use of Narrative by Critical Feminist and Critical Race Theorists. This Article further narrows that focus by limiting its analysis to the use of Narrative by Critical Race Theorists. Professors Farber and Sherry did an excellent job of illuminating the fact that Narrative is but part of a larger trend away from the formalism and grand theorizing that drive traditional scholarship. Indeed, a new form of scholarship is developing in which a new philosophical strain challenges the hegemony of liberalism. Some characterize this new philosophical strain as the new pragmatism: an amalgamation of the general theory with the specific context. At base, this new pragmatism embraces concreteness or contextualism and rejects formalism and universalism. Thus, rules in and of themselves do not dictate outcomes. Instead, rules informed by reason—practical reason learned through experience—create expertise. This new form of scholarship decries the use of analytic reasoning, reasoning not guided by practice or experience, as second-best.

Turning to stories authored by Critical Race Theorists, Professors Farber and Sherry grudgingly conceded that stories told by the oppressed may have special value since such stories tend to build solidarity and a sense of community among members of the oppressed group. They contended, however, that notwithstanding its inherent value, this type of scholarship does not meet their definition of legal scholarship—scholarly writings that "provide an increased understanding of some issue relating to law," or an "increasing [of one's] understanding of the law."


51. Farber & Sherry, supra note 16, at 820.

52. See Farber & Sherry, supra note 16, at 820 (discussing Frank I. Michelman, The Supreme Court: 1985 Term—Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4, 28 (1986)).

53. My interpretation is that, to a degree, pragmatism flips the way in which we think about legal rules and their applicability to situations. Instead of applying general rules and principles to govern a situation, reason guided by experience determines whether the rules are applicable and may blunt or moderate the applicability of the rules. Storytelling or Narrative enters into the equation and becomes important as a methodological form because it is the vehicle through which practical knowledge is gained without actually going through the experience. In other words, experience is learned without trial and error. Cf. id. at 821-22 (discussing Xerox repair technicians' acquisition of expertise through shared stories and problems with co-workers).

54. Id. at 824.

55. Id.
explicating the appropriate evaluative standards, there must be a framework upon which to build. Although they did not profess to do so, Professors Farber and Sherry premised their standards on a framework that is based on "neutral principles." They premised their critique of Narrative and the Voice of Color on the application of neutral principles to the traditional form of legal scholarship. This is antithetical to both the Voice of Color and the use of Narrative.

II. An Explication of Evaluative Standards

Any discussion of Critical Race Theory, the Voice of Color, Narrative, and the appropriate place of each in legal scholarship inevitably is reduced to a question of standards. The meta-issue of scholarly standards is implicated in the debate over the use and existence of the Voice of Color and its disjunctive articulation through Narrative. This Article's discussion of the appropriate evaluative standards scholars should apply to both Narrative and Critical Race Theory is, by necessity, reactive. In other words, it is beyond the scope of this Article to present a definitional framework of the appropriate evaluative standards one should apply to Narrative. No attempt, therefore, is made herein. Such an attempt, ultimately, will fail because the academy currently accepts no universal standards by which to judge and evaluate traditional scholarship. It is totally unrealistic and unworkable to assume that an evaluative standard can exist and be articulated to judge Critical Race Theory and Narrative when such a standard does not exist for traditional scholarship. Hence, this Article limits the discussion in this part to an analysis of the failings or shortcomings of Professors Farber and Sherry's attempt to develop evaluative standards and to assess the applicability of those standards to Narrative and Critical Race Theory.

When discussing Critical Race Theory, scholars normally present the standards issue in one of two ways. First, some contend that such work is not meritorious when judged by existing standards. This leaves open the question of whether any such work, including traditional scholarship, may be judged meritorious by existing standards. The second, more sophisticated contention is that some Critical Race Theory, Narrative, and more precisely, the Voice of Color when expressed in Narrative, is indeed meritorious. The trick is differentiating between what is meritorious and what is not. In their article, Professors Farber and Sherry clearly fell into the second camp of scholars who grudgingly concede that Critical Race Theory and Narrative can be meritorious. By employing this second contention and focusing solely on Narrative, as did Professors Farber and

56. See supra notes 40-43 and accompanying text.
57. Coombs, supra note 22, at 706-07.
58. Kennedy, supra note 6, at 1773-77; cf. Johnson, supra note 5, at 155-60 (asserting that works referenced by scholars of color not speaking in the Voice of Color may be evaluated by meritocratic standards); Alex M. Johnson, Jr., Scholarly Paradigms: A New Tradition Based on Context and Color, 16 Vt. L. Rev. 913, 921-25 (1992) (rejecting the application of meritocratic evaluative standards to articles spoken in the Voice of Color because they are too narrowly circumscribed, rejecting the identity and individual characteristics of the advocates).
Sherry, however, one encounters difficulty in differentiating between good and bad scholarship in Narrative form regardless of whether it is articulated in the Voice of Color.

Unfortunately, in their attempt to develop standards that differentiate between good and bad scholarship (or, more precisely, good and bad Narrative in this context), they develop evaluative standards that unduly cabin Narrative and, to a lesser degree, Critical Race Theory spoken in the Voice of Color, to the point of destroying the unique attributes and values of each. It is to Professors Farber and Sherry's standards that this Article initially turns.

A. Validity

Professors Farber and Sherry questioned Narrative's validity by asking: "When should a story be considered a valid source of insight?" More particularly, Professors Farber and Sherry found troubling the possibility that scholars may present and use stories or Narrative as empirical evidence. In other words, readers may accept the story or tale told in Narrative as truth rather than fiction. They may accept that the events depicted in the Narrative actually occurred without having proof as to the occurrence. Such proof is provided only when the story meets the "If you had been watching, this is what you would have seen" standard articulated by Professors Farber and Sherry. Failure to meet this standard, Professors Farber and Sherry alleged, may improperly deceive readers and ultimately lead to harmful claims that African-Americans and proponents of Critical Feminist Theory are less truthful than Euro-American majoritarians.

Although they framed the issue as one involving honesty, Professors Farber and Sherry ultimately were concerned about the truth, that is, verifiable truth, of that which scholars present as Narrative or Critical Race Theory. They skirted around the truth issue and talk about honesty, but reintroduced the notion of objective truth with the tripartite standard they used to judge whether "the author's account [is] what it purports to be." If honesty is really the key, then one must take the author's account for what it purports to be. Readers must trust the author's recollection of events.

However, as Professors Farber and Sherry phrased it, the validity issue is one involving truth and ultimately one that is a red herring. Addressing validity concerns, Professors Farber and Sherry conceded that legal scholars might often use fiction or fictional hypotheticals to demonstrate key points. As long as the scholars expressly label the hypotheticals as fictional, Professors Farber and Sherry believed no harm is engendered. The problem, they alleged, lies with nonfiction Narrative. Nonfiction Narrative

59. Farber & Sherry, supra note 16, at 831.
60. Id. at 833.
61. Id. at 833-34.
62. Id. at 833.
63. I am confused, though, by the authors' assertion that "[w]here fiction purports to mirror reality, however, the concerns are more pressing." Id. at 831 n.130.
can be proven valid only by applying the “if you had been watching, this is what you would have seen” standard. This objective standard, when applied to Narrative and Critical Race Theory, represents more than an attempt to interject objectivity and universality into the standards equation. In actuality it consciously ignores and negates the perspectival nature of Narrative and results in defeating the purpose of Narrative by universalizing the experience.

Indeed, not only must one reject Professors Farber and Sherry’s claim that the story or Narrative must comport with their objective definition of truthfulness, one must also recognize that it is perfectly acceptable for stories to be proven by a version of truth. More accurately, stories may achieve validity under Professors Farber and Sherry’s second standard, the perspectival version of the truth. They articulated this standard as: “[T]he situation might not have looked this way if you had been watching, but this is how it felt to me.”

To measure validity or judge truthfulness, Professors Farber and Sherry used two related standards: verifiability and typicality. They are related because the more typical the experience, the easier one may verify it. However, the authors used them in a disjunctive manner. Verifiability, they asserted, is not always possible with respect to personal Narrative. Yet readers should be cautious in relying on unverified Narratives due to the speculative existence of truthfulness inherent in such scholarship. This approach undercuts the use of Narratives in virtually all situations since Narratives relate past events in which the only probative evidence of veracity is the storyteller’s recollection.

Even if, for the sake of discussion, a Narrative is more objectively truthful, although not necessarily honest, if it is verifiable, the legal system uses Narratives all the time, even when the facts are not verifiable. For example, a witness on the stand giving uncorroborated testimony is a form of unverified Narrative. In the arena of academia, however, scholars could require corroboration when the issues at stake are so critical that the scholarship warrants it. In other instances, the academy should allow readers’ own interpretations to guide them. Yet, even if authors who employ Narrative did provide corroboration for their unverified work, that should make little difference as to the validity of the work. Authors of traditional scholarship often make assumptions and interpretations and offer opinions which are not verifiable. While they are, of course, subject to challenge and attack, no one derides the work as fundamentally flawed. Similarly, an unverified Narrative may be subject to challenge if implausible, unlikely, or suspicious. The Senate Confirmation Hearings which pitted Clarence Thomas against Anita Hill were the ultimate unverifiable

64. Farber & Sherry, supra note 16, at 833. This is what I characterize as the “objective standard” in evaluating scholarship.

65. Id. I have no quarrel with the validity of a story even if it is proven true by their “worse” standard, i.e., “[t]he situation didn’t feel this way to me at the time, but this is how it seems to me now.” Id. Indeed, I think it is perfectly acceptable in this context if that which is presented as the truth turns out not to be objectively true in the way in which that standard typically is viewed and used.
Narrative, yet, a seat on the Supreme Court hinged upon the believability of the parties.

The second standard Professors Farber and Sherry proposed to measure validity is typicality. They pointed out that if authors recommend policy changes through the use of Narrative, the Narrative should typify the experience of those affected by the changes. Although plausible, the problems with this view are two-fold. The first problem results in essentializing or privileging one experience over another. Valuing typical experience over atypical experience results in consequences that may be appropriate depending upon the experience presented.

The second problem, although tied to that notion of essentialization, is slightly different. Typicality is problematic because most authors of Narratives do not demonstrate a typical experience. The stories are quite personal and appear so for a reason: They tend to make the reader question whether any person should be subject to the treatment detailed in the story. The strength of this sort of Narrative is not that it is an accurate statistical sample or cross-section of a type, but that it stands alone as idiosyncratic, idiosyncratic, or unique behavior that only the author experiences. Authors who employ Narrative are claiming that the events occurred, or conceivably could occur, and that no one should endure that sort of experience. Alternatively, the authors who employ Narrative simply may be relating an experience from their lives as a written depiction of the current state of society.

An implicit value in storytelling is the rejection of universality and typicality in exchange for the personalization impressing that if one life is lost or one event occurs, as described in the story, that is one too many. The point is not that 99% of the community or the relevant group suffered through the experience related in the Narrative, although that actually may be the case. Indeed, Professors Farber and Sherry seemed to recognize that part of the strength of Narrative results from its atypical nature. Hence, their use of typicality to attack exposition in Narrative form is confusing at best and counterproductive at worst.

One final critique of Professors Farber and Sherry’s criticism of Narrative and Critical Race Theory is that they presented the case as though there is an ongoing battle in the academy for the methodological supremacy of certain types of scholarship. This ignores, however, the view that scholars do not offer storytelling or Narrative as an alternative methodological form of scholarship which will supplant the traditional


68. Farber & Sherry, supra note 16, at 838.

69. Id. at 830.
form. Hopefully the academy is broad and deep enough to encompass more than one sort of methodological form of scholarship.

B. Quality Standards

The second metric Professors Farber and Sherry addressed for evaluating stories as scholarship are the standards that should be employed in assessing the quality of the work. Contrary to the previous assertion that no universally accepted standards exist for evaluating the worth of scholarship, Professors Farber and Sherry asserted that traditional standards do exist for evaluating the quality of scholarship. They identified those standards as (1) consensus standards, (2) reason and analysis, and (3) methods of evaluating the importance of a work.70 This Article will address each of these standards in turn. However, assuming arguendo that the authors have correctly identified and defined the evaluative standards, Critical Race Theorists argue that such standards are inadequate for assessing the quality of articles written in the Voice of Color and Narrative.71

The meritocratic standards Professors Farber and Sherry delineated embody white, majoritarian norms and are premised on an interpretive heuristic that is antithetical to the articulation of the Voice of Color, whether or not expressed through Narrative. The standards are based on a view of scholarship that epitomizes the formal-race approach to legal issues and ignores or devalues the function of status-race, historical-race, and culture-race.72

In other words, the use of the conventional standards is premised on an interpretive heuristic in which the identity of the author of the article is divorced from the evaluation of the article. The use of those standards presupposes that randomly changing the author's identity will not result in changes of the reader's perception and interpretation of the article, or the reader's evaluation of the merit of the article.

Critical Race Theorists speaking in the Voice of Color, whether in Narrative or non-Narrative format, present works that call upon the reader to recognize and acknowledge the author's identity and to employ an interpretive framework based upon that identity. Changing the author's identity naturally results in a change in the reader's interpretive framework, something that does not happen if one employs the neutral standards proposed by Professors Farber and Sherry.

Similarly, when the author speaks in the Voice of Color in the Narrative format, for example, the author's identity influences the reader's evaluation of the quality of the article. The reader premises her evaluation on how well the author communicated those facts, opinions, beliefs, and

70. Id. at 847.

71. Summarizing my earlier work, Farber and Sherry correctly pointed out that I have argued that "the meritocratic evaluative standard ... embodies white, majoritarian norms." Johnson, supra note 7, at 2018 n.47. This standard is "inappropriate when applied to scholarship written in a distinct voice of color," due to the fact that it is "culturally biased against the inclusion of a voice of color." Johnson, supra note 5, at 138, 148.

72. For a discussion of the typology that leads to the categorization of formal-race, status-race, historical-race, and culture-race, see infra part IV.B.
DEFENDING THE USE OF NARRATIVE

assertions that are relevant to the author's identity and which necessitated
the author's use of this form of scholarship. Perhaps an example will clarify
the point.

In the traditional law review article, the author's identity is irrelevant
and, hence, any reference to the author's identity or personal characteristics
are surplusage that add nothing to the conventional tale. However, when
an author of color employing Narrative to speak in the Voice of Color
informs the reader that she is a woman of color, and that such status
influences her view on abortion, the reader assessing the article's worth
must determine whether a connection exists between the author's identity
and the views she states.

When an author prepares a traditional article in which there is no
claim to the Voice of Color, however, the author adopts an expositional
framework similar to formal-race. This framework assumes that all individ-
uals in the academy are equal in important aspects, such as racial identifi-
cation, socio-economic status, and gender and sexual preferences, and that
society bases social reality on a postulate of equality premised on equality of
opportunity. Traditional articles assume that all members of the academy
share the same experiential framework because they have the same
background, environment, and exposure to similar opportunities. Hence,
any difference in scholarship, either in output or quality, is attributable
solely to the author's individual attributes over which that person exercised
sole control.

The postulate of equality is the normative proposition that all individ-
uals are morally equal. It is the starting point for my philosophical
discussion addressing the distribution of entitlements. The postulate of
equality focuses on the individual and her treatment in society. Thus, “at
the very least, the postulate of equality condemns using differences of status
or birth [or color] as the basis for treating persons unequally.”

The concept of equality of opportunity requires that each member of the subject
class have equal opportunity to obtain the scarce good—in this case, the
attainment of scholarly rewards and accomplishments resulting from the
authorship of articles.

Those employing the Voice of Color ignore formal-race and its focus
on neutrality, and instead focus on historical-race, status-race, and culture-
race to argue that the postulate of equality and equality of opportunity, in
this society, are fictional. They do so by subverting the neutral process of
writing and evaluating scholarship, a process in which the author's identity
is said to be irrelevant. That irrelevancy assumes that the fictional state of
equality is reality. Instead, scholars of color speaking in the Voice of Color
demonstrate that society largely constructs social reality and that matters of
race affect this construction. These scholars accomplish their goal largely,
although not exclusively, through Narrative.

In the end, however, the question remains over how to judge schol-
arship written in the Voice of Color in the Narrative format. Professors

74. Id. at 21.
Farber and Sherry argued that the academy can judge Narrative and storytelling by traditional standards that include an analytical component. They divided these standards into three categories: (1) consensus standards, (2) reason and analysis, and (3) methods of evaluating the importance of a work. Because Professors Farber and Sherry subsequently dismissed the third category as the most difficult and the one most fraught with the potential for prejudice, this Article also will ignore that category and focus only on the first two.  

The consensus standards that Professors Farber and Sherry discussed appear to be comprehensibility, uniqueness, and familiarity with the relevant literature. Uniqueness and familiarity with the relevant literature are irrelevant to Narrative, whether employed in conjunction with the Voice of Color or independently of it. Most Narrative is, by definition, unique in the sense that it says something new. The something new is the author's tale, that is, that the events occurred as the author relates them.  

Similarly, the familiarity standard also is difficult to use in conjunction with Narrative. A standard critique of works written in Narrative is that they are not scholarly because they do not and cannot cite other literature; thus, they lack familiarity. But there is a problem in employing that particular standard when the author of the Narrative is not doing a survey piece, but instead is relating an experience. Indeed, here is where the conflation of uniqueness and familiarity with other literature comes into play. In order to be unique, to add something to the debate, one has to publish something that has not been published, or not published to death. One insures uniqueness by undertaking a survey of the literature, which produces familiarity.  

Comprehensibility is also problematic for this type of scholarship. Professors Farber and Sherry used a certain article on birthing as an archetype of scholarship failing the comprehensibility test because "[c]learly, an article whose thesis a knowledgeable and sympathetic reader can barely understand on the third try fails the requirement of comprehensibility." Their criticism is difficult to understand, and possibly even unfair. There exist articles written in the traditional format which command three reads before one can barely understand them. The key question is whether the work is unduly and unnecessarily complicated. That is a valid criticism of any type of work. Consequently, the appropriate  

75. Farber & Sherry, supra note 16, at 847.  
76. One could claim that the Narrative is not unique since someone may have already told the same story. However, if that is the case, that similar stories are repeated ad nauseam, the Narratives perhaps would meet Farber and Sherry's typicality requirement. Consequently, the something new added by a similar Narrative (it will never be exactly the same) is that the previous experience was not unique, it was typical. However, at a certain point, having 50 articles in print in which the author narrates an experience pursuant to which a clerk denies her admission to a clothing shop ostensibly because of her race adds very little to scholarship. We have yet to reach that point.  
77. My review of the literature reveals that that particular assertion is not true.  
78. Farber & Sherry, supra note 16, at 847.  
79. Collegial courtesy precludes me from citing articles that I found difficult to comprehend. Suffice it to say the well-read reader will have examples of qualifying articles.
question is whether the issues addressed warrant the complexity of the article. In other words, one must determine whether the payoff—the understanding and comprehension finally realized on the third or fourth close read of the article—is worth the effort expended to decipher the message contained therein. That is the crux of the comprehension issue which Professors Farber and Sherry failed to address.

What Professors Farber and Sherry were really advocating is a standard that would pronounce Narrative good scholarship when its author couples it with traditional legal analysis. The problem with this standard is that it requires express legal reasoning (express causal connection) and analysis as part of effective Narrative. The narrator must not only express the Narrative, but also must explicate for the reader the Narrative’s express relationship to finite legal issues and then go on to analyze how it leads to a predictive or normative position or conclusion on the legal issue that is its focal point.

By coupling express legal reasoning with Narrative, Professors Farber and Sherry ignored the more powerful form of Narrative: implied causal Narrative. Implied causal Narrative allows the reader to explicate the legal issues and the predictive or normative position of implicit expressed by the Narrative.

Lastly, although scholars should not cabin the use of Narrative and stories from the bottom to a process-oriented evaluative heuristic that consequently negates much of the value of the work, some may still argue that such work is not legal scholarship. Indeed, all that has so far been shown is that the work has value aside and apart from its alternative form

80. Farber & Sherry, supra note 16, at 849. Professors Farber and Sherry expressed their argument as follows:

A more effective format for outsider scholars would be a combination of Narrative and more traditional scholarship that draws analogies among different legal problems, or scholarship that proposes new legal solutions to problems of discrimination. As with the current criterion of comprehensibility, then, requiring scholarship to contribute to knowledge becomes problematic when applied to stories that convey no analysis and reasoned arguments.

Id.

81. Implied causal Narrative is valuable scholarship irrespective of the type of evaluative standard employed because it does expressly accomplish what the authors define as scholarship: It increases the reader's understanding of law. As I have stated in another context:

I believe [that the use of Narrative] offers a new mode for critically examining previously unquestioned assumptions and theories, a mode that explicitly employs the contributions of scholars of color [and feminist scholars]. Recognizing [the Feminist Voice and] the [V]oices of [C]olor as distinct and valuable voice[s] reflects the fact that life experiences and individual value systems based on those experiences are relevant in determining which scholarship is worthy or meritocratic. [Farber and Sherry’s critique of the use of Narrative], by contrast, depends on a value system that does not acknowledge the inherent pluralism of our society and excludes any non-majoritarian standard. [Farber and Sherry] recognize that this is a diverse, pluralistic society, but [they] cannot see that [their] standard for judging scholarship is based on an artificial view of supposedly neutral [principles] that in fact are informed by a notion of hierarchical social values.

Johnson, supra note 5, at 150-51.
or process. To verify that it is, in fact, legal scholarship, this Article turns to a claim made by Professors Farber and Sherry in Telling Stories.

The authors claimed that even if, as adherents claim, stories from the bottom build solidarity and strengthen minority communities, they "do not believe that these efforts in themselves are sufficient to validate stories as scholarship."82 This is an odd statement since the academy typically defines scholarship broadly as "[e]xisting knowledge resulting from scholarly research in a particular field."83 One can argue that scholars laboring in the field of Critical Race Theory have engaged in scholarly research concerning the woeful status of society and have, thus, determined that the plight of subordinated persons leads to a suboptimal state of affairs. Moreover, no one can remedy that suboptimal state of affairs until all persons can realize true equality and freedom. Finally, these same scholars may have concluded that reliance on the formal strictures of the law has failed and will continue to fail to cure this dismal state of affairs. They may have determined that the only viable way to rectify this plight is to build solidarity and strengthen minority communities until those communities are strong enough to demand equality.

Since law students and law professors represent important links to the communities, and sometimes to the leaders of communities,84 they are an appropriate audience to receive this message. In addition, these works may educate those law professors believing in the transformative power of the law about the errors of their way and about their mistaken reliance on law as a tool of social change—that is scholarship.

III. A Call for the Use of Neutral Principles in Legal Scholarship

In 1959 Professor Wechsler published an article which has had a profound impact on the development of constitutional law and jurisprudential theory. In this highly acclaimed article, "Toward Neutral Principles in Constitutional Law" (Neutral Principles),85 Professor Wechsler espoused a jurisprudential framework or perspective that scholars have come to know and understand as "process theory."86 Immensely simplified, the primary tenet of this jurisprudential philosophy is that the Supreme Court must follow appropriate institutional procedures when adjudicating cases. This approach to constitutional jurisprudence was part and parcel of a larger jurisprudential philosophy which emerged and which scholars developed fully in the 1950s.87

82. Farber & Sherry, supra note 16, at 824.
87. Professor Gary Peller has neatly summarized that larger philosophy:
In essence, process theorists do not concern themselves with the outcome of a particular judicial dispute or issue. Instead, they are concerned, first and foremost, that the appropriate institutional body make the determination. The "principle of institutional settlement" is driven by the notion that one institution is best suited to making the decision in any given dispute because it has the best procedures for resolving that dispute. It stands to reason, of course, that the "principle of institutional settlement" is based on a belief that the procedural methodology is inherently the most important part of the operation through which a correct outcome is reached. Adherence, then, to procedural norms is tantamount to the theory of judicial review predicated on process theory.

Criticizing the process approach as exalting form over substance is unfair since scholars subscribing to the theory believed, as some still do, that one will realize the correct substantive outcome only by adhering to form. What is most important to this Article's current endeavor is the effect that embracing neutral principles and procedural legitimacy had on legal scholarship. The scholars who advocated and adopted neutral principles were influenced by the norms of neutrality and objectivity that they prized in their scholarly pursuits. The focus here is not on the historical development of process theory or its continued validity in constitutional or other forms of jurisprudence. Instead, having familiarized the reader with the basic tenets of process

To account for the way that Wechsler and other white legal scholars interpreted the world so that it made sense simultaneously to perceive themselves as liberal and tolerant and yet to find problematic legal judgments that purported to dismantle racial apartheid, it is necessary to locate Neutral Principles within the wider setting of the 1950's mainstream legal discourse. Wechsler's work should be seen as part of the intellectual project undertaken by the first generation of post-War scholars—including Felix Frankfurter, Henry Hart, Alexander Bickel, Lon Fuller, Albert Sacks, and Henry Wellington—who together constructed the "legal process" approach to law, changing the focus for critical evaluation from the substance to the process of decision making.


88. Id. at 568 n.8 (citing Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 4 (tent. ed. 1958)).

89. Professor Peller has summarized process theory:

The process-oriented scholarship consisted of various analyses of institutional procedures and interrelationships, informed by the underlying assumptions of the "principle of institutional settlement" that, once their work was completed, the legal scholars would have identified an encompassing calculus of institutional procedures and then matched them with a corresponding typology of social issues so that each social dispute would receive the appropriate dispute-resolution process.

Id. at 571.

90. Procedural and jurisdictional legitimacy could be neutrally and apolitically determined, even if substantive legitimacy could not. To the extent that the boundaries of scholarship were themselves defined by the norms of neutrality and objectivity, a focus on issues of procedural legitimacy would address the particularly "legal" aspects of dispute resolution in a particularly "scholarly" way.

Id. at 570.
theory, this Article seeks to convince both the neophyte and the expert (in relation to exegesis of the doctrine of neutral principles) that Telling Stories represents an attempt to impose neutral principles and the legal process approach on the Voice of Color and its exposition in Narrative. In particular, Professors Farber and Sherry normatively based their critique of Narrative on adherence to neutral principles, and concomitantly emphasized using the correct processes to resolve substantive issues irrespective of the substantive outcome.

The foundational construct upon which Professors Farber and Sherry centered Telling Stories is a respect for the use of the correct procedure to lead to an appropriate substantive outcome. This led them to their critique of both Critical Race Theory and Narrative. However, although Critical Race Theorists often employ Narrative as an expositional format (especially when speaking in the Voice of Color), it is not the only methodological format they use. Nor, of course, is all Narrative Critical Race Theory. The reason that Narrative and Critical Race Theory are conflated and subject to Professors Farber and Sherry's critique is that both reject neutral principles and the process pursuant to which those principles are deduced. Instead, both Narrative and Critical Race Theory adopt experiential approaches that eschew formal procedures.

In support of this thesis, note first that Professors Farber and Sherry correctly deduced that Critical Race Theorists who employ storytelling or Narrative do not claim uniqueness because they focus on concrete experiences instead of relying on grand theory and abstract formalizing. They claim uniqueness because they focus, rather, on stories from the bottom. Professors Farber and Sherry attacked these stories as not representing valid legal scholarship because their authors do not write them in the linear, analytic method by which traditional scholarship is produced.

Determining whether an article is viable legal scholarship, according to Professors Farber and Sherry, is difficult, but not impossible. What appears to be important in separating valid legal scholarship from nonlegal scholarship is the process that produces the result. The substantive outcome is largely irrelevant as long as the author adheres to and follows the appropriate process. Drawing from the work of Professor Kathryn Abrams, Professors Farber and Sherry stated that legal scholarship is valid and useful when it sheds light on legal questions. "The crucial test of scholarly writing must be whether it provides an increased understanding of some issue relating to law." As indicated previously, Professors Farber and Sherry's view of scholarship proceeds from a baseline of traditional legal scholarship which "focus[es] on abstract deductive reasoning from high-level principles or general rules . . . ." Although their examination of

91. Farber & Sherry, supra note 16, at 823-24. The authors characterized focusing on concrete experiences as practical reasoning.
92. Id. at 824-27.
93. Id. at 824 (citing Kathryn Abrams, Hearing the Call of Stories, 79 Cal. L. Rev. 971, 1030 (1991)).
94. See supra notes 40-41 and accompanying text.
95. Farber & Sherry, supra note 16, at 820.
traditional scholarship was rather limited, as it was not the focus of their thesis, their view of such scholarship is important for the light it sheds on their view of Narrative as legal scholarship.

Professors Farber and Sherry premised their contention that Narrative is not necessarily valid legal scholarship on the rather unremarkable assertion that the creation of "literature" is not legal scholarship. Most importantly, the creation of literature is not valid legal scholarship regardless of whether it is created by legal scholars or by nonlegal scholars, even when it provides some insight into law or the legal system.

Professors Farber and Sherry appeared to make some meta-distinction between literature and scholarship that prohibits literature from being considered scholarship. Hence, once scholars characterize a work as literature, it cannot be considered legal scholarship. This is puzzling, since work they characterize as literature—"stories about the law"—meets their admittedly broad definition of legal scholarship because "it provides an increased understanding of some issue relating to law." It is troubling that work which provides an increased understanding of legal issues is not legal scholarship merely because it does not employ a stylized version of legal reasoning and analysis.

Two examples clarify this contention. Professor Patricia Williams, a leading proponent of Narrative, has compiled a series of her Narrative stories. One of them is the infamous Benetton story in which a white teenage clerk at a Benetton retail store in New York City refused to allow Professor Williams entry into the shop. The clerk claimed that the store was closed even though white customers were inside shopping. Since customers stood before a plate glass window through which clerks could see them and decide whether to "buzz" them in, the offending clerk was able to determine that Professor Williams is an African-American and deny her entry into the shop. Later, when Professor Williams attempted to publish an account of her experience in a traditional law review she encountered.

96. Id. at 845.

In rejecting the creation of literature as a form of legal scholarship, we are admittedly indulging a mild presumption in favor of institutional specialization. While works of literature may well be a source of important insights for lawyers, we contend that creating literature has little nexus with the specific institutional traits of law schools, and seems far more congenial to other settings such as creative writing departments or traditional communities of writers and artists. Thus, we do not believe that the production of literature ought to be considered part of the mission of law schools. Just because something is worthwhile does not mean that it should take place under a law school umbrella. Indeed, to the extent that fictional or fictionalized accounts purport to be scholarship, they jeopardize the credibility of legal scholarship.

Id.

97. Although Professors Farber and Sherry did not expressly address this situation, it seems reasonable to conclude that literature written by legal scholars that produces some insight about law or legal systems would likewise not be considered legal scholarship.

98. Farber & Sherry, supra note 16, at 844.

99. Id. at 824.


101. Id. at 44-51.
This story actually contains a surprising amount of law and legal analysis. First and foremost, it juxtaposes the issue of formal equality, ostensibly provided by the law, against the practical reality of a society in which race is a powerful historical and currently viable social construct. Perhaps more obtusely, the story demonstrates the limits of current policies to integrate society. The story also could represent a plea for the elimination of the state-action doctrine which limits the remedies for harm caused by racially discriminatory acts to those caused by state actors.

Additionally, in dealing with the editors of the law review, Professor Williams's experience demonstrates the privileging of white law review editors over authors of color and how control of the discourse between them has powerful consequences.

Two days after the piece was sent to press, I received copies of the final page proofs. All reference to my race had been eliminated because it was against "editorial policy" to permit descriptions of physiognomy. "I realize," wrote one editor, "that this was a very personal experience, but any reader will know what you must have looked like when standing at that window." In a telephone conversation to them, I ranted wildly about the significance of such an omission. "It's irrelevant," another editor explained in a voice gummy with soothing and patience; "It's nice and poetic," but it doesn't "advance the discussion of any principle... This is a law review, after all." Frustrated, I accused him of censorship, calmly he assured me it was not. "This is just a matter of style," he said with firmness and finality.

Ultimately I did convince the editors that mention of my race was central to the whole sense of the subsequent text; that my story became one of extreme paranoia without the information that I am black; or that it became one in which the reader had to fill in the gap by assumption, presumption, prejudgment, or prejudice. What was most interesting to me in this experience was how the blind application of principles of neutrality, through the device of omission, acted either to make me look crazy or to make the

102. Professors Farber and Sherry were likewise familiar with the Benetton story:

Although legal storytelling takes many forms, Patricia Williams' "Benetton" story might be considered a classic of the genre. In this story, she describes at length how she was refused admission to a Benetton store, and how she encountered difficulties in persuading a law review to publish a full account of this episode. It is not extraordinary that this narrative would be published; what is new and noteworthy is that a book consisting of a series of such autobiographical narratives would be hailed as a major work of legal scholarship.

Farber & Sherry, supra note 16, at 808.

Finally, the story simply could mean that in this society one is never far from one's race, or blackness in this case, and that the law's failure to recognize that represents a travesty and failure of the legal system.

As with any interpretive task, there is no single, correct interpretation of Professor Williams's experience. Individual readers will have different, although no less valid, interpretations of her story. Each of those interpretations have much to do with the law and each sheds light on legal issues. Yet nowhere does Professor Williams mention any case or law. She does not relate her story by reasoned analysis. The interpretive task is left to the reader. Yet so long as the story causes the reader to think about the law, it increases the reader's understanding of law and law's power or lack thereof.

A second example which fails the "reason and analysis" test of what is valid legal scholarship, yet nevertheless passes the authors' broader, more appropriate test of increasing the readers' understanding of law is an article entitled, "Bid Whist, Tonk and U.S. v. Fordice: Why Integrationism Fails African-Americans Again." That article is a personal account of my transition from a predominantly black high school in South Central Los Angeles to Princeton University. Although surrounded by an article that is critical of the United States v. Fordice opinion, the Narrative itself employs no legal reasoning and no legal analysis. It simply serves as a backdrop pursuant to which the other issues are analyzed. The reason (I hope) the Narrative works is because it is situated in a context. If the reader was told that this morning a professor got up, ate breakfast, went to the gym, drove to the law school, talked on the phone, and eventually arrived and parked at the law school, that is Narrative. Yet it tells no tale, nor does the author intend to tell a tale that provides insight about legal issues.

However, if the reader was told that the same professor was driving down Interstate 64 on his way to Richmond when he was stopped by a white Virginia State Trooper, that he drives an expensive car, dresses rather expensively, is a relatively young African-American male, and that the officer did not stop him to give him a citation but to ask if he could search the car—a warrantless search—the reader would have questions about the encounter that raise serious legal issues.

104. Williams, supra note 100, at 47-48.
106. For a discussion of the durability of an African-American's experience in the United States, see infra notes 129-36 and accompanying text.
107. See Johnson, supra note 10. This article represents my first use of Narrative. It was quite painful to reveal such personal experiences without the benefit of anonymity.
108. I grew up within easy walking distance of what is now the infamous comer of Florence and Normandy, which is where Reginald Denny was assaulted after the initial Rodney King verdict.
109. Also, a legitimate question is why I don't simply refuse consent to the search. One of my colleagues, William Stuntz, would recommend that I take this approach if I am "innocent" and drug-free. Unfortunately, or fortunately as the case may be, my colleague did not grow up in an environment in which the police were enemies and one risked losing teeth by challenging
Moreover, such an exposition changes the context in which scholars phrase legal issues by moving them from the abstract to the real. In the abstract, the question concerns how to balance society's desire and need to eliminate illegal drug use against individuals' rights not to be stereotyped and stopped or to have their privacy invaded. Indeed, one can employ a cost-benefit analysis to determine that the invasion was minimal in relation to the costs. Yet that judgment is difficult to make when the true cost of the invasion, and perhaps the true costs of prevention, are felt by individuals and, as such, cannot be measured or quantified in the abstract.

Could the author do all that—make all these points and more—through reasoned analysis that connects the law to the facts? Perhaps, but even if the author never mentions a law, a case, or a judicial principle in relating the Narrative tale, there will be some implied causal connection to the law that is discernible to the average reader. At the very least, Euro-American readers must ask themselves whether such an event could happen, and if so, how often. Similarly, these same readers might wonder about the law's supposed neutrality when law enforcement officers target African-American males disproportionately for stops and searches.\footnote{Beware Taint of Racism in the War on Drugs, USA Today, July 27, 1993, at 8A.} Sophisticated readers would likewise discern a distinction between the written and applied law in different situations and ask whether race may be a factor in that differential application and whether that differential application can be eliminated only by confronting it directly.

An author employing Narrative could choose to write in the analytical, linear form of traditional scholarship, but something important would be lost. Part of what makes Narrative powerful is that the author does not lay out the points in a linear, logical fashion for the reader to parse and follow. The author does not tell the reader assertions, facts, issues, questions, hypotheses, conclusions, or any of the other things that go into the making of a "good" legal analysis. To do so places readers in a passive, impersonal, dispassionate mode of analysis that requires them to ignore not only the author's life experience (horizon),\footnote{For a discussion of how the context of one's life experience or horizon affects interpretation, see William N. Eskridge & Phillip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321, 345-46 (1990) (citing Hans-Georg Gadamer, Truth and Method 263, 289-95 (G. Barden & J. Cumming trans., 2d ed. 1975)).} but their own life experiences as well. Instead, Narrative requires readers to employ a different interpretive heuristic that places them in an active, even interactive role.\footnote{At least as interactive as one can be when reading and evaluating and not participating.} Narrative attempts to situate readers within the context of the story by involving them in the events related by the story, as opposed to convincing them of the
correctness of the author's conclusions.\textsuperscript{113}

Returning to Professors Farber and Sherry, they alleged that Narrative fails as legal scholarship largely because it is not presented in the traditional methodological format. Simplistically stated, because the work does not look like a traditional law review article, it should not be accorded the same respect and worth as a traditional law review article. This does not mean that the authors have exalted form over substance with their adherence to methodological correctness. Instead, like Wechsler and other adherents to process theory, Professors Farber and Sherry apparently believed that the correct substance, whatever it might be in any given situation, can only be realized through the application of correct procedure, that is, the application of logical, linear reasoning and analysis.

Similarly, their objection to departure from neutral principles (in this case, adherence to the correct methodological form of scholarship) was not motivated by disagreement with the views of those who employ Narrative or the substantive outcome those authors reached.\textsuperscript{114} Instead, it was an apprehension that Narrative can as easily be used by scholars opposed to the objectives of Critical Race and Feminist Theorists as by those supportive of them. This apprehension motivates even those sympathetic to Critical Race and Critical Feminist Theory to oppose the use of Narrative. Consequently, Professors Farber and Sherry alleged that without standards for evaluating scholarship anyone could tell stories, and no principled vehicle would exist by which to privilege one story over another.\textsuperscript{115} Stories thus

\textsuperscript{113} Let me see if I can state it another way. I have written an article analyzing the efficacy of the current foreclosure process from an economic perspective. See Alex M. Johnson, Jr., Critiquing the Foreclosure Process: An Economic Approach Based on the Paradigmatic Norms of Bankruptcy, 79 Va. L. Rev. 959 (1993). In this article, I criticized the current method of foreclosure that results in the sacrifice of the mortgagor's equity interest in the property. By employing the collectivizational norms of bankruptcy, I argued that there is a method or vehicle which protects the mortgagor's equity, while at the same time protecting the mortgagee's interest. It is essentially a traditional law-and-economics piece with a normative base (efficiency) and a predictive theory.

I did not choose to use Narrative, primarily because I claim no special insight or empowerment based on my status as a minority or subordinated person. Yet, although the foreclosure article is admittedly one that would not be characterized as Critical Race Theory, I gave serious thought to using a fictional Narrative as the focal point in the article. I decided against it because it would not necessarily add anything to the article.

I have never had my interest in real or personal property realized or attached by creditors. Nor have I experienced the type of financial difficulties that leads to that sort of drastic event. Nevertheless, I thought I could fictionalize the plight of a foreclosed mortgagor until I asked myself what it would add to the piece. I assumed that most of my readers have as much access to the plight of foreclosed mortgagors as I, so instead of fictionalizing the plight of the mortgagor, I used traditional hypotheticals. Had I ever been in the position of a foreclosed mortgagor, or had I felt I possessed knowledge that would enrich the interpretive heuristic of the reader in assessing the consequences of this plight, I would have shared it with the reader through the use of Narrative.

\textsuperscript{114} Although criticizing the Court for its reasoning in \textit{Brown v. Board of Education}, Wechsler abhorred segregation and supported integration. See Wechsler, supra note 85, at 33-34. Professors Farber and Sherry, although critical of Narrative and the Voice of Color, were apparently sympathetic to the positions taken by scholars utilizing these heuristics.

\textsuperscript{115} See supra notes 59-84 and accompanying text (discussing appropriate evaluative standards).
become irrelevant unless the academy implements some result-oriented criteria for distinguishing between legitimate and illegitimate stories. Unfortunately, traditional legal scholarship, with its base in reason and analysis, precludes the adoption of result-oriented criteria for differentiating between good and bad articles.

Finally, Professors Farber and Sherry made one ruinous mistake: They assumed that the neutral process is indeed neutral, fair, and capable of employment by feminists and scholars of color. In other words, critics of the use of Narrative assume that the message authors of Narrative seek to communicate can be conveyed through the use of traditional scholarly vehicles. More importantly, they argued, if communicated through traditional scholarly vehicles, this message would reach a wider audience since it was realized through a process that is not subject to attack nor easily ignored.

The problem with this view is that the so-called neutral principle or process is not neutral. Nor is it capable of incorporating, to the fullest extent, the messages that those employing Narrative and speaking in the Feminist Voice or the Voice of Color seek to communicate. The neutral principles or process that critics seek to enforce against feminists and scholars of color is based on the existence of a scholarly community whose intellectual values are synonymous (majoritarian) and exclusive of the Feminist Voice and the Voice of Color. The process that Professors Farber and Sherry sought to apply to Narrative—the application of reason and analysis, the express causal connection methodology—is acontextual and impersonal while many of the claims that authors adhering to the Feminist Voice or Voice of Color seek to make are expressly contextual and personal.

IV. CRITICAL RACE THEORY: POURING CONTENT INTO THE EMPTY VESSEL

In a portion of their article that is independent of their critique of the use of Narrative, Professors Farber and Sherry raised a common criticism of Critical Race Theory. Repeating a complaint most prominently featured in Randall Kennedy’s “Racial Critiques of Legal Academia,” Professors Farber and Sherry alleged that there is a lack of evidence as to the existence of a distinct Voice of Color. Incredibly enough, they claimed that “[t]he most concrete description we could find is that the Voice of Color ‘rejects

116. Much of this analysis proceeds from, and is derivative of, Gary Peller’s critique of Wechsler’s adoption of neutral principles because Wechsler’s adoption of such principles meant opposing a “correct” result in Brown v. Board of Education that Wechsler believed was reached erroneously. See Peller, supra note 87, at 564.

117. See Johnson, supra note 5, at 149-55; Johnson, supra note 7, at 2015-18.

118. One should not lose sight of the fact that Critical Feminist and Race Theorists indeed have written many articles using traditional legal or scholarly analysis; this scholarship should not be improperly lumped or conflated with Narrative as nontraditional scholarship. See Richard Delgado, On Telling Stories in School: A Reply to Farber and Sherry, 46 Vand. L. Rev. 665, 669 (1993).

119. Kennedy, supra note 6, at 1778-82.
narrow evidentiary concepts of relevance and credibility."

Any attempt at defining what is unique or distinct about the Voice of Color is akin to trying to explain to majoritarian scholars what it may feel like to be an African-American in today's society, even when one stands in the privileged position of African-American law professor. It is a daunting task, but not an impossible one. Although African-Americans inhabit a socially constructed reality distinct from Euro-Americans, they also, in spite of their subordinated position in society, inhabit a socially constructed reality that is shared with Euro-Americans. It is this duality, membership in the subordinated group as well as partial, but not equal, membership in the larger dominant group, that allows the communication to take place.

One caveat must be addressed initially. The enormity of the task facing Critical Race Theorists to specifically define the content of the Voice of Color is both important and troubling. It is important in the sense that those who labor in the vineyard of Critical Race Theory feel it important to educate each other and majoritarian colleagues of the common themes inherent in their work. It is troubling if they feel compelled to respond to criticism of their work by applying a harsher standard to their own work than to that written in the traditional, linear format. Consequently, those who proclaim to be proponents of Critical Race Theory should resist efforts

120. Farber & Sherry, supra note 16, at 815 (citing Mari J. Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, Address at the Yale Law School Conference on Women of Color and the Law (Apr. 16, 1988), in 11 Women's Rts. L. Rep. 7, 8 (1989)). In this Article, I choose not to reiterate my previous reply to Professor Kennedy's query. See Johnson, supra note 5, at 149-55; Johnson, supra note 7, at 2012-20. Nor do I summarize others' responses to Professor Kennedy on this issue. See, e.g., Delgado, supra note 5, at 95 n.1; Responses to Racial Critiques, supra note 5, at 1844-86. However, I have chosen to revisit this issue to expand on a definition I began four years ago and hopefully to lay to rest the recurrent question concerning the existence of a distinct Voice of Color.

121. For a discussion of the significance of this sort of self-identification, i.e., whether one thinks of oneself as a law professor first or an African-American first, see Stephen L. Carter, The Black Table, the Empty Seat, and the Tie in Lure and Loathing: Essays on Race, Identity, and the Ambivalence of Assimilation 55 (Gerald Early ed., 1993).

122. Hence, I reject Professors Farber and Sherry's criticism of Richard Delgado's claim that "members of dominant groups share a coherent 'mindset' which underlies the 'institutional logic' of the system, while members of subordinated groups have a different and incomplete mindset." Farber & Sherry, supra note 16, at 825.

In Part I, we called into question the assumption that the "different voices" of subordinated groups reflect radically different ways of thought. Moreover, if whites did inhabit a socially constructed reality wholly distinct from people of color, it would be difficult to understand how communication across this gulf could take place. Any sentence uttered by a person of color, under this assumption, would be connected with one coherent world-view in the mind of the speaker, but a white listener could only understand the sentence within her own, equally coherent but quite different, world-view. In essence, the speaker would be using one language and the hearer would be listening to a completely different one, even though the words of both languages would sound identical.

Id. at 825-26 (citations omitted). For further discussion on how communication takes place between the two disparate groups, see Johnson, supra note 5, at 151-55.

123. For a discussion of this dual perspective, see infra notes 130-37 and accompanying text.
to hold their work to a higher, unascertainable standard to which traditional scholarship is not held. A precisely formulated one or two sentence definition of the Voice of Color will correctly be criticized as too narrow and incapable of encompassing all that rightfully should be included as Critical Race Theory. Conversely, any broad statement focusing on generality, e.g., describing it as "scholarship [that] raises new perspectives—the perspectives of minority groups," becomes so vague as to be meaningless. Following, therefore, is an attempt to explicate the salient characteristics of Critical Race Theory from the more general claim that authors present unique perspectives through the Voice of Color. The delineated specific claims about Critical Race Theory prove the more general statements defining it. For a more ordered explanation of the Voice of Color, this part of the Article is divided into three subparts, moving from the general to the specific.

A. Perspectival

Generally, the Voice of Color is perspectival in nature; scholarship written in the Voice of Color presents a perspective different from that possessed by majoritarian scholars. This unique perspective requires the reader to address issues discussed therein from a different temporal horizon or framework. This temporal framework forces the reader to think not only of the present and future—forward-looking perspective—but also, and perhaps more importantly, of the events that preceded and led to the present situation—backward-looking perspective. Issues are, thus, framed in a context that is temporally linear (relational) as opposed to a focus that is temporally discrete (contingent). Historical-race and its use in the Voice of Color represents a way of looking at issues in which the temporal framework of the relevant issue is telescoped historically to incorporate the development of race as a social construct in this society.

Additionally, the Voice of Color is socially constructed; it is a product of the past and present which looks to the future. Most importantly, it looks to the future in such a fashion that if current racial categorizations, unfortunately, are maintained (which is highly likely if history is any guide), those categorizations will result in the continued subordination of African-Americans. If one must personalize the Voice of Color, it is socially constructed as different or minority—as “other” or “them,” never as “same”

124. Such an approach would be tantamount to trying to define something impossible such as law and literature, or even something more important like the definition of what is or is not good, meritorious scholarship. Nevertheless, authors continue to produce and evaluate such work. Indeed, even assuming agreement upon such definitions in the abstract, problems still arise with respect to appropriate and acceptable application. See supra notes 75-81 and accompanying text (discussing standards to evaluate scholarship and the futility in any attempt to develop an all-encompassing definition that most if not all would agree upon).

125. A temporally discrete framework is one in which each event is viewed in isolation and separation from the historical factors that preceded it.

126. For a precise definition of historical-race, see infra note 155 and accompanying text.

or “us.” In that respect, it is uniquely perspectival. It encompasses a perspective partly based on the concept of “historical-race,” a concept in which African-Americans examine topical issues through a historical lens that recognizes and refuses to ignore a past in which race-based subordination was legal and legitimate. Subordination has created a concept or perspective of “status-race”128 in which minorities, because of their status as African-Americans, seem to occupy a slightly different social reality.129

The perspectival approach is not new or unique to legal scholarship. Indeed, a famous quotation in African-American literature captured it best: 

After the Egyptian and Indian, the Greek and Roman, the Teuton and Mongolian, the Negro is a sort of seventh son, born with a veil, and gifted with second-sight in this American world—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one’s self through the eyes of others, of measuring one’s soul by the tape of a world that looks on in an amused contempt and pity. One ever feels his two-ness—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.

The history of the American Negro is the history of this strife—this longing to attain self-conscious manhood, to merge his double self into a better and truer self.130

New in legal scholarship is the explicit recognition that African-American scholars, other minority scholars, and feminist scholars possess this double-consciousness and that they are expressing it in their scholarly endeavors. Instead of embracing a form of scholarship that presupposes a monolithic cultural perspective of its users—that of the upper middle class, well-educated Euro-American male—these “other” scholars have embraced a type (the Voice of Color), and to a lesser degree, a method (Narrative), of scholarship that exposes their duality and differentness.

Most importantly, the Voice of Color illuminates the differences in perspectives of its users.131 It understands that the presumed norm of neutrality actually masks the reality that the Euro-American male’s perspective is the background norm or heuristic governing in the normal

128. For a definition and discussion of status-race, see infra notes 150-54 and accompanying text.
129. Professor T. Alexander Aleinikoff neatly addressed and explicated whites’ perspective of their dominant racial status and their identification with other whites to maintain their dominant racial status, as well as the societal privileges and perks that accompany such dominant status. T. Alexander Aleinikoff, A Case for Race-Consciousness, 91 Colum. L. Rev. 1060 (1991).
131. See infra notes 172-215 and accompanying text. Later, I discuss the articulation of a white Voice of Color.
evaluative context. In effect, the default rule for evaluating scholarship is the Euro-American male heuristic. This norm makes no call to uniqueness or privilege.

Consequently, what the academy normally considers neutral or aperspectival is, quite to the contrary, perspectival. Legal scholarship that is presented as aperspectival is, in fact, influenced by and based on a perspective that undergirds the debate:

The interpretive community of academic scholars presumes a white, male majoritarian language that represents the voice of white men . . . . The voice of white male hegemony has controlled legal discourse. The lack of a distinct white voice is not puzzling, nor is the failure to label some texts as articulating the white voice.\(^{132}\)

As a result, Critical Race Theory has content—a unique perspectival approach—as long as the typology of races has content. Professor Neil Gotanda has demonstrated that American racial classifications are dichotomous and premised on a definition of what is African-American or black.\(^{133}\) In other words, society defines white by reference to what it is not. It defines “not” as that which is African-American or black:

American racial classifications follow two formal rules:

1) Rule of recognition: Any person whose Black-African ancestry is visible is Black.

2) Rule of descent: (a) Any person with a known trace of African ancestry is Black, notwithstanding that person’s visual appearance; or, stated differently, (b) the offspring of a Black and a white is Black.\(^{134}\)

While everything stated is rather obvious, it usually goes unspoken because speaking of racial classifications creates ill ease. This unease derives from a recognition that historically those classifications have been used to create more harm than good. Moreover, speaking of racial classifications is troubling because they are difficult to define with any specificity. As a result, white becomes defined by anything that is not black, and black becomes defined by anything that is not white.\(^{135}\) More precisely, white and

\(^{132}\) Johnson, supra note 5, at 159-60 (citation omitted).


\(^{134}\) Id. at 24.

\(^{135}\) Similarly, although much is made of the definition of persons of color by Critical Race Theorists, what it boils down to is that people are defined as persons of color because they lack one characteristic—they are not white. In our society there is precious little discussion or recognition of mulattos or mixed-race individuals—one is either black or white. There is no in-between. Now, this last lacuna can be overlooked if it is assumed that when Critical Race Theorists refer to persons of color they are including mulattos. By definition, mulattos are persons of color because they are not pure white; their racial makeup is not one hundred percent biologically white. Or, to be more charitable, mulattos are included in the “people of color” category because they are regarded by society as black or African-American. That conclusion is, however, both under- and over-inclusive. Certainly there are some mulattos who are not visibly black or African-American, yet they are the product of a union between an African-American and a white. Indeed, individuals who fail the “rule of recognition” test but
whiteness in this society is defined by the absence of black. At base, each
definition is a social construct that has no meaning in isolation but contains
meaning only when compared to its diametrically opposite construct.

Finally, scholars debate whether Euro-American people can speak in
Narrative and also whether they can speak in Voice. The immediate
focus here is on the nonissue of whether Euro-Americans can utilize
Narrative and whether they can speak in a Voice of Color that is
Euro-American. This Article concedes both points.

The first question is the easier one to resolve: No one has ever claimed
that Narrative is exclusively the province of the subordinated. Euro-
American scholars have used Narrative for many years and scholars of color
trace their use of it to its use by Euro-American scholars. What is
troubling is that Narrative came under attack when Critical Race Theorists
began using it as their primary vehicle for expression.

As to the second question, whether Euro-American scholars can use
Voice, it seems they are capable of speaking in the Voice of Color—the
white Voice of Color—either in the Narrative methodological framework or
outside of it. However, that Voice requires some explanation because
determining whether Euro-American scholars can speak in Voice is not the
real issue. The real question is: When don’t they speak in Voice? In other

pass the “rule of descent” test, and therefore should be classified as black but are not, frequently pass themselves off as white to enjoy the benefits attained when one is accorded the status and privileges of whiteness. For a discussion of the racial phenomenon of “passing,” see Cheryl White, Whiteness as Property, 106 Harv. L. Rev. 1707, 1710-14 (1993). Conversely, not all who are regarded as white are one hundred percent white. Thus, there are people who are regarded as white who perhaps should be included in the “people of color” category just as there are others who appear to be white but view themselves as persons of color.

The nation’s answer to the question “who is black?” has long been that a black is any person with any known African black ancestry. This definition reflects the long experience with slavery and later with Jim Crow segregation. In the South it became known as the “one-drop rule,” meaning that a single drop of “black blood” makes a person black.


137. See infra note 149 and accompanying text. As I discuss below, they may be able to speak in what I characterize as the counterfeit Voice of Color when they mimic the authentic Voice of Color.


139. This differs immensely from the issue addressed below about whether whites can speak in the Voice of Color of a person of color. See infra notes 142-47 and accompanying text.


141. If everybody can speak in voice as to certain issues, the logical question is: Why is the existence of the Voice of Color and narrative so controversial? One probable answer to this question also explains why those who identify with the subordinated in our society favor using Voice of Color and Narrative; those vehicles empower the people who use them. These stories and Voice not only celebrate our differences, they accomplish a sort of leveling that may not otherwise be attainable. Using traditional scholarship, minority scholars may be at a historical disadvantage in traditional discourse due to prior discrimination. Voice and Narrative provide outlets for expression and opportunities for rewards that may not otherwise be attainable by minority scholars.
words, what the academy perceives as the neutral voice, that which it assumes to be apersonal and meritocratic, is really the white Voice. The majoritarian, universalistic, meritocratic standard masks the existence of the white Voice, yet simultaneously presupposes it by presupposing one set of speakers who have shared similar experiences. Thus, the real question is what would readers learn from the stories that Euro-Americans tell in the white Voice? What do those stories add to the discourse? The answer is nothing because being prepared and presented in the white Voice of Color is the norm for most scholarship.

A further issue in need of resolution is whether Euro-American scholars can speak in a Voice of Color other than the white Voice of Color. The account of Forrest Carter answers this question with a resounding yes.142 Mr. Carter was a Euro-American who wrote a children’s book about life on the reservation.143 He used a pseudonym that implied he was a Native American, and indeed, many believed the book to be autobiographical in nature. Critics who are unconvinced that a distinct Voice of Color exists contend that this story demonstrates that the Voice of Color is chimerical since scholars who are not persons of color can use it.144 This story, they allege, exposes the fallacy or weakness of the argument supporting the Voice of Color. If someone who lacks the pigmentation of an African-American, that is, someone who fails both the rule of recognition and the rule of hypodescent tests,145 can make a call to status-race or even historical-race, then how can scholars of color claim a unique Voice of Color that only they possess and articulate?146

The answer is simple and is premised on the assertion that race is a social construct contingent solely upon history, and not entangled with immutable genetic or biologic attribute.147 Consequently, it is only logical that someone other than a person of color should be able to speak in the Voice of Color given the right experience, learning, or aptitude. This does


145. For a discussion of the rule of recognition and the rule of hypodescent, see Gotanda, supra note 133, at 23-32.

146. Indeed, the facts of the Forrest Carter case represent an easy case to distinguish in defense of the unique articulation of the Voice of Color because no claim is made that Forrest Carter, for example, lived with, grew up with, or even experienced a portion of his life treated as a Native-American. In other words, he was not socialized in whole or in part as a Native-American. Simply put, his speaking in the Native-American voice was the equivalent of an affectation that he used when it was to his advantage and discarded when it was not.

147. See Gotanda, supra note 133, at 32 (discussing the Supreme Court’s confusion of racial classifications with scientific fact).
not mean that Forrest Carter experienced life as a Native American or that he learned to live life as a Native-American; it means only that he apparently had the desire, aptitude, and access to enough knowledge about those that he ostensibly portrayed to write in their voice. Yet, even though the Voice of Color admittedly is diminished by the fact that individuals like Forrest Carter can imitate it, that marginal diminution does not mean that it has little value and is incapable of articulation.

The Voice of Color continues to exist and can be employed as a powerful explanatory vehicle for several obvious reasons, and a few that are less obvious. Among the obvious, it is not fatal to the existence of the Voice of Color that persons of noncolor can use it, for persons of color also speak in many different voices. Certain situations and environments in the experience of persons of color have forced them to adopt the voice of majoritarians.\(^{148}\)

A more obscure defense to the charge that the Voice of Color is of questionable worth since majoritarian scholars can mimic it is that even its counterfeit use achieves some benefits. For the Voice of Color to be successfully articulated and heard, an interpretive heuristic must be based on authorial intent and reader interpretation.\(^{149}\) In the example of Forrest Carter, both attributes are present and used to accomplish the successful articulation and completion of the Voice of Color. At the very least, by speaking in a counterfeit Voice of Color Forrest Carter accomplished a call to a perspective that requires the reader to confront the author's alleged differentness and, in so doing, the white race-consciousness that is implicit and endemic in this society. That is not a total failure.

B. Giving Content to Voice and the Perspectival Approach

In a powerful article addressing the Supreme Court's color-blind constitutionalism and its opinions that foster continued white domination in American society, Professor Neil Gotanda examined the method by which the Supreme Court has used race in its decisions.\(^{150}\) He concluded that a trichotomy has developed in the Court's treatment of race as a concept. His article neatly captures the essence of the concept of Voice.

Professor Gotanda divided the Court's treatment of the concept of race into three distinct categories: status-race, historical-race, and formal-

\(^{148}\) See Johnson, supra note 7, at 2015-18. Consequently, African-Americans have adopted the "hierarchical majoritarian voice" in their scholarly endeavors. Because persons of color are not the only multilingual individuals, white individuals, including Forrest Carter, may be able to speak in the Voice of Color given the right situation and context. Also, and this seems to be somewhat perverse, if communication is measured by how well it reaches a white audience, someone like Forrest Carter may speak more effectively in what is perceived to be the Voice of Color than a Native-American. As a member of the majority group, Forrest Carter undoubtedly possessed some insights about what others like him wished to hear from persons of color speaking in the Voice of Color. That insight could be used to produce a Voice of Color that is attractive (some might say patronizing) to members of the majority group, but not so attractive to members of the minority group apparently represented by impostors like Forrest Carter.

\(^{149}\) Johnson, supra note 5, at 160-63.

\(^{150}\) See generally Gotanda, supra note 133.
race. He deftly showed how the Court has used these categories in varying
fashions to maintain the legal domination of whites and white culture in
American society. How the Supreme Court has manipulated the use of
these doctrines to maintain white domination is not relevant to this Article.
What is relevant is how fitting and useful his categorization is in defining
the content of the Voice of Color. The two categories of status-race and
historical-race define the content of the Voice of Color. Formal-race, on the
other hand, resembles the adoption of neutral principles with their reliance
on neutrality and process for differentiating between favored and disfa-
vored outcomes.

Emblematic of the category status-race is the conception of race that
the Supreme Court used in its infamous Dred Scott\textsuperscript{151} opinion. In that
opinion, the Court accepted the inferior status of African-Americans as a
baseline from which to begin its analysis.\textsuperscript{152} What is important is that it
focused on the status of African-Americans as a group and, rightly or
wrongly, attributed certain characteristics to individuals solely because they
belonged to that group. This sort of essentialization can have either positive
or negative effects.\textsuperscript{153} Crucial to this typology is that group affiliation, on
which the attribution of characteristics is based, is socially constructed.
Thus, in Dred Scott the Court regarded all African-Americans as inferior to
Euro-Americans simply because of their status as African-Americans.\textsuperscript{154}
Individual attributes were ignored.

Historical-race, on the other hand, focuses on the historical usage and
context of race to ascribe attributes to members of a group based solely on
their identification or membership in that group.\textsuperscript{155} Although at first
glance historical-race appears identical to status-race, it differs in one key
manner. Historical-race focuses on how the racial group's history affects
current issues. Its focus is not on the individual's present membership
within the group, but rather on how the group's historical treatment
influences the present treatment received by either individual members or
the group as a whole. Thus, similar to the concept of status-race, the
individual's identity is relatively unimportant in the resolution of relevant
issues.

Formal-race, on the other hand, ignores the situated or historical
reification of race as a social contract. Most frequently, scholars equate it
with color-blindness in constitutional adjudication.

Besides presuming that racial classifications are unconnected to
social status or historical experience, the [Supreme] Court's
formal-race analysis fails to recognize ties between the classifica-

\textsuperscript{151} Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
\textsuperscript{152} See Gotanda, supra note 133, at 37 (discussing Dred Scott).
\textsuperscript{153} For a discussion of essentialization, see generally Angela Harris, Race and Essentialism
\textsuperscript{154} See Dred Scott, 60 U.S. (19 How.) at 404-05 (discussing denial of citizenship status to
African-Americans).
\textsuperscript{155} See Gotanda, supra note 133, at 39 (discussing historical-race in the context of Justice
Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537 (1896), and Justice Marshall's dissent in
Bakke v. Regents of University of California, 438 U.S. 265 (1977)).
DEFENDING THE USE OF NARRATIVE

The distinction between individualism and communalism thus classifies arguments about responsibility according to whether they emphasize or deemphasize the responsibility of particular persons, either through rules of liability or through excuses and defenses. . . . Individualism and communalism, however, are not simply orientations of greater and lesser responsibility in general; they are claims about the responsibility of particular persons.

Id.

156. Gotanda, supra note 133, at 38.
157. See Johnson, supra note 10, at 1414-22.
159. I am assuming, for the sake of argument, that in this context the parties agree upon the identity of the injured party as the minority. Balkin identifies "who is the victim" as the source of underlying symmetry between individualism and communalism:

"[I]ndividualism and communalism are really mirror images of each other. Communalism emphasizes the responsibility of the injurer and deemphasizes the responsibility of the victim, while individualism takes precisely the opposite strategy. Because from different perspectives one can be either the injurer or the victim, individualist and communalist arguments turn out to be the same arguments with the parties reversed. This analytical indeterminacy as to who is the injurer and who is the victim is the source of the underlying symmetry between individualism and communalism."

Balkin, supra note 158, at 210-11.

160. Id. at 206-07.
161. These two diametrically opposite ideological positions are explored in Johnson, supra note 7, at 2041-42.
Formal-race, to the contrary, with its embrace of neutral principles, just as inevitably leads to the individualist position which places the responsibility on the victim because it ignores the factor—race—that is alleged to be a causative factor leading to victimization. Once it ignores or minimizes racial classifications on the basis that they are detached from either or both social status (status-race) and historical status (historical-race), its focus is left to the individual’s present condition of injury and her responsibility in creating it. This, in effect, leaves the injury irremediable.  

Although society sometimes uses historical-race and status-race to the detriment of minority interests, Critical Race Theorists succeed in using them positively because these authors possess a perspective that views African-Americans as victims whose plight is subject to remediation. Thus, the use of status-race does not presuppose that all African-Americans are inferior to Euro-Americans as was reasoned in Dred Scott. It does, however, presuppose that because majoritarian society, as injurer, incorrectly perceives African-Americans as of an inferior status, society continues to inflict harm on them. That harm must be remedied before African-Americans are able to attain true equality.

Similarly, historical-race, as used by Critical Race Theorists employing Voice, posits people of color as presently injured or as suffering the effects of injury. This injury is the consequence of past societal acts that resulted in the subordination of people of color in society. By casting people of color into the role of victims, historical-race provides the bridge that justifies remediation notwithstanding current adherence to color-blindness or formal-race. Hence, it is only through the use of historical-race that Critical Race Theorists can simultaneously and consistently argue in favor of the unique status of subordinated persons and yet demand the continued benefits and remedies that spring from that status.

Finally, there is one discrete temporal framework that is forward-looking. It also can be viewed as perspectival and as incorporated within the Voice of Color. Characterized as “culture-race,” Professor Gotanda defined it as follows:

The assimilationist color-blind society ignores, and thereby devalues, culture-race. Culture-race includes all aspects of culture, community, and consciousness. The term includes, for example, the customs, beliefs, and intellectual and artistic traditions of Black America, and institutions such as Black churches and colleges.

... Only by treating culture-race as analytically distinct from other uses of race can one begin to address the link between the

162. The debate over the continued use and efficacy of affirmative action perfectly demonstrates the distinction between the individualist and communalist positions and is discussed further in Johnson, supra note 7, at 2045-47. For an in-depth discussion of the issues raised by affirmative action, see Alex M. Johnson, Jr. et al., The Efficacy of Affirmative Action in Legal Education (1994) (unpublished manuscript, on file in the University of Iowa College of Law Library). Looking at the issue from a slightly different perspective, opponents of affirmative action use formal-race to argue against its use. See Gotanda, supra note 133, at 41-42. Proponents of affirmative action, on the other hand, use either historical-race, status-race, or both to justify the continued and expanded use of affirmative action.
cultural practices of Blacks and the subordination of Blacks, elements that are, in fact, inseparable in the lived experience of the race.\(^{165}\)

Culture-race is related to, but slightly different from, historical-race. It is related because of the tremendous influence that historical-race had on its development. It is different, however, because of the perspective from which it is viewed. By viewing culture-race from a present or future perspective, the attributes that compose it—customs, beliefs, and intellectual and artistic traditions—are viewed as equal to those of the majoritarian community. As a result, although separatism and subordination may have created culture-race, rejecting a notion of assimilation leads one to conclude that it is worth preserving the attributes of culture-race as equal, and not subordinate, to their majoritarian equivalents.\(^{164}\)

The new genre in Critical Race Theory, aside from Narrative, focuses on the culture-race aspect of the Voice of Color. It is worthy of a limited discussion because it lies somewhere between traditional Critical Race Theory espousing status-race or historical-race through traditional scholarly methodology and Narrative. This new scholarship utilizes either the traditional methodological expository form of legal scholarship or Narrative in its discussion of predominantly nonlegal and nonacademic issues.\(^{165}\) Furthermore, it appears to focus on the maintenance of and legal respect for African-American institutions and cultures.

These articles may even turn formal-race on its head by rejecting neutrality in favor of a contextual perspective that supports the continued maintenance of difference.\(^{166}\) One of the interesting attributes of this type of scholarship that focuses on culture-race is that, unlike the debate over the existence of the Voice of Color or the appropriate use of Narrative, it

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163. Gotanda, supra note 133, at 56 (citations omitted).
165. See infra notes 166-73 and accompanying text.
166. Illustrative of this type of scholarship is Paulette Caldwell's article, A Hair Piece: Perspectives on the Intersection of Race and Gender, 1991 Duke L.J. 365, in which the author employed Narrative of her own experience with braided hair to demonstrate that the traditional approach to race and gender is analogous but distinct, lacking focus on their intersection on an issue such as the one presented in the article. The author purported to show how African-American culture creates and imbues certain connotations that are unique to the African-American community and worthy of legal protection.

Correspondingly, John O. Calmore focused on the “fire” music of jazz saxophonist Archie Shepp to demonstrate the transformative potential of Critical Race Theory and how the theory can be used to provide intellectual authenticity to people of color. Calmore, supra note 144, at 2147-52. He argued that liberating praxis is tied to a cultural orientation of racial distinctiveness and that cultural racism is a crucial form of subordination that scholars must confront. Id. at 2160-61. Calmore's important insight is that through the use of cultural metaphor on the unique cultural institutions and practices of African-Americans, scholars of color in legal academia can likewise confront the status-racism and historical-racism that continue to infect society.
is self-consciously directed to scholars of color inside the legal academy. The point is simply that articles focusing on status-race and historical-race, when compared to articles focusing on culture-race, have a wider intended audience—majoritarian scholars as well as scholars of color within the academy. Consequently, when Regina Austin writes an article about the makeup of the black community and how those within the community can mend various rifts, her primary or even secondary audience is not majoritarian scholars, but other Critical Race Theorists. This represents a healthy development because it signifies that not only are the numbers of Critical Race Theorists growing so that meaningful communication can take place, but also that minority scholars in legal academia are members not only of the community of scholars, but also of the African-American community. Hence, the dual status discussed by W.E.B. Du Bois is part of the experience of minority scholars within the academy.

C. A Review of the Literature

As indicated previously, one author identified over two hundred articles and books as within the realm of Critical Race Theory, some employing the Voice of Color. Additionally, a good number of these articles invoke the use of Narrative to explicate salient points and principles. This section seeks to demonstrate that both types of articles—those that use Narrative and those that do not—employ a perspectival approach that is properly classified as either status-race or historical-race. There is, of course, one caveat to any review of the literature: A survey of less than all of the works presently in print runs the risk of receiving criticism for self-validating selectivity. An all-encompassing survey, however, is the subject of another article and has no place herein. Hence, the authors and articles selected are by and large those used by Professors Farber and Sherry in their criticism of the existence of Voice and use of Narrative.

167. In that sense, it could be said to represent an attempt on the part of these scholars to build a community and to strengthen the ties of the African-American scholars in achieving a common goal, i.e., the elimination of the results of historical-race on academia and in larger society. Professors Farber and Sherry believed that this is not a function of legal scholarship. To the contrary, I contend that it is the quintessential function of legal scholarship. See infra notes 169-70 and accompanying text.

168. See infra note 178 and accompanying text (discussing Richard Delgado's article, "The Imperial Scholar").


170. See supra note 105 and accompanying text.

171. See supra notes 3, 4, 27 and accompanying text.


173. See infra notes 174-215 and accompanying text.
1. Non-Narrative Critical Race Theory

An examination of non-Narrative Critical Race Theory is somewhat anomalous and perturbing since much of the literature focuses on the existence of a distinct Voice of Color. Randall Kennedy's critique of the existence of the Voice of Color prompted a large number of non-Narrative pieces. Notwithstanding the rather nested quality of the debate, even these articles demonstrate that a distinct Voice of Color exists.174

Professor Delgado's impressive body of work is emblematic of the distinct Voice of Color that incorporates the categories of status-race and historical-race. In "The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?"175 evidence of Professor Delgado's focus on status-race and historical-race is readily apparent. The article focuses on minorities' perspectives about what a Critical Legal Studies program could do to enhance its attractiveness to minority students. This article is representative of an approach to legal scholarship in which the author implicitly assumes that the position of minorities, as a group, is different from that of Euro-Americans. The author assumes that minorities have a different perspective on certain selected issues.176

In that same article, Professor Delgado rejected the expanded use of formal-race. Implicit in that rejection is the adoption and explication of historical-race. Formal race, it was contended, has the effect of solidifying, in the present, the historical vestiges of racism and subordination of African-Americans.177

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174. See infra notes 175-97 and accompanying text.
175. 22 Harv. C.R.-C.L. L. Rev. 301 (1987). This article is one of the seminal pieces that began the development of Critical Race Theory as a response to Critical Legal Studies.
176. See id. at 304.
177. Ostensibly, the CLS [Critical Legal Studies] choice of structure for the post-revolutionary community is neutral and based on those arrangements with the greatest potential for humanity. However, that choice is not value-free. Utopian society would empower whites, giving them satisfaction currently denied, and disempower minorities, making life even less secure than it is today.

Id. at 314; see also id. at 318 (recognizing that focusing on governmental or public discrimination, through the use of doctrines like the state action doctrine, results in the use of "formal-race" and privileges private discriminatory action or conduct).

The bottom line is that formal public settings are relatively safe for minorities, while informal private settings present risks. To minimize racism, one should structure settings so that public norms are enforced, and prejudice openly confronted and discouraged. Society should avoid creating intimate, unguided settings where highly charged interracial encounters can take place.
Similarly, in a later article entitled "The Imperial Scholar: Reflections on a Review of Civil Rights Literature," Professor Delgado again focused on status-race and historical-race. He questioned why majoritarian scholars do not cite articles written by their minority peers. His view was that the two sets of scholars prepare equally worthy scholarship, but that majoritarian scholars ignore the work prepared by minority scholars because of a desire to maintain their dominant position and their control over minority scholars in the legal academy. The important thing to note about Professor Delgado's work is its focus on minorities as a group, their collective status, and how they were relegated to that status through a history of racial subordination.

Professor Matsuda's pioneering work in Critical Race Theory likewise stems from a perspectival approach that focuses on either or both status-race or historical-race. In "Looking to the Bottom: Critical Legal Studies and Reparations," Professor Matsuda exhorted scholars to "look to the bottom" to examine the concepts of justice and injustice, "not from an abstract position but from the position of groups who have suffered through history, [because] moral relativism recedes and identifiable normative priorities emerge." Throughout the article, Professor Matsuda employed a perspectival approach that analyzes the experience of people of color through the prism of status-race, influenced by historical-race. This experience shapes the very contours of the present experience and position of African-Americans and other subordinated persons. Professor Matsuda rejected the neutrality inherent in formal-race and posited that those on the bottom, because of the historical factors that put them there, have much to offer proponents of Critical Legal Studies.

Jerome Culp's work presents a slightly different picture. In "Voice, Perspective, Truth, and Justice: Race and the Mountain in the Legal Academy," Professor Culp forcefully argued that "[a]ll scholars of color have a voice of color." He based his assertion on the notion that the history of American society, as it pertains to racial relations (historical-race), has created a universal characteristic (status-race) that scholars of color possess and which cannot be denied or successfully ignored. Professor Culp's approach is important because he rejected formal race and neutrality and instead assumed that scholars of color, however and wherever situated, have some universal attributes resulting from the historical forces that created racism.

I reject the notion that the Voice of Color is always spoken by scholars of color when they speak on any issue. My view is that when African-Americans speak or write an article they recognize that in this society they are African-American and speak as African-Americans. Even if the article

179. Id. at 574.
181. Id. at 325.
183. Id. at 63.
is about something so mundane as relational leaseholds,\textsuperscript{184} the fact that the article is written by an African-American will be duly noted by some readers.\textsuperscript{185}

However, that is not the Voice of Color. The Voice of Color is about articulating or illuminating the unique insights that come from the duality inherent in the existence of any person of color who resides in the United States. If those insights are not applicable, for whatever reason (when, for example, a scholar of color prepares an article about some esoteric topic like the efficacy of foreclosure for which he makes no claim to insight based on his position as a person of color in this society even if the activity—foreclosure—disproportionately affects persons of color\textsuperscript{186}), then the scholar of color is not speaking in the Voice of Color. The fact that a scholar of color prepared the work may be relevant to the reader in placing the article in some appropriate context, but the writer has not spoken in the Voice of Color.

Briefly, I characterize my own work as Critical Race Theory in two different respects. In my earlier defenses of the Voice of Color,\textsuperscript{187} I rejected formal-race and neutral principles. In those articles I contended that historical race inevitably influences the works of scholars of color. In addition, I attributed a commonality of perspective akin to status-race to scholars of color by ascribing to them a perspective that is forged by a reaction to racism.\textsuperscript{188}

Moreover, in my most recent article, "Bid Whist, Tonk and \textit{U.S. v. Fordice}: Why Integrationism Fails African-Americans Again,"\textsuperscript{189} I critically analyzed the Supreme Court’s recent opinion in \textit{U.S. v. Fordice},\textsuperscript{190} by taking a perspectival approach that focuses directly on status-race and historical-race. In particular, I contended the formal-race approach taken by the Court in \textit{Fordice} is erroneous and wrong-headed because it ignores the status of African-Americans (status-race) in our society. That status is the result of historical forces that have essentially created and maintained segregated schools. In addition, I focused on culture-race by explicating the unique virtues and benefits that derive from the maintenance of voluntarily separate historically black colleges.

Professor Stephen Carter represents a more interesting case to prove the existence of a distinct Voice of Color. In his work "The Best Black, and

\textsuperscript{184} E.g., Alex M. Johnson, Jr., Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward A Theory of Relational Leases, 74 Va. L. Rev. 751 (1988) (charging that a lessor should be free to restrict arbitrarily the alienation of a leasehold pursuant to an ex ante agreement based on the theory of relational contracts).
\textsuperscript{185} For the difference that such recognition makes in the perspective of the reader evaluating the worth of the article, see Johnson, supra note 5, at 161 n.123 (recounting experience of author when he was told his article was viewed more positively by a majoritarian reader when the reader was informed that the author is an African-American).
\textsuperscript{186} Johnson, supra note 113.
\textsuperscript{187} See, e.g., Johnson, supra note 5; Johnson, supra note 7.
\textsuperscript{188} See Johnson, supra note 7, at 2012-20.
\textsuperscript{189} 81 Cal. L. Rev. 1401 (1993).
\textsuperscript{190} 112 S. Ct. 2727 (1992).
Other Tales, that preceded and later became part of his autobiographical work, "Reflections of an Affirmative Action Baby," Professor Carter spoke in the Voice of Color. The perspectival approach he used to critique affirmative action is based on status-race and historical-race.

Professor Carter informed the reader that he is an African-American scholar who has been both benefitted and harmed by affirmative action. Most interesting about Professor Carter's claims and contentions is that he used his status as an African-American to attack affirmative action. In other words, if he had adopted a formal-race approach to attack affirmative action, he would have made no mention of his status as an African-American. However, the very first sentence of the book, "I got into law school because I am black," connotes that the reader should take the author's race into account when reading and interpreting the work. Professor Carter used the sentence to color (pun intended) the reader's perception of the work by asking the reader to employ an interpretive framework that acknowledges Carter's status as an African-American.

Professor Kennedy, on the other hand, in "Racial Critiques of Legal Academia," did not speak in the Voice of Color. In his article, he attacked scholars of color who claim to speak in the Voice of Color while adopting a formal-race approach to the issues.

In my earlier work I contended quite aggressively that Professor Kennedy did, indeed, speak in the Voice of Color in "Racial Critiques of Legal Academia." Upon reflection, I have determined that my contention was not based on authorial intent, which remains a necessary part of the articulation of the Voice of Color, but upon reader perception, which is also necessary for successful articulation of Voice. My mistake was focusing on the categorization of Professor Kennedy's article as speaking in the Voice of Color. I focused on the latter attribute—reader perception—to the detriment of the former. In other words, since Professor Kennedy is

191. Carter, supra note 6; Johnson, supra note 7, at 2008-10.
193. Id. at 11.
194. Kennedy, supra note 6.
195. See Johnson, supra note 5, at 164.
196. See id. at 160-63.
easily and well recognized as one of the preeminent African-American scholars of his generation, I conflated that reader knowledge with authorial intent, concluding that Professor Kennedy was speaking in the Voice of Color.

However, reader perception alone is not enough to create the successful exposition of a Voice of Color. In addition to the framework explained above, something more must enter into the equation. Specifically, the author must employ a framework or perspective that uses either or both status-race or historical-race as a lens through which to examine and frame issues. That perspective or framework is lacking from Professor Kennedy's work in Racial Critiques of Legal Academia.

2. Narrative Critical Race Theory

Although there is a large array of work from which to obtain a representative sample of Narrative, the focus here centers on three authors: Richard Delgado, Mari Matsuda, and Patricia Williams. These authors were chosen because of the prominent mention and discussion they receive in Professors Farber and Sherry's article. Additionally, each contributed an article to a symposium issue on Legal Storytelling and each is widely credited with emphasizing the use of Narrative in legal scholarship. This analysis focuses on each author's contribution to that symposium issue to determine if it meets the perspectival definition of the Voice of Color.

a. Delgado.—Professor Richard Delgado's "Storytelling for Oppositionists and Others: A Plea for Narrative," is the most difficult to analyze because Professor Delgado did not speak in the first-person, nonfiction Narrative, but defended its expanded use by scholars of color and others in the legal academy. Nevertheless, his article is important as a topic of analysis because of its message about the perspectival approach as an objective of Narrative.

In "A Plea for Narrative," Professor Delgado demonstrated the power of Narrative and, correspondingly, the folly of judging it by applying validity standards that deem it valuable only when it meets the "if you had been watching, this is what you would have seen" standard. Professor Delgado told a fictional tale involving an African-American candidate for a teaching position at a major law school. The stock story the Euro-American faculty member tells as an explanation for not hiring the candidate, John Henry, focuses on the hiring committee's perception of John Henry's lack of merit and the lack of acceptable minority candidates (whom they would be willing to hire) when measured by the same criteria.

197. See supra notes 195-96 and accompanying text.
200. Id. at 2411.
201. Farber & Sherry, supra note 16, at 833. For further discussion of validity standards, see supra notes 59-69 and accompanying text.
202. See Delgado, supra note 140, at 2418-35.
meritocratic story.\textsuperscript{203} In a theme that Professor Delgado replicates throughout the article, he noted that the focus of the majoritarian stock story is on neutral principles, that is, on the procedures employed by the institution, rather than on the substance of the result.\textsuperscript{204}

John Henry's recollection and perspective of the events leading to his rejection is quite different, yet just as truthful. Henry characterized the faculty as rude, hostile, and demeaning.\textsuperscript{205} He summed up his experience as follows:

They're a good law school; I could see myself teaching there. But I think they're looking for someone they will never find—a black who won't challenge them in any way, who is just like them. I tried telling them about the cases I have argued and the litigation strategies that I have pioneered. Most of them couldn't have cared less. Their eyes glazed over after three minutes, or they changed the subject.\textsuperscript{206}

Important to this discussion is that Professor Delgado recognized and detailed the explicitly different perspectival approach taken by each party in its interpretation.\textsuperscript{207} In this account, the status-race of John Henry is foremost. Henry bases his perception on the belief that his cool reception was attributable to the fact that he is an African-American. He appears to believe that, in this context, status as an African-American trumps and defeats the application of neutral principles. In this respect, historical-race continues to have a present influence on society.

\begin{itemize}
\item 203. Id. at 2418-21.
\item 204. The [stock story] account is highly procedural—it emphasizes that Henry got a full, careful hearing—rather than substantive: a black was rejected. It emphasizes certain “facts” without examining their truth—namely, that the pool is very small, that good minority candidates have many choices, and the appropriate view is the long view; haste makes waste.
\item 205. Id. at 2423.
\item 206. Id. at 2424.
\item 207. Henry and his younger colleague's story is, obviously, quite different from the institution's story. Their story shows, among other things, how different “neutrality” can feel from the perspective of an outsider. Henry's story emphasizes certain facts, sequences, tones of voice, and body language that the stock story leaves out. It infers different intentions, attitudes, and states of mind on the part of the faculty he met. Although not completely condemnatory, it is not nearly so generous to the school. It implies that the supposedly color-blind hiring process is really monochromatic: School X hires professors of any color, so long as they are white. In Henry's story, process questions submerge; the bottom line becomes important.
\end{itemize}
Professor Delgado's use of John Henry's story forces the reader to confront the reality that different stories are constructed out of the same event and that all constructions are inevitably influenced and altered through interaction with members of other races. He thereby challenged the whole postulate of neutrality and demonstrated it to be contingent on the racial identities of the actors participating in the event. Neutrality that presupposes members of the same racial group, therefore, is skewed when historical-race and status-race enter into the equation.

b. Matsuda.—Mari Matsuda's article, "Public Response to Racist Speech: Considering the Victim's Story,"\(^2\)\(^0\)\(^8\) likewise forces the reader to focus on the actor's status-race and on how that status-race has been inalterably shaped and contoured by historical-race. Professor Matsuda began by detailing three stories: a black family intimidated by a visit from the Ku Klux Klan, a racist caricature posted on an African-American's dorm-room door, and the author's personal confrontation with racist, anti-Asian prejudice and behavior in Australia in her call for legal sanctions to prohibit or regulate racist speech.

Most interesting about the article, especially in light of Professors Farber and Sherry's critique of Narrative and its alleged lack of connection to law, is how much law and legal reasoning the article actually contains and how Professor Matsuda used Narrative to make legal arguments and statements. Nevertheless, her use of Narrative is properly characterized within the context of the Voice of Color since she contended that, because of historical-race, the status-race of both the victim and the perpetrator of the speech must be taken into account when determining whether a compensable, remedial harm has occurred.\(^2\)\(^0\)\(^9\)

Moreover, Professor Matsuda made a compelling case that the racial identity of the person considering the issue of banning racist speech is important. She demonstrated that persons of color, because of the victimization that results from their status-race, have a different perspective on this issue than their majoritarian peers.\(^2\)\(^1\)\(^0\) Status-race, and the important perspectival approach it provides, caused Professor Matsuda to reject the view that society should employ neutrality and the use of neutral principles as a paradigm for resolving issues when those issues are disproportionately impacted and affected by the race of the participants.

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\(^{208}\) Matsuda, supra note 11.

\(^{209}\) What is it that characterizes the new [outsider's] jurisprudence of people of color? First, it is methodology grounded in the particulars of their social reality and experience. This method is consciously both historical and revisionist, attempting to know history from the bottom. From the fear and namelessness of the slave, from the broken treaties of indigenous Americans, the desire to know history from the bottom has forced these scholars to sources often ignored: journals, poems, oral histories, and stories from their own experiences of life in a hierarchically arranged world.

Id. at 2323-24.

\(^{210}\) Id. at 2326-27.
c. Williams.—In “The Obliging Shell: An Informal Essay on Formal Equal Opportunity,”211 Professor Williams related a story in which a Euro-American student and an African-American student become embroiled in a controversy over whether Beethoven “had black blood.”212 This led them to deface two posters (a white poster of Beethoven was defaced to represent a black stereotype, and in a separate, but apparently related, incident, an African-American fraternity’s poster was “emblazoned with the word ‘niggers’”).213 Professor Williams used this story metaphorically to demonstrate that her law students respond differently to her because of her status as an African-American woman.214 She illustrated, in a quotation worthy of repetition, how status-race continues to be used in such a fashion that it distorts the legal system’s theory of neutrality:

[A]n interpretive shift has occurred . . . by going from a totally segregated system to a “partially integrated” one. In this brave new world, “white” still retains its ironclad (or paradigmatic) definition of “good,” but a bit of word-stretching is allowed to include some few consistent additional others: blacks, whom we all now know can be good too, must therefore be “white.” Blacks who refuse the protective shell of white goodness and insist that they are black are inconsistent with the paradigm of goodness, and therefore they are bad. As silly as this sounds as a bare-bones schematic, I think that it is powerfully hypostatized in our present laws and in Supreme Court holdings: this absurd type of twisted thinking, this racism-in-drag is propounded not just as a theory of “equality” but as a standard of “neutrality.” (I also think that this schematic is why equality and neutrality have become such constant and necessary companions; they are two sides of the same coin. “Equal . . .” has as its unspoken referent “. . . to whites”; “neutral . . .” has as its hidden subtext “. . . to concerns of color.”)215

As a fine point, although one easily and correctly could characterize much of the work discussed in this Article as politically on the left, there is no allegation or belief that Critical Race Theory, the Voice of Color, or

211. Williams, supra note 172.
212. Id. at 2133.
213. Id.
214. Id. at 2136-37. Professor Williams stated:

When [the white student’s] whole relationship to the music changed once he discovered that Beethoven was black, it made me think of how much my students’ relationship to me is engineered by my being black; how much I am marginalized based on a hierarchy of perception, by my relation to definitional canons which exercise superhuman power in my life. When Beethoven is no longer Ubermensch, but real and really black, he falls to debasement beneath contempt for there is no racial midpoint between the polarities of adoration and aversion. When some first-year law students walk in and see that I am their contracts teacher, I have been told that their whole perception of law school changes.

Id. 215. Id. at 2137.
Narrative necessarily contains any inherent political content. Indeed, any notion that it is and must always be liberal is rejected.

CONCLUSION

Although related, Narrative as a methodological expositional vehicle and the articulation of the Voice of Color are distinct. Majoritarian scholars, Critical Feminists Theorists, and Critical Race Theorists have used Narrative and all will continue to do so. As an expositional vehicle, its use predated, by many centuries, the development of legal scholarship with its apersonal, linear, logical, universalistic framework. No doubt, scholars will continue to employ Narrative many centuries after the traditional law review article ceases to exist, as it inevitably will.²¹⁶

On the other hand, the exposition of the Voice of Color in Narrative and non-Narrative form is a relatively recent addition to legal scholarship.²¹⁷ What differentiates the Voice of Color from Narrative is its perspectival approach. That approach, while focusing on supposedly neutral legal issues, also focuses on the country's attempt to handle a multiracial and multicultural pluralistic society and the issues raised therein. One may categorize these issues as a recognition of the existence of status-race, historical-race, and culture-race in American society and the continued role these perspectives play in the appropriate resolution of issues.

What links the methodological, formal, and process-oriented form with the contextual, informal, and nonuniform process is that they both represent challenges to traditional legal scholarship. Narrative represents a methodological challenge that has the potential to energize and irreparably alter the fashion in which debate about legal issues is structured and resolved. No longer are issues addressed from a neutral perspective in which facts, theories, heuristics, and paradigms are studied. Instead, insight on legal issues is explicated from experiences. Insight is gleaned through doing rather than through thinking. Legal issues are removed from the books and the classroom, and returned to the streets, the homes, and the relationships where they belong and originated. That concept is frightening to those people unable to live life as well as study it, or at the least, to learn from the life experiences of others.

The Voice of Color likewise represents a challenge to traditional legal scholarship because its perspectival approach is centered on the differences that continue to affect and divide members of society rather than on the similarities that connect them. The Voice of Color puts to rest the notion that society is a meritocracy in which individual achievement is truly prized and awarded. Individuals are not viewed as atomistic, singular beings whose

²¹⁶. A review of the prominent law review journals of one hundred years ago reveals how legal scholarship has evolved since that time. What is perceived today as an acceptable law review article would not be cognizable by the scholars who authored those ancient pieces and, perhaps, vice versa. See generally Charles A. Reich, The Individual Sector, 100 Yale L.J. 1409 (1992).

²¹⁷. The fact that the Voice of Color in Narrative and non-Narrative form is a relatively recent addition to legal scholarship is attributable, in part, to the fact that until recently there were very few scholars of color in the academy.
accomplishments and failures are discretely their own for which they are solely accountable. Instead, the individual is viewed in a larger historical context in which the individual's fate is inextricably tied not only to what has come before, but also to how what has come before has inalterably shaped perceptions, judgments, emotions, attributes, and qualifications. Now the individual and the individual's accomplishments, or lack thereof, can be viewed and judged solely within that larger historically situated context. At a deeper level, once the contingent nature of the individual is explored and revealed, much that was thought to be accepted and uncontroversial—the attainment of rank and privilege—becomes deconstructed.

Thus, it is not surprising that both Narrative and Critical Legal Theory have come under attack recently. The foundational norms challenged through their use have many staunch defenders who will not go down without a fight. However, as with any war, there will be many skirmishes and many heated battles before peace is achieved and declared. It is through these battles that the terms of the settlement will be realized.