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Learning Law Through the Lens of Race

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In the spring of 2003, the University of Virginia community was shocked by a racially motivated assault on a prominent student leader.¹ The crime generated an immediate and powerful response from the university community. At the law school, there was an outpouring of not only concern and outrage, but also creative dialogue and proposals for ways to move forward in a constructive manner. Culminating in the summer of 2003, with strong support from faculty, students and administrators, law school Dean John Jeffries founded the Center for the Study of Race and Law.² Dean Jeffries also appointed me the Center's Director. The Center aims to promote course offerings addressed to racial issues, and to provide a range of extra-course opportunities to study race and law, including lectures, workshops, panels, and scholarly symposia.³

The University of Virginia is not alone in valuing the study of race and law. In recent decades, the study of race has achieved increasing prominence in the legal academy. Legal scholarship on race, including but not limited to critical race theory, has proliferated,⁴ and the number of law

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¹ Second year college student and leading candidate for student council president Daisy Lundy, while leaning into her car at night to retrieve her cell phone, was grabbed by a man who, while saying "no one wants a nigger to be president," slammed her head against her car's steering wheel. See Alexis Unkovic, *Daisy Lundy assaulted behind West Lawn*, CAVALIER DAILY, Feb. 26, 2003.

² See Denise Forster, *Center Sparks Dialogue on Race and Law: Initiative Has Promising First Year*, U. VA. LAW., Fall 2004, at 39.

³ For a fuller description of the Center's activities, see <http://www.law.virginia.edu/race>. See also Forster, *supra* note 2, at 39-41.

⁴ See Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 283 n.255 (1997) ("[T]he influx of female and minority scholars onto law faculties has coincided with a dramatic increase in scholarship drawing upon feminist or critical race theory. Some of those articles are among the most cited and influential works in legal scholarship today."); Susan Westerberg Prager, *Special Feature Expectation of the Twenty-first Century Law Library for the Support of Faculty Scholarship: Law Libraries and the Scholarly Mission*, 96 LAW LIBR. J. 513, 514 (2004) (stating that with the increase in diversity on faculties, there has also been an increase in scholarship using critical race theory); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 964 (2002) (stating that "[a] growing body of literature contests the racial dimensions of Fourth Amendment law"); Kevin R. Johnson, *Race*

school courses that substantially address race-related issues has noticeably increased.⁵ A newer trend in legal education is the emergence of institutionalized programs that promote opportunities in and outside the classroom to engage issues at the intersection of race and law. Indeed, this past February, the University of Florida's Center for the Study of Race and Race Relations hosted its inaugural Race and Law Curriculum Workshop, which brought together directors of the small but growing number of race and law programs across the country to share ideas, and to encourage the establishment of such programs in other law schools.⁶

This raises the question, why? Why should law schools incorporate race as a substantial component of the curriculum? Put simply, why study race and law? Legal educators have differed on the importance of race to legal education. Skeptics, most of whom would acknowledge the relevance of race to certain topics, such as discrimination and affirmative action, question whether it should be a substantial focus of legal study, especially for lawyers who do not plan to work on civil rights issues.⁷ To emphasize race in the law school curriculum, particularly in required courses, detracts from the amount of time law students can spend developing professional skills more pertinent to their career goals.

Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique, 2000 U. ILL. L. REV. 525, 543 (2000) (noting that “[b]esides LatCrit Theory, a growing body of Asian American legal scholarship focuses on the racial impacts of immigration law”); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 949 (2000) (observing that “[t]here is a growing body of legal scholarship criticizing the exploitation of bias in lawyering strategies, most of which focuses on racial bias”); Sidney D. Watson, *Foreword: Health Law Symposium*, 48 ST. LOUIS U. L.J. 1, 2-3 (2003) (observing that “[s]ince 1996, . . . legal scholarship concerning racial and ethnic disparities in medical care has exploded, fueled by a growing body of empirical research exploring the nature and extent of racial disparities in health care”).

⁵ The Committee on Curriculum and Research of the Association of American Law Schools found that a majority of schools responding to their survey had in recent years added at least one course on “populations historically differentially affected by the law,” including Race/Ethnicity and the Law, American Indian/Native American Law, and Critical Race Theory. William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 215-16 (1996) (citing Taunya L. Banks, *Twenty Most Common New Courses Added over the Past Three Years*, NEWSLETTER, Apr. 1992, at 10).

⁶ See University of Florida, Center for the Study of Race and Race Relations: Race and Law Curriculum Workshop, Inaugural Conference: February 24-26, 2005, at <http://www.law.ufl.edu/centers/csrrr/conference050224.shtml> (last visited Apr. 16, 2005). See also Symposium, *Race and the Law at the Turn of the Century*, 47 UCLA L. REV. 1459 (2000) (commemorating the establishment of UCLA Law School's concentration in Critical Race Studies).

⁷ See Trail & Underwood, *supra* note 5, at 216. (citing race-related and other humanities/social science-type courses in law schools as part of detrimental trend away from practical courses, which “consumes resources that would otherwise be available for instruction more directly relevant to new lawyers”).

In contrast, advocates of race and law teaching and scholarship contend that race is crucially relevant to a broad range of legal fields that extend far beyond civil rights law. Fields such as criminal law, property, health care, and even subjects as ostensibly race-neutral as contracts, corporate law, insurance and tax affect and are affected by racial considerations.⁸ They argue that more, not less, of the law school curriculum should address racial issues. Moreover, what is needed is not only specialized courses that focus on race for the benefit of students already or especially interested in those issues. Rather, race should also play a more substantial role in courses of general interest, including the standard first-year curriculum. Furthermore, outside the classroom, greater opportunities are needed for students and faculty to engage over issues at the intersection of race and law through lectures, workshops, academic panels and conferences. The creation of centers, institutes, and other structured programs to promote the study of race and law are warranted to meet this need.

My purpose in this essay is not to engage this debate comprehensively, a debate reflected in a rich and voluminous literature,⁹ but rather to propose

⁸ See, e.g., David Brennen, *Race and Equality Across the Law School Curriculum: The Law of Tax Exemption*, 54 J. LEGAL EDUC. 336 (2004); Dorothy A. Brown, *Pensions, Risk and Race*, 61 WASH. & LEE L. REV. 1501 (2004); Thomas W. Joo, *Race, Corporate Law, and Shareholder Value*, 54 J. LEGAL EDUC. 351 (2004); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003); Shirley Lung, *Developing A Course on the Rights of Low-wage Workers*, 54 J. LEGAL EDUC. 380 (2004); Steven A. Ramirez, *What We Teach When We Teach About Race: The Problem of Law and Pseudo-Economics*, 54 J. LEGAL EDUC. 365 (2004); Cheryl L. Wade, *Attempting to Discuss Race in Business and Corporate Law Courses and Seminars*, 77 ST. JOHN'S L. REV. 901 (2003).

⁹ See, e.g., Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1512 (1991); Steven W. Bender, *Silencing Culture and Culturing Silence: A Comparative Experience of Centrifugal Forces in the Ethnic Studies Curriculum*, 5 MICH. J. RACE & L. 913 (2000); Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283 (2002); Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 4 S. CAL. REV. L. & WOMEN'S STUD. 33 (1994); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993); Nancy E. Dowd et al., *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA. J.L. & PUB. POL'Y 11 (2003); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993); Judith G. Greenberg, *Erasing Race from Legal Education*, 28 U. MICH. J.L. REFORM 51 (1994); Judith G. Greenberg & Robert V. Ward, *Teaching Race and the Law Through Narrative*, 30 WAKE FOREST L. REV. 323 (1995); Peter Halewood, *White Men Can't Jump: Critical Epistemologies, Embodiment, and the Praxis of Legal Scholarship*, 7 YALE J.L. & FEMINISM 1 (1995); Angela P. Harris, *On Doing the Right Thing: Education Work in the Academy*, 15 VT. L. REV. 125 (1990); Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215 (2002); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807 (1993); Susan Homer & Lois Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L.J. 1 (1989); Randall Kennedy, *Race Relations, Law in the Canon of Legal Academia*, 68 FORDHAM L. REV. 1985 (2000); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989); Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11

and explain the following three observations about the study of race and law. First, as Part I explains, law can be more adequately understood and evaluated when examined through the lens of race, that is, when considered in view of the role race has had in the development, administration, or consequences of the law. Second, as explored in Part II, the assessment of the relevance of race to law is vulnerable to two distorting biases: race essentialism and race exceptionalism. Race essentialism, for purposes of this essay,¹⁰ refers to the tendency to overemphasize the relevance of race to the merits of laws. To essentialists, the relationship between a law and its racial origins, administration, or impact is so essential that the law's merits stand or fall on its racial implications, regardless of the law's value in serving other purposes. By race exceptionalism, I mean the contrary tendency by some to minimize the relevance of race to the merits of a law or doctrine, viewing the law's relationship to race as exceptional or aberrational, having little or nothing to say about the law's merits in general with respect to contexts or purposes unrelated to race. Third, as discussed in Part III, the most effective way to gain the benefits of studying law through race while avoiding the twin biases just mentioned is to study race in a sustained, deliberative manner that remains open to and takes seriously a diversity of views, including from the political right and left, and from the economic "top" and "bottom."¹¹ To the extent these observations are plausible, then the study of race and law, properly undertaken, would enhance

HARV. WOMEN'S L.J. 1 (1988); Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 5 MICH. J. RACE & L. 847 (2000); Margaret M. Russell, *McLaurin's Seat: The Need For Racial Inclusion in Legal Education*, 70 FORDHAM L. REV. 1825 (2002); Peter M. Shane, *Why Are So Many People So Unhappy? Habits of Thought and Resistance to Diversity in Legal Education*, 75 IOWA L. REV. 1033 (1990); Gerald Torres, *Teaching and Writing: Curriculum Reform as an Exercise in Critical Education*, 10 NOVA L.J. 867 (1986); Mark V. Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992); Francisco Valdes, *Barely at the Margins: Race and Ethnicity in Legal Education -- A Curricular Study with LatCritical Commentary*, 13 LA RAZA L.J. 119 (2002); Stephanie M. Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. LEGAL EDUC. 147 (1988); Donna E. Young, *Two Steps Removed: The Paradox of Diversity Discourse for Women of Color in Law Teaching*, 11 BERKELEY WOMEN'S L.J. 270 (1996).

¹⁰ The term race essentialism is used by scholars in varying ways, having in common some sense that race is accorded fundamental or foundational significance. The definition I give here is for the limited purpose of describing the approach to appraising law that I discuss in this essay.

¹¹ Referring to economically privileged people as the "top" and economically or socially disadvantaged communities as the "bottom" borrows from the work of critical race theorists. See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283 (2002); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Athena D. Mutua, *Shifting Bottoms and Rotating Centers: Reflections on Latcrit III and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1177 (1999).

significantly the law student's ability to understand and appreciate the implications of the laws, whichever they may be, by which the student as lawyer will eventually practice and by which our society lives.

A few final points about my methodology and purpose are worth clarifying at the outset. My claims are not substantiated by in-depth research or detailed documentation. Rather, this essay is a thought piece, a synthesis of ideas and observations developed in the course of my own scholarship;¹² my teaching, including the subjects of Race and Law, Constitutional Law, and Criminal Law & Procedure; and in the course of my tenure as Director of the Center for the Study of Race and Law. I will also suggest the salience of my points for legal subjects outside my expertise. I will not, moreover, address the question whether programs or specialized courses to study race and law would be appropriate in a world in which race was substantially and adequately addressed in conventional law courses. While complicated questions would arise if race were well integrated into law school curriculums, at present that is not the case at most institutions. My primary purpose is to defend the benefits of studying race and law in whatever forum that can be done. I will suggest, however, that under current circumstances in which the lens of race is underutilized in many courses, institutionalized race and law programs can serve an important role in complementing the law student's education.