

***Moving from Fear to Courage, and Replacing Preaching with Reaching***

**By**

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Race does not have to be “placed” in the law school curriculum, for race is already there. Even in a Contracts class taught by a white professor to all white students, issues of race are present. They speak volumes about racial exclusion. But sometimes our fear keeps us from addressing issues that are shouting out to us.

Before I attended law school, I taught undergraduate finance courses at two different colleges. At the historically black college and university where I taught, it was not unusual for me as the black professor to teach a class of all black students. And at the predominantly white institution, it was not unusual for me, the first black American professor in the department, to teach a class of all whites. Racial dynamics were very present in the classroom and in the business and economics issues discussed. My fear of being different in my approach and my own insecurities kept me from addressing the racial issues. As a result, I cheated my students and felt unfulfilled in my work.

Many years later and upon becoming a law school professor, I made a personal commitment to find the courage to address issues of race, gender and diversity in the classroom. As a result, as I approached tenure, I gave myself high marks for addressing issues of race in my core and elective classes. But I had a different problem. I had to admit to myself that too many of my students greeted these discussions with hostility, especially with these sensitive discussions being led by a black woman. I began to

wonder whether a black woman can ever address race in the classroom where the majority of the students are white, male and conservative.

Students open to these topics enjoyed my classes, others did not. In other words, while my “preaching to the choir” always worked, the rest of the congregation went to sleep or stormed out of the room, at least figuratively.

After I was tenured, I began to experiment with a variety of ways to incorporate discussions of race and diversity in the classroom. And I have learned that a more productive class dialogue on race evolves when the professor replaces preaching with reaching.

The purposes of this paper, therefore, are two-fold. First, I want to provide, from my own experiences, some suggestions for moving from fear to courage. And secondly, I want to share some of the techniques I’ve been using recently to replace race-based preaching with reaching.

### **I. Moving from fear to courage**

In my first years of law school teaching, I was determined to address issues of race, even in my first year Contracts course. Although I seemingly and courageously plunged right in, actually I carefully considered what I was about to undertake.

Following are several steps for other professors to take in their efforts to move from fear to courage:

**A. Acknowledge that “race” is already present in your courses.** Recently, in a faculty colloquium at the law school where I teach, I led a discussion on race in the curriculum. My theory is that race is already present in each and every course we teach.

The only questions are whether we choose to “address” race as it appears in our courses and what methods to select to most effectively do so.

For example, in the Criminal Law and Procedure courses, some of the cases are about minority race defendants, and some of the language used in the cases is considered by many to be derogatory.<sup>1</sup> A professor teaching these cases could choose at those points to talk more broadly about race and the criminal justice system in America.

Also, even classes such as Business Associations or Corporations include issues of race. In those courses there is often discussion of the ownership rights of shareholders who represent a minority interest (minority in terms of percentage of ownership of the corporation) and the various rules and voting procedures available to protect those minority interests. The approach taken in corporate law is, arguably, far more protective of minority interests than the approach taken with minorities’ constitutional voting rights in America.<sup>2</sup> A professor could explore these different approaches and discuss reasons for the differences.

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<sup>1</sup> One of my white colleagues shared that a white student briefed a case in her course where the black defendant was referred in the case to as an n \_ \_ \_ \_ . She said the white student used the “n” word in his briefing. She wasn’t sure what to do in class, so she did nothing. After the class a number of the minority students approached her and told her how upset they were. I suggested that there were a number of possible approaches she could take depending on whether she thought the use of the word were necessary for an understanding of the case. Perhaps before the cases with such language are covered, she could engage the students in a broader discussion of race and the times of the cases. Maybe by having such a discussion, some students would be more sensitive in their briefings or other students would be more prepared with an understanding that not all people share the same disdain with the “n” word. I thought that discussion before or even after the case could possibly enlighten students and expand some racial sensitivity.

A key is that a professor should plan to address race in class and consider the vehicles to do so. Merely attempting to ignore a smoldering issue does not make it go away and does not prepare our students for the really diverse society in which they will practice law and serve as community or political leaders.

<sup>2</sup> Lani Guinier wrote a book discussing these differences and urging for consideration of the corporate model to also protect constitutional rights of racial minorities. Lani Guinier, *The Tyranny of the Majority* (1994).

Even the Family Law or Domestic Relations courses include race. Race is present in topics such as transracial adoption,<sup>3</sup> adoption generally and the legal system's response to nonwhite children,<sup>4</sup> and the laws related to domestic violence and the impact on minority women.<sup>5</sup> Ample cases addressing race are also present in the torts<sup>6</sup> and property courses.<sup>7</sup>

In the race and teaching colloquium at my school, one of my colleagues also pointed to the issues of race in her Women and the Law course. She explained that cases such as the 1873 case, *Bradwell v. Illinois*,<sup>8</sup> describing women as “delicate” and, arguably, placing women on a pedestal surely were not referring to the way black women were regarded during those times. Recently she and her class completed a project examining the depictions of women in art displayed in our city. She found that almost all of the art publicly displayed depicted white women, and therefore the exclusion of

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<sup>3</sup> See, e.g., Ruth-Arlene Howe, Transracial Adoption: Old Prejudices and Discrimination Float Under a New Halo, 6 B. U. Pub. Int. L.J. 409 (1997); Cynthia Hawkins-Leon, Race and Transracial Adoption: The Answer is Neither Black or White nor Right or Wrong, 51 Cath. U. L. Rev. 1227 (2002); Angela Mae Kupenda et al, Law, Life and Literature: Using Literature and Life to Expose Transracial Adoption Laws as Adoption on a One-Way Street, 17 Buff. Pub. Int. L.J. 43 (1998-1999).

<sup>4</sup> See, e.g. Angela Mae Kupenda, Two Parents Are Better Than None: Whether Two Single, African American Adults—who are not in a Traditional Marriage or a Romantic or Sexual Relationship with each other Should be Allowed to Jointly Adopt and Co-Parent African American Children, 35 J. Fam. L. 703 (1996-1997).

<sup>5</sup> See, e.g., Zanita E. Fenton, Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence, 8 Colum. J. Gender & L. 1 (1998); Angela Mae Kupenda, Law, Life and Literature: A Critical Reflection of Life and Literature to Illuminate How Laws of Domestic Violence, Race and Class Bind Black Women, Based on Alice Walker's Book, *The Third Life of Grange Copeland*, 42 How L.J. 1 (Lead Article)(1998).

<sup>6</sup> A case that often appears in torts casebooks is *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W. 2d 627 (1967) (court holding that manager snatching dinner plate from Negro and shouting that Negroes are not served in the club was a battery). I recall that when I was a student, after we covered this case, we went on to discuss race more generally in class. The movie *Mississippi Burning* had been recently released. Many of the white students from Mississippi expressed outrage at the movie for airing dirty laundry and for bringing up issues that, as they said, only existed in the past. (At the time of this class discussion, my law school had no black professors.) Upon speaking with some of my black classmates, I learned that many were amazed at the white classmates' outrage and were quite surprised to hear some of the white students' articulated views.

<sup>7</sup> See, e.g., *Shelley v. Kraemer*, 334 U.S.1 (1948) (addressing racially restrictive property covenants).

<sup>8</sup> 83 U.S. 130 (1873) (Court rejecting attack on Illinois law prohibiting women from receiving licenses to practice law).

nonwhite images was telling as to the issue of race. Her class had to intentionally search for depictions of nonwhite women. The class then discussed the impact that such depictions and mindsets in the law.

At the colloquium, another colleague pointed out that even his Ethics course includes racial issues. One question, for example, is whether those with racist views or exhibiting racist conduct ought to be disciplined by the bar.<sup>9</sup>

After the session one professor, perhaps, was not persuaded that race is present in every course. She challenged another professor to find race in a course such as Commercial Paper. He quickly pointed to the background of one of the dominant jurists in that substantive area, Lord Mansfield. Lord Mansfield is often credited with helping to end slavery in England. And, a general discussion of this jurist in class could also easily include this major contribution.<sup>10</sup> In addition, Commercial Paper, with a discussion of our country's move from a cash-based society to a check-based society to a paperless society, also inherently includes a discussion of race and poverty and the impact of a cashless or paperless society on individuals in these groups.

Many of my colleagues that do address race in their classes say that, to give more complete coverage to the racial issues presented, they had to go outside their casebook to find underlying facts in cases, scholarship and news events to prepare them to explore the issues with the students. Not one who mentioned taking these steps, though, expressed any regrets for addressing race.

***B. Make an honest assessment of the racial environment of your school.*** After you are persuaded that race is already present in your courses, the next step is to make an

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<sup>9</sup> See, e.g., Andrew E. Taslitz and Sharon Styles-Anderson, Regulating Race, Gender and Ethnic Bias in the Legal Profession: A Modest Proposal, 7 No. 3 Prof. Law. 10 (May 1996).

<sup>10</sup> See James Oldham, English Common Law in the Age of Mansfield, 305-23.

honest assessment of the racial environment of your school. You should do this so you can be prepared for the responses you may receive from others as you address race in your classes or attempt to add elective or required courses on race.

Be realistic and honest in your assessments. Remember, my theory is that race is already present in the curriculum, even at your school. Therefore, this step is necessary to determine the messages and sentiments that are already being expressed about race so that you will know best how to open the dialogue on these issues.

Make the following assessment:

\*First, consider the faculty composition: How many minority faculty members, how many white women, and how many white male professors teach at your school? What about adjuncts? What do these numbers suggest?

\*Do the same for the student body as a whole and for the usual enrollment in your courses.

\*In addition, consider whether there is vocal diversity of viewpoint at your school. Is the school seemingly welcoming of discussions of race, or hostile?

\*Take a look at the curriculum: Are there, or have there ever been, any race classes in the curriculum (what about other courses like Civil Rights, Women and the Law, Domestic Violence, First Amendment, Immigration Law, etc.)?

\*As to campus speakers and other invited guests (such as moot court judges, etc.), are any minorities included? Are any whites included who hold viewpoints different from the mainstream thought at your school?

\*Also, what about the administration? Is it diverse, welcoming of discussions of race, or hostile?

\*Finally, have there been any racial conflicts among the students, faculty or administrators. How were the conflicts resolved? Were they resolved openly and honestly, or were the complainers silenced?

An evaluation of the racial environment may leave you discouraged or encouraged. But if it leaves you discouraged, that could just mean that there is lots of opportunity at your school and a great need for someone to take the courageous step of

addressing the racial dynamics that many already know are there and are likely privately discussing.

When I made this assessment for myself when I joined the law faculty at my school in 1995, I saw that I was only the second minority faculty member at my school, and there did not seem to be any others at the university level. And, I was the first minority to teach in the first-year law courses. We had no classes on Race and the Law, although we had the Women and the Law course that was taught every other year and a Civil Rights course that was also taught every other year. I was not aware of any faculty members routinely or actively addressing race in the classroom. I teach at the law school where I earned my law degree. From my student years, the times that I do recall professors addressing race in the classroom, some of the white students met the discussions with great hostility, and many of the black students later expressed much dissatisfaction at the discussions and feelings of alienation.

In spite of this realistic assessment, I was determined to go forward, primarily for the reasons discussed below.

***C. Honestly examine your own motivations for wanting to incorporate race in the curriculum.*** If you are a white instructor who wants to learn about race from your minority students, that probably is not the best motive for addressing race in your courses. In a race discussion, the professor must be informed and prepared to bring a balance of power to the discussion if necessary. The professor can not do this if the professor is depending on the minority students to always bring a minority perspective.

I had several motives myself. First, I wanted to make this world a better one for the children who would come after me. My thoughts were that every racial discussion I have will possibly be one that my nieces and nephews will not have to have.

Second, I wanted to help all my students be better informed about other groups. I would rather face the racial stereotypes some of my students have about black women, for example, than for those stereotypes to show themselves the first time my students have to face a black female judge in court. I believe that America's racial problems hold us all back as a country. Our refusal to address those problems in the classroom results in our sending out law graduates to lead this country who are ignorant about race and diversity. And, as racial ignorance breeds hatred, hostility and discrimination, racial progress will halt the growth and, possibly, eventually eliminate those diseases.

So, even though my school's racial climate at that time did not appear to be the most encouraging, my motivations were strong and pushed me forward to address race in my classes.

## **II. Taking simple steps.**

Initially my steps were quite simple and very direct. I write about them in my article, *Making Traditional Courses More Inclusive: Confessions of an African American Female Professor Who Attempted to Crash all the Barriers at Once*.<sup>11</sup> In summary:

\*I was my own self in the classroom (I did not try to be a darker copy of the white professors) and tried to model what I considered to be the best teaching I had enjoyed as a student.

\*I made sure that a greater diversity of students participated in the classes. I encouraged participation by minorities, women and those with differing

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<sup>11</sup> Angela Mae Kupenda, *Making Traditional Courses More Inclusive: Confessions of an African American Female Professor Who Attempted to Crash all the Barriers at Once*, 31 U. San Francisco L. Rev. 975 (1997).

perspectives. Although the white males were probably the most regular speakers in class, I made sure other voices were heard, too, daily.

\*I used materials that were more inclusive. Perhaps better than adding materials (as I did) is to select a casebook that incorporates race.<sup>12</sup>

In my first years these simple steps were regarded by some as being radical and too far outside the norm. Students resisted discussions of race, even in classes as First Amendment. After a few years though, students seemed to be more receptive on the surface.

### **III. Replacing Preaching with Reaching.**

So, since the year 2000, I've been experimenting with other ways to incorporate race that was less "preaching to them about race" and more "reaching" them in hopes of opening dialogue. Following are examples of some of the approaches I have used:

*A. Let them explore "others issues" for themselves.* One of my favorite courses to teach is Constitutional Law, especially the individual rights sections. I enjoy sharing my childhood experiences of segregation and riding in the back of the bus, as I believe this helps make the case studies more real. But some students see my sharing as preaching or as trying to convert them to a dangerous level of inclusiveness. Although I enjoy teaching Constitutional Law, until several years ago I received my lowest student evaluations in that required course. The course becomes even more difficult for me when addressing constitutional law topics such as race and the aftermath of the terrorist attacks of 9/11. For my experiences while visiting at a school in the Midwestern part of the

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<sup>12</sup> A very good casebook selection for contracts is Amy H. Kastely, Deborah W. Post, and Sharon K. Hom, *Contracting Law* (1996).

country, see my article *On Teaching Constitutional Law when my Race is in Their Face*.<sup>13</sup>

Recently, I've been experimenting with something new in that class. For the first half of the course, I lead the class with a typical Socratic method. My students, in self-selected groups, then lead the second half of the course on individual rights. Each group is responsible for presenting a topic. For each class meeting, the class is assigned the core materials to read. The group's grade is based on whether the group: covered the core case materials, discussed the various points of view, conducted and gave evidence of conducting additional outside research, etc. I reserve the last ten minutes of each class to elaborate as needed, but further elaboration is rarely needed as the groups usually do a great job covering the material.

Both in my office, as the groups come by to discuss the materials and their upcoming presentations, and in the classroom, we enjoy spirited discussions on race, gender, homosexuality, national origin, poverty, etc. Some students, after researching the topics, modify once rigid viewpoints to more tolerant viewpoints. In addition, as the students are presenting the most controversial materials, I am freed to share even more of my experiences without the students thinking I am trying to forcibly convert them. Not only are my student evaluations now much better, my peer evaluations are also very good.<sup>14</sup>

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<sup>13</sup> Angela Mae Kupenda, *On Teaching Constitutional Law when my Race is in Their Face*, 21 L. & Ineq. J. 215 (2003).

<sup>14</sup> Some of my colleagues use film to address the race issues in their courses. One requires that his Constitutional Law class view together the *Eyes on the Prize* series. He said that it helps them to place the cases in context. Many of the students learn and enjoy from the viewing. Sometimes, though, racial conflict develops as some of the minority students become frustrated when some of the white students make derogatory comments, or perhaps insensitive remarks, during the viewing.

***B. In addition to substantive race discussions, give the students opportunities to see diversity (or no diversity) at work.*** While teaching as a visiting professor in the northeastern part of the country, I taught Constitutional Law to a class of about 140 students. For many students, I was their first black professor. And many of the white students had had very little contact with nonwhites. That semester I administered a “collaborative midterm examination.” Students in self-selected small groups worked together for four days writing an essay answer. See a discussion of the entire process in the report *Risking Collaborative Learning*.<sup>15</sup>

They learned a lot about diversity for themselves. For example, one group composed of seven white males explained to me that they did not include women or nonwhites as members of their group in an effort to avoid dealing with mixed group dynamics. But by the end of the exam, they voluntarily admitted to a big mistake. They came to see that their essay and the process could have been better had their group been diverse and included students with different backgrounds. Now, all the preaching in the world would not have taught them that lesson. They had to learn the value of diversity for themselves.

Regularly in my classes, I provide opportunities for students to work in small groups with their classmates. This includes race and diversity in the curriculum and provides opportunities for self growth in ways that substantive teaching may not.

***C. Sneak race in by using common experiences as text.*** Several years ago I visited at a school in the Midwest. I knew I was in trouble the first day of my Race and the First Amendment Course. I took for discussion a hypothetical about a city banning

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<sup>15</sup> Risking Collaborative Learning, in *The Law Teacher* (spring 2002), also available on internet, <http://www.law.gonzaga.edu/ILST/newsletters/spring02/kupenda.htm>.

the performance of a black feminist rap group that I had read in one of the many excellent books on race and the law.<sup>16</sup> My class, which included a number of white students, some students of color and no black students, resisted my efforts to discuss race or gender. They were determined that race and gender are irrelevant to the law in their generation, in spite of statistics and anecdotes indicating continued racial oppression (and in spite of their being enrolled in a *Race* and the First Amendment course).

Fortunately, I had planned for the semester a group of exercises I called “Marketplace of Ideas” assignments. A theme in First Amendment jurisprudence is the “marketplace of ideas” concept. Basically, advocates of this concept urge for opening speech rights and for allowing all ideas in the marketplace of ideas. As explained by the late Justice Holmes, “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>17</sup>

The purposes of the marketplace of ideas assignments were for the students to: observe the ideas spoken, directly and indirectly, in the “market” about race; consider the power of the particular market forum; question what is the truth about race; conclude whether the truth has won; evaluate the appropriate relationship between race and free speech; and reflect on the students’ own preconceptions prior to completing the exercises. Students prepared reflection papers following each exercise.

During the semester, students prepared twelve marketplace of ideas assignments. For example, one marketplace of ideas assignment was: “Critically watch three consecutive hours of entertainment television (along with the snacks, keep a notebook handy). Consider both the shows and commercials. What ideas about race prevail in this

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<sup>16</sup> See, e.g., Derrick Bell, *Race, Racism and American Law* (2004); Perea, Delgado, Harris and Wildman, *Race and Races, Cases and Resources for a Multiracial America*.

<sup>17</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

marketplace of ideas?” Other assignments focused on film, books, the higher education classroom of ideas, television news, print media, children’s shows, and religious, social and political forums. Their papers were interesting. Many students were amazed at the racial stereotypes still present in the marketplace. Their own critical inspection of the messages communicated about “others” in the marketplace helped them to see more clearly the First Amendment implications.

***D. Use nontraditional sources as background material.*** The first time I wanted to teach race and the law, my then-dean insisted that I use traditional sources only, cases only. Recently, though, I have used nontraditional law school readings in my race and law courses so that students may read firsthand from other voices. For example, in my Race and the Law class I have started the semester with readings from slave narratives,<sup>18</sup> from reconstruction-era readings by W.E.B. Du Bois, from the civil rights movement,<sup>19</sup> and from fiction.<sup>20</sup> In my Race and the First Amendment course, I have started with Anne Moody’s book of her personal account of involvement in the protests in Mississippi in the Sixties.<sup>21</sup> This semester I am starting my Civil Rights course with Dr. King’s book, *I Have a Dream*.<sup>22</sup> Then we are going to use the reading on that civil rights movement as a springboard to examine the civil rights statute, section 1983, and finally to also address other contemporary and possible civil rights movements.

***E. Try even more experiments.*** In addressing race in the curriculum, it is important to be flexible, prepared, creative and resilient. I try to view each school year as

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<sup>18</sup> Harriet Jacobs, *Incidents in the Life of a Slave Girl* (2000); Frederick Douglass, *Narrative of the Life of Frederick Douglass, an American Slave* (Houston Baker, Jr., ed.) (1982).

<sup>19</sup> Martin Luther King, Jr., *I Have a Dream* (1986).

<sup>20</sup> Bebe Moore Campbell, *Your Blues Ain’t Like Mine* (1992).

<sup>21</sup> Anne Moody, *Coming of Age in Mississippi* (1968).

<sup>22</sup> King, *supra* note 19.

a new opportunity to be a good professor and to prepare good students for their professional and personal futures in our society.

This year I decided to focus again on my first-year courses. Other than the simple steps covered in part II, above, I had not addressed additional topics on race in my first-year Contracts course. This semester, however, is different. In my Contracts II class, we are spending the first part of the course completing the coverage of the basic principles. We are covering more material each class meeting so as to complete the basic materials by the end of February. Then, in part II of the course, which will be facilitated by student groups, contemporary contract problems and issues will be covered. The students, in small groups, will research and present contemporary issues. I've already conducted enough preliminary research to assign reading for the entire class for each presentation day. Topics include a number of contemporary issues, including race and contract law, gender and contract law, surrogacy contracts, hip hop and contract law, predatory lending, etc. The stated goal is for students to apply the basic contract principles to these relatively new subject areas. An underlying goal is to also engage the students and for them to see how race, gender and poverty are addressed, are affected by and affect contractual rules and principles.

Even if an administrator is reading this and is faced with a faculty that is ambivalent about addressing race in the curriculum, there are still steps the administration can take. The administration, too, should take a look at its list of invited speakers and invited scholars. Are these individuals usually all white and all with similar backgrounds and experiences? If so, race is definitely present in these decisions, race that speaks of exclusion and an intentional ignoring of other perspectives that can only lead to racial

ignorance. So, the administration, itself, can take steps to address race, by removing the language of exclusion, by becoming more inclusive.

#### **IV. And, what if you don't address race in the curriculum?**

I must admit that some professors I talked with at my school thought that we all need to just put race behind us and stop talking about it. They thought that ignoring any racial dynamics may be more conducive to healing than constantly bringing it up. Needless to say, I disagree with that viewpoint.

If you don't address race in the curriculum then three things may happen. I fear that, one, you will join the group of moderates that pretend that racial dynamics are not present in America and that the Rev. Dr. Martin Luther King said are a bigger problem than the KKK.<sup>23</sup> And, two, I fear that you will cheat your students. The facts are that our students will live and work in a very diverse society. The better equipped they are to be able to at least discuss race, the better professionals they will be. And three, you will cheat yourself. The fact that you are reading this paper suggests that you at least acknowledge the relevance of race to the law school curriculum. As educators, we try to prepare our students to our best ability so they can make positive differences in our country and the world. The more they succeed, the more fulfilled we are. How can they succeed and how can we be fulfilled if they graduate in complete racial ignorance and in denial of the issues of race in our country and the world?

So there is really no choice, and there is probably no one way to place race in the curriculum, for it is already there. We must move to address it by moving from fear to courage, and then by replacing preaching with reaching.

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<sup>23</sup> King, *supra* note 19, at 9.