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Rodrigo's Reconsideration: Intersectionality and the Future of Critical Race Theory

*Richard Delgado**

I. INTRODUCTION: IN WHICH RODRIGO ANNOUNCES HIMSELF IN A NOVEL MANNER.....	1248
II. IN WHICH RODRIGO EXPLAINS HIS NEW THESIS AND THE MEANING OF HIS MESSAGE (“ARE YOU A CRIT?”).....	1250
III. RODRIGO’S CRITIQUE—HOW A RADICAL MOVEMENT HAS BEGUN TO LOSE ITS WAY.....	1254
A. <i>THREE CORE CRITICAL-RACE-THEORY IDEAS</i>	1256
1. Narrative Jurisprudence.....	1257
2. Intergroup Coalitions	1258
3. Intersectionality.....	1259
B. <i>RODRIGO’S REVIEW: INTERSECTIONALITY—A CENTRAL TENET</i>	1259
IV. INTERSECTIONALITY: RODRIGO’S CRITIQUE	1263
A. <i>PRACTICAL CONSEQUENCES</i>	1263
B. <i>CONCEPTUAL INCOHERENCE</i>	1268
1. Intersectionality as a Social Construction: In Everyday Life	1269
2. In Judicial Opinions.....	1270
C. <i>ADDING A NEW VOICE?</i>	1271
1. The Voice of Color.....	1271
2. In the Master’s Voice	1274
D. <i>POWER AND COERCION</i>	1279
1. Intersectionality and the Social Science of Race	1282
2. “A Peculiar Intensity”	1283
3. White Privilege	1285
V. CONCLUSION	1287

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I. INTRODUCTION: IN WHICH RODRIGO ANNOUNCES
HIMSELF IN A NOVEL MANNER

I had been standing on the sidewalk, staring in confusion at my new cell phone¹ and trying to remember which button the young sales agent had told me to push to summon the taxi I needed to get home, when a string of letters popped up on the display panel. Fearing that it would be the phone company scolding me for proceeding in an unacceptable sequence, I squinted at the tiny panel.

“R U a Crit?” the message said. To my astonishment, I saw that the sender was none other than my young friend and protégé Rodrigo,² signing off with the P.S.: “Call me.”

1. It was, in fact, my first ever. Although I do try to keep up with the new technology, I had held off on getting a cell phone until now. Even so, I was proud that I was among the first of my senior colleagues to get one.

2. See Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) (book review) [hereinafter Delgado, *Chronicle*] (introducing my interlocutor and alter ego Rodrigo Crenshaw). The son of an African American serviceman and an Italian mother, Rodrigo was born in the United States but raised in Italy when his father was assigned to a U.S. outpost there. Rodrigo graduated from the base high school, after which he attended an Italian law school (“one of the oldest in the world, Professor”), graduating second in his class. When the reader meets him, he has returned to the States to investigate graduate law (LL.M.) programs in hopes of becoming a law professor. Encouraged by his sister, famed civil-rights lawyer Geneva Crenshaw, see DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987) (recounting the adventures of Bell’s fictional superlawyer), Rodrigo seeks out “the Professor” for career advice. Despite their age difference, the two become good friends, discussing a host of topics in the years ahead, including law and economics (Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993) [hereinafter Delgado, *Second Chronicle*]; Richard Delgado, *Rodrigo's Roadmap: Is the Marketplace Theory for Eradicating Discrimination a Blind Alley?*, 93 NW. U. L. REV. 215 (1998) [hereinafter Delgado, *Roadmap*]); love (Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CALIF. L. REV. 387 (1993) (book review) [hereinafter Delgado, *Third Chronicle*]); legal rules (Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993) (book review)); the critique of normativity (Richard Delgado, *Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581 (1993)); relations between minority men and women (Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993) [hereinafter Delgado, *Sixth Chronicle*]); enlightenment political theory (Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721 (1994)); black crime (Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994)); narrative jurisprudence (Richard Delgado, *Rodrigo's Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545 (1995) [hereinafter Delgado, *Final Chronicle*] (final chronicle in first cycle and final chapter of RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE (1995))); the rule of law (Richard Delgado, *Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379 (1994)); affirmative action (Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995) [hereinafter Delgado, *Tenth Chronicle*]); clinical theory (Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CALIF. L. REV. 61 (1996) [hereinafter Delgado, *Eleventh Chronicle*]); desperately poor border settlements (Richard Delgado, *Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667 (1997) [hereinafter Delgado, *Twelfth*

He and I had met years earlier when, as a newly minted lawyer, he had sought me out for career advice.³ Following an initial conversation about race, affirmative action, and the decline of the West,⁴ we had remained good friends, discussing love,⁵ law and economics,⁶ merit,⁷ narrative jurisprudence,⁸ the role of Latinos in the civil-rights equation,⁹ and many other topics over the years ahead.¹⁰ I had watched with quiet satisfaction as he completed his degree, fell in love, married, secured his first law-teaching position, and had his first child.¹¹

Muttering to myself, I pushed what I hoped was the call-back button.¹² To my relief, I heard a faint ring followed by the voice of my animated young friend.

Chronicle]); legal formalism (Richard Delgado, *Rodrigo's Thirteenth Chronicle: Legal Formalism and Law's Discontents*, 95 MICH. L. REV. 1105 (1997) [hereinafter Delgado, *Thirteenth Chronicle*]); interracial love and indifference (Richard Delgado & Noah Markewich, *Rodrigo's Remonstrance: Love and Despair in an Age of Indifference—Should Humans Have Standing?*, 88 GEO. L.J. 263 (2000) (book review); Latino civil rights (Richard Delgado, *Rodrigo and Revisionism: Relearning the Lessons of History*, 99 NW. U. L. REV. 805 (2005) (book review) [hereinafter Delgado, *Revisionism*]); the black–white binary paradigm of race (Richard Delgado, *Rodrigo's Roundelay: Hernandez v. Texas and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23 (2006) [hereinafter Delgado, *Roundelay*]; Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black–White Binary*, 75 TEX. L. REV. 1181 (1997) (book review) [hereinafter Delgado, *Fifteenth Chronicle*]); postcolonial theory (Richard Delgado, *Rodrigo's Corrido: Race, Postcolonial Theory, and U.S. Civil Rights*, 60 VAND. L. REV. 1689 (2007) [hereinafter Delgado, *Corrido*]); and many other topics in the ensuing years. During this period, the brash, talented youth earns his LL.M. and embarks on his first teaching position. The Professor meets Rodrigo's friend, soul mate, and, later, wife, Giannina, and still later, her mother Teresa. He also learns that Rodrigo's father's family immigrated to the United States via the Caribbean and spoke perfect Spanish.

3. See *supra* note 2 (explaining how Rodrigo and the Professor met). For further details on “the Professor,” Rodrigo's mentor and straight man, see, for example, Delgado & Markewich, *supra* note 2, at 264 n.3, which notes that the Professor, like Rodrigo, is a fictional character, a composite of many individuals, and not to be identified with any single person. He also is a man of color teaching civil rights at a major law school and in the late stages of his career.

4. Delgado, *Chronicle*, *supra* note 2, at 1361–80.

5. E.g., Delgado, *Third Chronicle*, *supra* note 2; Delgado & Markewich, *supra* note 2.

6. See Delgado, *Roadmap*, *supra* note 2; Delgado, *Second Chronicle*, *supra* note 2.

7. Delgado, *Tenth Chronicle*, *supra* note 2.

8. Delgado, *Final Chronicle*, *supra* note 2.

9. Delgado, *Fifteenth Chronicle*, *supra* note 2; Delgado, *Corrido*, *supra* note 2; Delgado, *Revisionism*, *supra* note 2; Delgado, *Roundelay*, *supra* note 2.

10. See *supra* note 2 (listing some of their many topics).

11. See, e.g., Richard Delgado, *White Interests and Civil Rights Realism: Rodrigo's Bittersweet Epiphany*, 101 MICH. L. REV. 1201, 1201 n.1 (2003) (describing Rodrigo's origins, family, loves, and career); see also *supra* note 2 (summarizing Rodrigo's life and interests).

12. The young sales clerk had demonstrated this feature with pride, explaining that it was popular with my generation since it allowed the owner to call the sender of a text message. “Many of our older customers seem to prefer this,” he said. “That way, they don't have to look at all those tiny numbers when trying to call back.” I was happy to give it a try.

“Rodrigo,” I said. “I just got this phone. Where are you, and how did you get my number?”

“Teresa gave it to me,” he said.¹³ “I called you at home, but she told me you were at school. I’m in town for a meeting with my editor. We finished early, so I wondered whether you’d like to have dinner. I have some ideas I’d like to run past you.”

“I’d love to,” I said, “although we’ll be eating alone. I’m sure Teresa told you she has a meeting tonight. But what’s this about ‘R U a Crit?’ Are you using a lot of abbreviations these days?”

Rodrigo laughed. “I gather you haven’t explored the text-messaging function of your new phone. I can explain it to you over dinner, if you like. My message referred to my new thesis about critical race theory. My editor and I were discussing it, but she’s not a lawyer. Oh, and to answer your question, text messaging requires that your message be no more than 160 characters long. That’s why you see a lot of abbreviations. You’ll get the hang of it.”

“I’m sure I will,” I said, thinking that I wouldn’t try it unless I had a teenager close at hand in case I got stymied. “The fellow at the store gave me a demonstration, but I’m afraid I’ve forgotten half of what he said. Anyway, yes, I’d love to hear your thesis. Do you have a restaurant in mind?”

“Teresa suggested a place two blocks from where you’re standing. It’s called the Milano. It just opened, and it’s Italian.”

Wondering how he knew my location,¹⁴ I said, “Sure. Teresa and I had talked about going there someday.”

“OK,” he said. “I’ll meet you there. Whoever arrives first can get us a quiet table.”

II. IN WHICH RODRIGO EXPLAINS HIS NEW THESIS AND THE MEANING OF HIS MESSAGE (“ARE YOU A CRIT?”)

Moments later, we were seated in a comfortable side booth in the homey restaurant with photos of Roman ruins and Italian fountains decorating the walls. Placing the cell phone in front of me on the red-and-white checkered tablecloth to remind me to get instructions from my dinner companion before we left, I said, “Let’s not forget.”

13. See Delgado & Markewich, *supra* note 2, at 266–68 (introducing Teresa, the Professor’s Italian-born second wife, ardent environmentalist, and love of his life). The Professor, a widower, recently remarried. On the Professor, see *supra* note 3.

14. I had heard about GPS technology and wondered whether Rodrigo’s phone contained some variant of it that could tell him where the other party to a conversation was located. Once or twice, Rodrigo had materialized or dematerialized under unusual circumstances, see, e.g., Delgado, *Final Chronicle*, *supra* note 2, at 574; Delgado, *Tenth Chronicle*, *supra* note 2, at 1711, prompting me to wonder whether he possessed extraordinary powers.

He looked up from the menu, which he had been studying intently, and said, "It's easier than you think. All your students do it." Then, "I'm thinking of having the pan-fried octopus. How about you?"

Mindful of my doctor's orders to cut down on rich food, I said, "That does sound good. But I think I'll have the pasta primavera with a salad on the side."

The courteous waiter arrived to take our orders. As he walked away ("Good choices, gentlemen"), I thought he looked vaguely familiar and wondered if he might be a student at my school.

While waiting for our food, Rodrigo deftly explained how to use my new phone and guided me through my first text message—to Teresa, telling her that I had, indeed, met up with Rodrigo and would be home late. The reader from a younger generation will be glad to know that I even dreamed up a new abbreviation.¹⁵

"Now, then," I said, looking up. "What's that new thesis of yours? From your message, I gather it has to do with critical race theory."

"It does," he replied. "Over the years, you and I have discussed a host of topics associated with that school of thought, such as intersectionality, essentialism, and narrative jurisprudence.¹⁶ But I've never asked what you thought of the movement as a whole or whether you consider yourself a member."

"Odd that you should ask," I replied. "A few others have asked me the same question lately. I did attend one of the early meetings, and many regard me as a fellow traveler. But I haven't been a regular participant, and most of my writing takes the form of standard civil-rights scholarship.¹⁷ I don't have much of a feel for the movement's fancy European roots, although I know most of the main figures and read their works. Why do you ask?"

Rodrigo gave me an appraising look. "I didn't want to be too harsh if you identified with it strongly. I used to think CRT was moribund because the meetings have stopped and many of the major figures are no longer writing. Then, I realized that the situation is more complex than that. For one thing, some of the younger scholars are still writing. It's just that they are saying different things."¹⁸

15. Specifically, I used "Q.E.D." (*quod erat demonstrandum*—"which stands demonstrated"—or more colloquially, "it goes without saying") to explain to my dear wife that Rodrigo, once again, had offered to run a new idea past me.

16. See *supra* notes 2, 4–10 and accompanying text (explaining where these can be found).

17. The Professor often describes himself as an earnest, old-time race reformer. See, e.g., Delgado, *Third Chronicle*, *supra* note 2, at 403.

18. See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) (illustrating scholarship by the new generation); *infra* notes 19, 52 and accompanying text (describing LatCrit scholarship); *infra* Parts III.B, IV (discussing identity politics and intersectionality in general).

Just then, the waiter arrived with our plates of savory-smelling food. Placing them down in front of us, he said, "Enjoy," and departed.

"The movement has also splintered," I said, "at least in an organizational sense."¹⁹ We ate for a few minutes in tacit silence. Then, he asked how I was finding my food.

"Wonderful," I replied. "How's yours?"

"The vegetables are tender and lightly cooked. And the *polpo*: juicy and grilled to perfection. Teresa will love this place."

After a short pause, he leaned forward and said, "And now, would you like to hear my new thesis?"

I smiled at his intellectual impetuosity. Rodrigo had never been shy about sharing an audacious idea. "Please go on," I said.

"Before I begin, recall for a moment how the movement got started."

"It sprang up in the mid-seventies, did it not?"

"Yes, as progressive scholars and activists across the country realized that the heady gains of the sixties-era civil-rights movement were stalling and, in some cases, being rolled back."²⁰

"Right," I said. "New approaches were needed to deal with new forms of subtle, unconscious, or colorblind racism and a society that seemed tired of hearing about race."²¹

19. See, e.g., Francisco Valdes, Afterword, *Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265 (1999) (describing a number of spin-offs from critical legal studies and critical race theory); LATCRIT, <http://www.latcrit.org> (last visited Feb. 9, 2011) (official website of the Latina & Latino Critical Legal Theory organization); see also RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 6, 81–83 (2001) (describing spin-off movements).

20. On the movement's origin, see, for example, DELGADO & STEFANCIC, *supra* note 19, at 3–4; Kimberlé Crenshaw et al., *Introduction to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, at xiii (Kimberlé Crenshaw et al. eds., 1995); Cornel West, *Foreword to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, *supra*, at xi.

21. DELGADO & STEFANCIC, *supra* note 19, at 3–4 (explaining the movement's origins and early history).

"And so," he continued, "the early work of Derrick Bell,²² Charles Lawrence,²³ Mari Matsuda,²⁴ and Kimberlé Crenshaw²⁵ developed a vocabulary and framework to address these types of structural or institutional racism."²⁶

When he paused and looked up, I asked: "And so, Rodrigo, I gather you think that the times call for a different approach? Perhaps some further elaboration of the early strategies and techniques?"

"I do. The movement is starting to fall out of fit. The times and circumstances have changed. Just as altered conditions brought about the movement in the first place back in the seventies, something similar needs to take place today."

"And I gather you have some idea what it is?"

"I do. But first, I need to explain how the movement, as a whole, has ceased to perform its function."

"And that function is . . . ?"

"Providing a thoroughgoing leftist critique of social institutions and practices, particularly ones that bear on the fortunes of minorities and the poor," he said, looking up at me intently. "This is no small task."

"And one I'd like to hear about. As mentioned, I don't consider myself a crit—at most a well-wisher—but I've followed the movement closely over the years. And like you, I've noticed that it's entered a quiet phase. I can't quite put my finger on it. But I'm looking forward to your thoughts."

"Why don't we proceed in two parts," he said. "I'll lay out my critique, showing how the movement is no longer performing its original function.²⁷ Then, I'll sketch a few thoughts on what might replace it."²⁸

22. See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992) (documenting the author's view that racism is a persistent feature of American life); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (offering materialist explanations for the landmark decision); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (discussing conflict of interest in public-interest adjudication).

23. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (explaining how traditional equal-protection analysis is ill-equipped to redress discrimination that is not clearly marked as intentional).

24. See, e.g., Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (urging that antidiscrimination law consider the victim's perspective in determining whether a remedy is in order).

25. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (discussing the deficiencies of both traditional liberal thought and critical legal studies in regard to the question of race).

26. See DELGADO & STEFANCIC, *supra* note 19, at 1-49 (summarizing the movement's major themes and tenets). For a discussion of the early years, figures, and scholarship, see Crenshaw et al., *supra* note 20, at xi-xxxii.

27. See *infra* Part III.

28. See *infra* notes 146-65, 176-85, 203-16 and accompanying text.

“I’m all ears.”

III. RODRIGO’S CRITIQUE—HOW A RADICAL MOVEMENT HAS BEGUN TO LOSE ITS WAY

“Let me start by asking you a question,” he said. “Can you think of any once-progressive movements that have turned conservative, either in design or in effect?”

I paused. “I can think of a few. Classical liberalism, which now stands as an obstacle to affirmative action and other race-conscious programs.²⁹ Consider, for example, how colorblindness and the content of our character—originally liberal tenets—are now almost entirely co-opted by the right.³⁰ And not long ago, our Latino friends were insisting that they were white and demanding that the authorities treat them as such and not assign their kids to segregated schools, make them enter restaurants by the back door, and use water fountains for blacks.³¹ They thought that they were protecting the dignity of their race, even though nobody really thought of them as white.”³²

“So you know that a principle or strategy that once served progressive goals can, over time, begin to serve the opposite set of purposes.”

29. I meant, of course, classical liberalism’s insistence on treating all persons alike, regardless of their differing initial positions and histories. *See, e.g.*, RONALD DWORKIN, *LAW’S EMPIRE* 165 (1986).

30. *See, e.g.*, SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* (HarperCollins 1998) (1990). *See generally* DINESH D’SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* (1995) (arguing that racism is not the main force suppressing minorities today); STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1997) (disputing the need for identity politics in forging a united America).

31. *See, e.g.*, DAVID G. GUTIÉRREZ, *WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE POLITICS OF ETHNICITY* 73–78 (1995) (discussing this era), *reprinted in* RICHARD DELGADO, JUAN F. PEREA & JEAN STEFANCIC, *LATINOS AND THE LAW: CASES AND MATERIALS* 131–37 (2008).

32. In the Latinos’ case, me-tooism soon lost its appeal. During its brief two decades, it postponed development of a distinct Latino identity, *see* DELGADO, PEREA & STEFANCIC, *supra* note 31, at 131–37, and did little to endear them to other minority groups, *see* GUTIÉRREZ, *supra* note 31, at 79; *see also* IAN F. HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003) (positing that the Latino identity grew out of sixties-era struggle); Neil Foley, *Becoming Hispanic: Mexican Americans and the Faustian Pact with Whiteness*, 1997 *REFLEXIONES: NEW DIRECTIONS IN MEXICAN AMERICAN STUDIES* 53 (1998) (observing that Mexican Americans during a critical period insisted that they were white, but that this redounded to their disadvantage); *infra* note 111 and accompanying text (mentioning development of the next stage of Latino consciousness).

"Or be co-opted by one's adversaries, as conservatives have done with many of Martin Luther King's most memorable lines.³³ Jack Balkin calls this ideological drift."³⁴

"That's good. I can use that," Rodrigo said, scribbling a note on a scrap of paper and shoving it into his pocket. "Along those lines, you'll be interested to know that while I was still a graduate student, I met an LL.M. student from Harvard. He said that one of his classmates, a lawyer from China, told him how at one of the top law schools in that country a small group of professors teach and study American critical theory."

"I think I heard about that, too. And what do you make of it?"

"What intrigued me is that, according to my informant, the rest of the Chinese law faculty looks down on those colleagues because they consider critical race theory a conservative body of scholarship. In their eyes, it's merely a new form of socialism, which is passé. It's a form of nostalgia or longing for the past. All the hip new ideas over there have to do with capitalism, private ownership, and free enterprise."³⁵

"So, in a different time or a different place, what is radical and emancipatory can seem stuffy, backward, and illiberal," I said, shaking my head slightly. "I suppose that's theoretically true. But do you actually think that the writings and teachings of Matsuda,³⁶ my friend Lawrence,³⁷ Crenshaw,³⁸ and our buddy Delgado³⁹ are now beginning to disserve their aims and fall behind the times?"

33. See STEELE, *supra* note 30 (providing an example of conservatives' co-optation of the great civil-rights leader's rhetoric ("the content of our character")).

34. On the phenomenon generally, see J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869 (1993); and for an explanation of the relation of legal and cultural change, see also J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* (1998).

35. See, e.g., GLORIA DAVIES, *WORRYING ABOUT CHINA: THE LANGUAGE OF CHINESE CRITICAL INQUIRY* 72-78 (2007) (noting the low regard in which critical legal studies and similar movements are held); Wang Hui & Rebecca E. Karl (trans.), *The Year 1989 and the Historical Roots of Neoliberalism in China*, 12 POSITIONS: E. ASIA CULTURES CRITIQUE 7, 33-34 (2004) ("[A]lmost all critiques of the contemporary period are seen as regressions into the Cultural Revolution and thus basically irrational."); Xudong Zhang, *The Making of the Post-Tiananmen Intellectual Field: A Critical Overview*, in *WHITHER CHINA? INTELLECTUAL POLITICS IN CONTEMPORARY CHINA* 1, 40-41, 49-51 (Xudong Zhang ed., 2001) (noting the low regard in which critical legal studies and similar movements are held); see also Mark Lilla, *Reading Strauss in Beijing: China's Strange Taste in Western Philosophers*, NEW REPUBLIC, Dec. 30, 2010, at 14, 15 (noting that liberal Western political and legal theory is now considered "unhelpful" in Chinese academic circles, whereas getting rich is glorious).

36. A founder of the critical-race-theory movement, Professor Mari Matsuda is a principal contributor to its scholarship. See, e.g., Matsuda, *supra* note 24; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (urging that society evaluate hate speech from the perspective of those targeted by it).

37. See, e.g., Lawrence, *supra* note 23.

38. E.g., Crenshaw, *supra* note 25.

39. E.g., Richard Delgado, *Commentary, The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984) (noting how an inner circle of white male

“Bear with me,” Rodrigo said. But before he could go on, the waiter arrived to ask how we liked our food. “Great,” we said in unison. After asking us if we’d like more bread (recalling my doctor’s orders, I shook my head), he left.

“Where were we?”

“Oh yes, my critique.”

A. THREE CORE CRITICAL-RACE-THEORY IDEAS

Rodrigo speared a final morsel of the *polpo*, swallowed, patted his lips with his napkin, and then began:

“Professor, I’ve been thinking about this for some time. I think you know that I’ve been updating the materials for my course on American progressive legal thought. In fact, that’s what I was meeting with my editor about today.”

“So, this has been on your mind.”

“It has. And the three areas that I plan to cover quite differently next year are narrative jurisprudence,⁴⁰ coalitions,⁴¹ and essentialism and intersectionality⁴²—which go together, as you know. The reasons vary. Narrative jurisprudence, because it has become part of the mainstream.”

scholars at elite institutions marginalizes minority contributors); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) [hereinafter Delgado, *Words That Wound*] (urging an independent, freestanding tort for racial vituperation).

40. See DELGADO & STEFANCIC, *supra* note 19, at 37–49 (describing the role of legal storytelling and narrative analysis in critical race theory); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (illustrating and analyzing the case for legal storytelling).

41. On the hope for a grand coalition of all groups of color confronting the power, see, for example, CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 379–92 (Francisco Valdes et al. eds., 2002) [hereinafter CROSSROADS]. But see Richard Delgado, *Linking Arms: Recent Books on Interracial Coalition as an Avenue of Social Reform*, 88 CORNELL L. REV. 855 (2003) (book review) (casting doubt on this hope).

42. See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139, 141–52 [hereinafter Crenshaw, *Demarginalizing*] (analyzing black women’s employment struggles “in order to contrast the multidimensionality of Black women’s experience with the single-axis analysis that distorts these experiences” and discussing three cases that illustrate that fallacy); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) [hereinafter Crenshaw, *Mapping*] (addressing sexual violence against women of color); *id.* at 1262 (“Women working in the field of domestic violence have sometimes reproduced the subordination and marginalization of women of color by adopting policies, priorities, or strategies of empowerment that either elide or wholly disregard the particular intersectional needs of women of color.”); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585–90 (1990) (arguing that much of feminist legal theory is essentialist, presupposing an encompassing, ideal woman as model (that woman, of course, is white) and demonstrating this presupposition in the work of two leading feminists—Robin West and Catharine MacKinnon); *id.* at 591 (“Despite its power, MacKinnon’s dominance theory is

1. Narrative Jurisprudence

"I've noticed that, too," I said. "The fate of this once-novel approach reminds me of a remark by Duncan Kennedy.⁴³ A few years ago, someone asked him what had happened to critical legal studies.⁴⁴ He answered that it had not ceased to exist.⁴⁵ Far from it, it had infiltrated the discourse of a dozen areas of law. So much so that nobody thinks of it as a separate movement anymore. Everyone points out indeterminacy when they teach contracts or torts, and the same for subject position, the fundamental contradiction, and a host of other ideas once associated with the critical-legal-studies left."

When Rodrigo nodded, I added: "And so you think that is what has happened to critical race theory? It has gone mainstream?"

"Parts of it retain their cutting edge," he said.⁴⁶ "Other parts, like legal storytelling and narrative jurisprudence, have turned into what sociologists of knowledge call normal science."⁴⁷

"That reminds me of work I have seen by Jerome Bruner and Peter Brooks on the role of narrative in the law.⁴⁸ They hardly mention Derrick Bell or the other pioneers. Even clinical scholars now write about narrative, often in connection with turning the client's story into a legally cognizable form.⁴⁹ They, too, build on CRT scholarship, sometimes without giving it its due."

flawed by its essentialism. MacKinnon assumes, as does the dominant culture, that there is an essential 'woman' beneath the realities of differences between women . . ."); see also DELGADO & STEFANCIC, *supra* note 19, at 51–58 (discussing essentialism and intersectionality in critical race scholarship).

43. See Interview by Kirstin Eidenbach with Duncan Kennedy, *Asked and Answered: Thoughts from the Works of Duncan Kennedy*, 1 CRIT 8, 12 (2008), <http://www.thecritui.com/articles/kennedy.pdf> (discussing the fate of the critical-legal-studies movement).

44. *Id.*

45. *Id.*; see also John Henry Schlegel, *CLS Wasn't Killed by a Question*, 58 ALA. L. REV. 967, 976 n.40 (2007) (discussing the fate of the critical-legal-studies movement).

46. See generally CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) (anthology of writings by the movement's newer scholars).

47. See, e.g., Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213, 1214–18 (1997) (explaining and illustrating the term).

48. See, e.g., ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 19–164 (2000) (discussing the role of narratives and mental categories in the law); LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds., 1996) (same); Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?*, 18 YALE J.L. & HUMAN. 1 (2006) (same).

49. See, e.g., DELGADO & STEFANCIC, *supra* note 19, at 45 (discussing the use of narrative in the courtroom); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) (describing frustration over representing a client who ultimately was more interested in obtaining a pair of shoes than in winning an abstract legal victory).

“That’s why I plan to devote less attention to legal storytelling in my course and that new book I’m working on,” he said. “It’s now such a familiar notion that it takes little explaining. The same is true for coalitions.⁵⁰ Everyone holds out this great hope these days. It’s practically the new mantra.⁵¹ LatCrit, for example, an offshoot of CRT, is so ecumenical and all-inclusive that some of its senior figures grumble that the group hardly devotes any attention to Latinos these days.”⁵²

2. Intergroup Coalitions

“So this notion, too, has dissolved into the ether, so to speak,” I said. “And since intergroup coalition persists, so far as I can tell, mainly at the academic level in the form of well-appointed conferences and retreats,⁵³ it, too, has lost its punch. That’s your point, right?”

“Right. Nothing much going on there, except a lot of abstract language about the virtues of working together, listening to each other, and ‘rotating centers.’⁵⁴ Don’t mistake my meaning. I’m not saying anything is really wrong with a critical tenet’s taking up residence in the mainstream. Rather, it’s just that when it does so, it often loses its sharp edge. The popular version does liberal, not radical, work.”⁵⁵

“What about your third critical tool? Is it intersectionality?”

50. See, e.g., Julie A. Su & Eric K. Yamamoto, *Critical Coalitions: Theory and Praxis*, in *CROSSROADS*, *supra* note 41, at 379 (describing this hope); see also Delgado, *supra* note 41 (describing this hope but doubting that it will come to pass).

51. See, e.g., ANTONIA DARDER & RODOLFO D. TORRES, *AFTER RACE: RACISM AFTER MULTICULTURALISM* 104–07 (2004) (warning that CRT is in danger of turning into a set of mantras), *reprinted in* *THE LATINO/A CONDITION: A CRITICAL READER* 267 (Richard Delgado & Jean Stefancic eds., 2d ed. 2011). On the dialectical process by which a progressive tenet may ossify into a canon requiring deconstruction, see Delgado, *Sixth Chronicle*, *supra* note 2, at 658–73.

52. Telephone Interview with a senior LatCrit figure (June 2007) (deploring inattention to Latino issues in the LatCrit movement); see also Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 *HARV. LATINO L. REV.* 101, 103 (1997) (arguing that the LatCrit movement needs “to focus on core issues on which shared experiences breed common interests among Latinos”).

53. On self-professed radicals meeting in lavish circumstances, see, for example, Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 *TEX. L. REV.* 121, 146 (2003) (book review).

54. See Symposium, *Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections*, 33 *U.C. DAVIS L. REV.* 751 (2000). “Rotating centers” means a discourse of radical equality in which every group and position receives its due. *Id.*; see *LATCRIT*, *supra* note 19 (explaining the virtues of an approach in which every point of view receives its share of attention).

55. On the current faith in intergroup coalition as an approach to challenging illegitimate authority, see, for example, Delgado, *supra* note 41.

3. Intersectionality

"It is." But Rodrigo gestured toward the waiter, who had been standing by patiently.

"Would you gentlemen care to see the dessert menu?"

I looked at Rodrigo, who nodded vigorously. The waiter produced two copies, pointing out some of the evening's specialties.

"I'll take the flaming *tartufo*," Rodrigo said. Wondering what that was, I ordered instead an abstemious lime sherbet.

When the waiter retreated with our orders, Rodrigo continued as follows:

"With intersectionality and its close relative essentialism, I see things taking a somewhat different turn. In some respects, this signature notion continues to be useful and positive. In others, not. I'm trying to figure out if what I'm seeing is a metaphor for the movement as a whole."

"I gather that you hope not."

"I'm actually indifferent. If the times require a new form of leftist scholarship, so be it. As I mentioned when we first met, I hope to apply my talents, such as they are, to reforming Western society in a more humane direction.⁵⁶ I've been associated with critical race theory for a number of years. But for me at least, it's a marriage of convenience. I'll definitely prepare that revised version of my course materials and, maybe, turn them into a book. But after that, I may look for a wholly new theoretical approach that better addresses the needs of our time."

"I've never been enamored of some of the fancy scholarship," I admitted. "Particularly the emphasis on discourse.⁵⁷ I do try to keep up, as you know. But at heart, I guess I'm an old time civil-rights warrior. So, I'm curious to hear what you have to say about intersectionality's role as portent of CRT's future."

B. RODRIGO'S REVIEW: INTERSECTIONALITY—A CENTRAL TENET

Rodrigo looked around to see if the waiter was in sight. When he wasn't, he looked up at me and began:

"Professor, I'm sure you know how intersectionality and anti-essentialism took root in critical race theory."

"We talked about this once before, but it's been a while. Why don't you begin with a quick review?"

56. See Delgado, *Chronicle*, *supra* note 2, at 1376–78 (explaining why Rodrigo has returned to the States).

57. For discussion of the discourse branch of critical race scholarship, see, for example, Delgado, *supra* note 53, at 122–25, 131–37, 144–46; and Richard Delgado, *Two Ways To Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279 (2001).

“Glad to,” he said. “The concepts gained popularity in legal discourse with two articles by Kimberlé Crenshaw⁵⁸ and one by Angela Harris⁵⁹ in the late eighties and early nineties.”

“That’s only a short time after the movement began, at least in an organizational sense,” I added.

“It is. The founding workshop, in Madison, was in 1989,⁶⁰ Crenshaw and Harris published their articles a short time later, after which Martha Fineman⁶¹ and Catharine MacKinnon⁶² wrote responses. In law, the field has not advanced greatly beyond that early exchange, although other writers

58. Crenshaw, *Demarginalizing*, *supra* note 42 (containing foundational treatments of intersectionality); Crenshaw, *Mapping*, *supra* note 42.

59. See Harris, *supra* note 42. The concept may be older than its appearance in legal discourse might suggest. See Ann Phoenix & Pamela Pattynama, Editorial, *Intersectionality*, 13 EUR. J. WOMEN’S STUD. 187, 187 (2006) (“Long before the term ‘intersectionality’ was coined in 1989 by Kimberlé Crenshaw, the concept it denotes had been employed in feminist work on how women are simultaneously positioned as women and, for example, as black, working-class, lesbian or colonial subjects.”); see also ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE: BLACK WOMEN’S STUDIES (Gloria T. Hull et al. eds., 1982) (collecting early writings on intersectionality); Combahee River Collective, *A Black Feminist Statement* (1977) (calling attention to unique forces that combine to marginalize and oppress black women), in THE ESSENTIAL FEMINIST READER 325 (Estelle B. Freedman ed., 2007).

60. See, e.g., DELGADO & STEFANCIC, *supra* note 19, at 4 (describing the origins of critical race theory); Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or “A Foot in the Closing Door,”* in CROSSROADS, *supra* note 41, at 9, 15–16; Crenshaw et al., *supra* note 20, at xxvii; Richard Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 IOWA L. REV. 1505, 1510–11 (2009) (same).

61. See Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25 (1990) (deploring self-indulgent differentiation as divisive and a threat to feminist solidarity).

62. See Catharine A. MacKinnon, *From Practice to Theory, or, What Is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 13 (1991) [hereinafter MacKinnon, *White Woman*] (noting that academic lawyers like the author’s anti-essentialist critics can easily become so caught up in theory as to lose sight of how feminism began with and rooted itself in the realities of women’s lives and noting that “[s]ocial change is first thought about, then acted out. . . . Bodies do not crunch bodies”); *id.* at 14–15 (rearticulating what it is to be a woman “as woman” and listing the many indignities and crimes all women suffer in daily life, at work, and in the world of pornography (internal quotation marks omitted)); Catharine A. MacKinnon, *Keeping It Real: On Anti-“Essentialism,”* in CROSSROADS, *supra* note 41, at 71, 72 [hereinafter MacKinnon, *Keeping It Real*] (defending feminism against the charge that it is essentialist and pointing out that the accusation “has created a false antagonism with regressive consequences”); *id.* at 74 (“[My work] systematically addresses racism and makes point after point that it is said to miss.”); *id.* at 75 (positing that anti-essentialism, as practiced, erodes solidarity and shifts attention away from the realities of power and toward the individual); *id.* at 76 (suggesting that the academy, as a collection of scholars, needs to reflect on its role in derailing progressive thought and movements); see also Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 689 (2000) (analyzing the relation between the diversity movement—and presumably, critical race theory—and radical feminism).

have filled in a few gaps and applied the basic concepts to new areas, such as international human-rights law.”⁶³

“I understand it has caught on in a number of other fields,” I said.

“Many others,” he replied. “A recent symposium⁶⁴ and two book-length anthologies⁶⁵ describe how intersectionality now is practically required reading for scholars in a host of disciplines, ranging from women’s studies to international human rights, sociology, and anthropology.⁶⁶ Intersectionality, as you know, calls attention to events and forces operating at the intersection of two or more categories, such as race and gender.”⁶⁷

“Crenshaw’s articles focus on workplace harassment and domestic abuse, as I recall.”⁶⁸

63. See, e.g., *MORAL IMPERIALISM: A CRITICAL ANTHOLOGY* (Berta Esperanza Hernández-Truyol ed., 2002) (applying critical-race-theory concepts, including intersectionality, to international human-rights law); Berta Esperanza Hernández-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1994); Symposium, *Intersectionality*, 13 EUR. J. WOMEN’S STUD. 187 (2006) (applying the concept to a number of new areas).

64. Symposium, *supra* note 63.

65. *THE INTERSECTIONAL APPROACH: TRANSFORMING THE ACADEMY THROUGH RACE, CLASS, AND GENDER* (Michele Tracy Berger & Kathleen Guidroz eds., 2009) [hereinafter *INTERSECTIONAL APPROACH*]; *INTERSECTIONALITY AND BEYOND: LAW, POWER AND THE POLITICS OF LOCATION* (Emily Grabham et al. eds., 2009) [hereinafter *INTERSECTIONALITY AND BEYOND*].

66. See Kathy Davis, *Intersectionality as Buzzword: A Sociology of Science Perspective on What Makes a Feminist Theory Successful*, 9 FEMINIST THEORY 67, 68 (2008) (noting that today, scholars are applying intersectionality analysis in such fields as philosophy, social science, humanities, economics, and law). Indeed, “Feminist journals are likely to reject articles that have not given sufficient attention to ‘race’, class, and heteronormativity, along with gender. At this particular juncture . . . any scholar who neglects difference runs the risk of having her work viewed as theoretically misguided . . .” *Id.*; see also Emily Grabham et al., *Introduction to INTERSECTIONALITY AND BEYOND*, *supra* note 65, at 1 (noting that the concept has made its way into law, sociology, political geography, political science, economics, and psychotherapy); Leslie McCall, *The Complexity of Intersectionality*, 30 SIGNS: J. WOMEN CULTURE & SOC’Y 1771, 1782–84 (2005) (enumerating additional fields and applications in which intersectionality plays a part); UCLA School of Law, 4th Annual CRS Symposium, *Intersectionality: Challenging Theory, Reframing Politics, Transforming Movements* (Mar. 11–13, 2010) (unpublished program notes of presentations) (on file with author) (applying “intersectionality” to topics as diverse as toxic wells, people with cancer, rape, police behavior, substandard immigration-detention facilities, and one woman’s tenure struggle).

67. Joanne Conaghan, *Intersectionality and the Feminist Project in Law*, in *INTERSECTIONALITY AND BEYOND*, *supra* note 65, at 21, 22–24 (noting that intersectionality arrived in response to concern over essentialism in social theory and the problem of overbroad generalizations); Davis, *supra* note 66, at 68 (noting that the aim was to ensure that the experiences of small groups, such as women of color, did not “[fall] between the cracks”). Other intersections might be race and sexual orientation (e.g., black gays or Latina lesbians) or gender and religion (e.g., Muslim women). See also Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 702–03 (2001) (defining intersectionality and listing variants of the concept).

68. See, e.g., Crenshaw, *Demarginalizing*, *supra* note 42, at 141–50; Crenshaw, *Mapping*, *supra* note 42, at 1242–45.

“Right. She pointed out—quite correctly, in my view—that the legal system often left black women with inadequate coverage.⁶⁹ Their employer might discriminate against them on account of their black womanhood, singling them out for harassment or unfair treatment. Yet if the company treated black men and white women fairly, the employer would often escape liability.⁷⁰ The women could not prove discrimination on the basis of race because the employer could show it liked and promoted black men.⁷¹ And because the employer was not biased against all women—in particular, it valued white women—a suit for discrimination on the basis of gender might fail as well.”⁷²

“The author also addressed how black women were treated in political organizations, if I recall.”

“She did,” he replied. “The feminist movement would often give scant consideration to issues lying close to the heart of black women—for example, Head Start or domestic abuse—preferring to focus on issues of interest to all women”⁷³

“Meaning, of course, white women,” I interjected.

“Indeed—issues such as the glass ceiling. Black women who insisted on including their concerns in the feminist agenda were told to wait their turn, on penalty of being seen as divisive.”

“And I gather that much the same was true of black women’s relations to men of color.”

“Exactly. Their male counterparts were more numerous and forceful. So, in meeting after meeting, the men succeeded in putting their issues—the criminal-justice system, police profiling, the war on drugs—at the top of the agenda. Black women’s issues once again got pushed to the side.”⁷⁴

“So, the agendas of both movements took on the interests of their most empowered members, namely, white women and black men.”

69. E.g., Crenshaw, *Demarginalizing*, *supra* note 42, at 141–50; Crenshaw, *Mapping*, *supra* note 42, at 1246–48; see also Carbado & Gulati, *supra* note 67, at 710–14; Delgado, *Sixth Chronicle*, *supra* note 2, at 650–52.

70. That is, absent a confession (“I can’t stand you black women—you’re all lazy and have an attitude problem. You’re fired!”), the plaintiff will need to rely on other forms of evidence, such as the employer’s treatment of large numbers of plaintiffs like her.

71. “What do you mean I’m prejudiced against blacks? Look at all the black men I’ve hired and promoted. I love black men. They are so cool and rhythmical. I like to talk sports with them on Monday.”

72. By the same token: “What do you mean I’m prejudiced against women? Look at all the white women I have hired as secretaries, receptionists, and executive assistants. I love white women. They remind me of my mother. The younger ones are so pretty, and they all are neat workers and very cooperative.”

73. E.g., Crenshaw, *Mapping*, *supra* note 42, at 1256–65; see also Delgado, *Sixth Chronicle*, *supra* note 2, at 643, 652–53 (explaining how a focus on women “as women” can easily lead to neglect of such topics).

74. See Crenshaw, *Mapping*, *supra* note 42, at 1256–66.

“Just as happens with the law of racial remedies, where the most empowered find the law calibrated to redress their types of injury.⁷⁵ You could see it as an issue of voice.⁷⁶ Voices sounding messages that the majority hears repeatedly command attention. Those who find themselves far removed from the mainstream, as intersectional people do, have trouble making themselves heard. And the same holds even truer for those who suffer a triple or quadruple whammy, like black women who are lesbians, or foreign-born Latino gay men who speak with an accent. All these intersectional individuals find themselves shorn of social power because they do not occupy the center of any single large, familiar category.”

IV. INTERSECTIONALITY: RODRIGO'S CRITIQUE

“Sounds like common sense to me,” I said, resolving to push my young friend a little. “What can you possibly find fault with, apart from the concept's occasional application in other disciplines without full understanding?”

Rodrigo paused as the waiter brought our desserts and set them on our table. “Am I supposed to blow it out?” he asked. The waiter said his flaming dish would go out in a moment all by itself.

“A metaphor for much of critical race theory, I'm afraid,” he quipped.

I took a bite of my sherbet, while he did the same, a little gingerly, with his flan-like dish, which was still sizzling. Then, he looked up and said:

“I'd like to proceed by parts. I see a series of problems, some of which apply more broadly to the movement at large. You can help me decide if I'm being uncharitable.”

“I will. Please go ahead.”

A. PRACTICAL CONSEQUENCES

“One problem with intersectionality is what I call the so-what question.⁷⁷ Once you point out that a category contains subcategories, what follows? Presumably, one begins paying more attention to those in the subgroup if they have been feeling neglected. You may need to pass a new law or expand an old one if they have been getting short shrift. But then, suppose that certain members of that very subcategory emerge clamoring

75. E.g., Crenshaw, *Demarginalizing*, *supra* note 42, at 141–50.

76. On the role of voice in legal scholarship, see, for example, Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990). *But see* Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1789–810 (1989) (pointing out that anyone is capable of writing in the voice of color and that such a unique voice may not exist).

77. *See infra* notes 80–81, 128–29 and accompanying text (noting that the approach can lead to solipsism and absorption with identity and the self); *cf.* JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 143 (1990) (noting that merely observing that a category contains subcategories, by itself, advances analysis very little).

for attention—black women *lesbians*, say. They want to be recognized as a new subcategory. Categories are, potentially, infinitely divisible.”

“Didn’t Angela Harris point this out in her article on essentialism?”⁷⁸

“She did,” he said with alacrity. “She called it the problem of Funes the Memorious who could not think in terms of general categories but gave everything its own name.”⁷⁹

“The legal system cannot work that way,” I said. “At least beyond a point. Otherwise everyone would be a law unto himself. And the same is true for politics and political work, which, by their nature, presuppose groups.”⁸⁰

“And it is no answer,” Rodrigo continued, “to say that subdivision merely comes to an end at the point where going further would serve no purpose—a sort of rule of reason. That’s because you will never be sure in the back of your mind that someone will not come along later and point out that your unit of analysis—the one you thought would end things—is too broad. ‘Your neat analysis does not apply to *me*.’”

“The speak-for-yourself reproach.”

“Exactly. So, intersectionality can easily paralyze progressive work and thought because of the realization that whatever unit you choose to work with, someone may come along and point out that you forgot something. It’s like trying to pack for a trip.”

I smiled, recalling what it was like trying to get ready for a vacation when my two daughters were young, but said: “Does intersectionality’s preoccupation with form, end points, units of analysis, and so on, strike you as a type of evasion? I wonder if it’s a way of dodging questions of substance.”

“It is a kind of formalism,”⁸¹ Rodrigo said, “a desire for yet another category. By itself, intersectionality does not mount a challenge to anything important. Moreover, in focusing on smaller and smaller units of analysis, you can easily overlook large-scale processes that are working to the

78. See Harris, *supra* note 42, at 581 (noting that intersectional analysis has no logical stopping point); see also Alice Ludvig, *Differences Between Women?: Intersecting Voices in a Female Narrative*, 13 EUR. J. WOMEN’S STUD. 245, 247 (2006) (noting that the potential differences within a large category are innumerable and that one cannot take them all into account); Nira Yuval-Davis, *Intersectionality and Feminist Politics*, 13 EUR. J. WOMEN’S STUD. 193, 197–204 (2006) (noting that intersectional analysis has no logical stopping point).

79. Harris, *supra* note 42, at 581.

80. “Politics” derives from the Greek work “*polis*,” meaning the people or polity. By its nature it concerns groups and group action. A closely related discipline, ethics, is concerned with individual actions. SIMON BLACKBURN, *THE OXFORD DICTIONARY OF PHILOSOPHY* 121, 282 (2d ed. 2005) (defining “*polis*,” philosophy of politics, and “ethics”).

81. On the role of formalism in legal discourse, see, for example, JEAN STEFANCIC & RICHARD DELGADO, *HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS* 33–49 (2005); Delgado, *Twelfth Chronicle*, *supra* note 2. On its role in legal justification, see Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607 (1999).

disadvantage of large classes, say, workers vis-à-vis management or women vis-à-vis men.”⁸²

“Or all people of color,” I added.

“Exactly. Darder and Torres point this out.⁸³ MacKinnon, too.⁸⁴ Even worse, identifying a new subcategory can end up harming members of the very category you think you are championing.”

“I’d like to hear how.”

“One may begin with the intention to empower the smaller group by calling attention to its difficulties and unique voice and perspective. But things may not work that way.”

“Could you give me an example?”

“Sure. One writer points out that certain Canadian judges have been using intersectionality to increase the severity of sentences they hand down to indigenous women convicted of certain crimes.⁸⁵ On learning the defendant’s identity, they reason that the crime is especially dangerous, so they impose an especially harsh sentence to discourage other Indians from behaving similarly.”⁸⁶

“So, intersectionality can invite power in as well as show it the door.”

“Exactly. That’s the problem with formalism. It can cut both ways. A famous judge might write that the Constitution is color-blind as a way of condemning Jim Crow laws in the South.⁸⁷ Years later, the conservative movement picks up on the same slogan to oppose affirmative action.”⁸⁸

“Hmm, I just thought of another example for you,” I said. “Latinos complain that current immigration policies are unfair because they can lead to the deportation of law-abiding people who have been here for years and

82. These forces might include globalization, outsourcing of jobs, the weakening of unions, and the growth of nationalism and nativist sentiment. They might also include America’s drift toward a neocolonial order in response to demographic changes in the makeup of its population. See DELGADO & STEFANCIC, *supra* note 19, at 111–12; *infra* notes 130–65 and accompanying text.

83. DARDER & TORRES, *supra* note 51, at 101–07 (criticizing identity politics, including critical race theory, for overlooking the role of capital in structuring law and society).

84. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1987) (describing the harms women suffer at the hands of a patriarchal system); MacKinnon, *White Woman*, *supra* note 62, at 15–21; MacKinnon, *Keeping It Real*, *supra* note 62, at 74–76.

85. Toni Williams, *Intersectionality Analysis in the Sentencing of Aboriginal Women in Canada: What Difference Does It Make?*, in INTERSECTIONALITY AND BEYOND, *supra* note 65, at 79 (discussing some Canadian judges’ sentencing practices for Native women).

86. *Id.* at 79–88.

87. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (urging an anticaste interpretation of the Equal Protection Clause), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

88. See, e.g., MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY (2003) (discussing how the conservative movement appropriates this and similar concepts).

have children who are U.S. citizens.⁸⁹ If the authorities send the adults back to their home country, the children will have to go with them, and so in effect, the children end up deported, too.⁹⁰ Either that or the kids will have to stay in the United States and make their way somehow, perhaps never to see their parents again.”

Rodrigo seemed intrigued so, recalling his Latino roots,⁹¹ I went on: “The tactic seems to have backfired. The right wing, reminded of how the children of undocumented immigrants born in this country are U.S. citizens, has launched a campaign to abolish birthright citizenship.”⁹²

“In other words,” Rodrigo recapitulated, “when progressives pointed out the plight of this intersectional group—children of undocumented parents—their adversaries seized on their predicament to urge solving it, but in a way the progressives didn’t like.”

“Right,” I said. “By eliminating their basis for citizenship altogether. This would presumably require a constitutional amendment since that document is the source of birthright citizenship in the first place. But stranger things have happened, and as you know, the tide is running against our Latino friends these days.”

Ain't I intersectional, too?

“A third example just occurred to me,” Rodrigo said. “Recently, Latino scholars have been arguing against what they call the reigning black–white binary paradigm of race in which a nonblack person, to achieve legal redress, must analogize his or her predicament to one cognizable under black-coined civil-rights law.⁹³ Some of them have been insisting that their group does not consist of blacks with slightly lighter skins—black wannabes—but *mestizos*, a new intersectional category composed of individuals with both European and Indian ancestors and a host of legal problems of its own.”⁹⁴

89. E.g., JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 503, 1019 (2d ed. 2007) (discussing the current anti-immigrant fervor).

90. *Id.*

91. Namely, that his mother was Italian and his father’s family immigrated to the United States via the Caribbean and spoke perfect Spanish. See Delgado, *Chronicle*, *supra* note 2, at 1359–60 (explaining his origins); *supra* note 2 and accompanying text (same). As the son of a black father, Rodrigo identifies as both black and Latino.

92. E.g., Alexander Tsesis, *The Boundaries of Free Speech*, 8 HARV. LATINO L. REV. 141, 153 (2005) (book review) (describing this initiative); Enough!, *HR 1868 Legislation Would Abolish Birthright Citizenship for Anchor Babies*, PATRIOT ACTION NETWORK (May 30, 2009, 11:37 PM), <http://www.patriotactionnetwork.com/profiles/blogs/hr-1868-legislation-would>.

93. E.g., Delgado, *Fifteenth Chronicle*, *supra* note 2 (discussing the drawbacks of a binary approach to racial issues); Perea, *supra* note 47 (same).

94. On *mestizaje* (racial mixture) and *mestizos* (mixed-race individuals), see, for example, DELGADO, PEREA & STEFANCIC, *supra* note 31, at 148–49, 168–69, 514; Martha Menchaca, *Chicano Indianism: A Historical Account of Racial Repression in the United States*, 20 AM. ETHNOLOGIST 583 (1993).

"For example, discrimination on the basis of a foreign-sounding name or accent,"⁹⁵ I added. "Also presumed illegal-immigrant status.⁹⁶ And a set of stereotypes, some of which are like those society attaches to blacks, but others not. ⁹⁷ A legal system framed with black problems in mind cannot easily redress harms such as these. But what conclusion do you draw from this?"

"Oh," he said. "I seem to have gotten ahead of myself. What I meant is that recently, a number of African American legal scholars have challenged Latinos' use of the term *mestizo*.⁹⁸ It strikes them as an evasion of blackness.⁹⁹ Many Latinos have black blood, these scholars point out, stemming from the importation of African slaves early in Mexico's history.¹⁰⁰ So, insisting that they are *mestizos*, part European, part Indian, as many Latinos do, is to deny their black heritage.¹⁰¹ These Latinos should accept their places in the black-white binary paradigm and decide which side of the line they want to be on—white or black."

"A case of castigating someone who believes himself intersectional," I added. "Just in the wrong intersection, or a little confused—like me with my new cell phone. Now I see what you mean. Intersectionality, by itself, means little. Politically, it can serve as a necessary first step toward organizing on behalf of a new group, such as Latinos or black women. But, it can also be a double-edged sword, taken up by the group's adversaries to heap trouble on their heads."

95. See Richard Delgado, *Derrick Bell's Toolkit—Fit To Dismantle That Famous House?*, 75 N.Y.U. L. REV. 283, 288–306 (2000) (discussing the black-white binary paradigm of race); Delgado, *Fifteenth Chronicle*, *supra* note 2, at 1183, 1196–200 (same).

96. Delgado, *Corrido*, *supra* note 2, at 1734–38 (discussing discriminatory stereotypes of this group, such as lazy, happy-go-lucky, or slow to learn English and assimilate); Delgado, *Fifteenth Chronicle*, *supra* note 2, at 1198.

97. See RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND 56–57 (2004) (discussing the history of stereotypes of Latinos); Delgado, *Corrido*, *supra* note 2, at 1722–38; Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1273–75 (1992) (same).

98. E.g., Taunya Lovell Banks, *Mestizaje and the Mexican Mestizo Self: No Hay Sangre Negra, so There Is No Blackness*, 15 S. CAL. INTERDISC. L.J. 199 (2006); Tanya Katerí Hernández, *Latino Inter-ethnic Employment Discrimination and the "Diversity" Defense*, 42 HARV. C.R.-C.L. L. REV. 259 (2007) (analyzing Latinos' use of this form of self-identification).

99. E.g., Banks, *supra* note 98 (suggesting that Latino culture historically has concealed its black roots and instead exalted the European-Indian mixture); Hernández, *supra* note 98 (same).

100. See DELGADO, PEREA & STEFANCIC, *supra* note 31, at 174 (discussing racial intermixture in Mexican colonial history).

101. *Id.* (posing the same question); see also Banks, *supra* note 98 (same); Hernández, *supra* note 98 (same).

B. CONCEPTUAL INCOHERENCE

“Part of the problem,” he said, “is that the notion stands on a weak conceptual footing. Intersectionality can lead a group to believe that its members are endowed with a physical property that justifies special treatment. But no one is intersectional in an ‘out there’ sense. People don’t come wearing labels saying ‘I am an intersectional person,’ or by contrast, ‘I am a person who occupies only one category.’”¹⁰²

“Intersectionality is a social construction,” he continued. “Consider Kimberlé Crenshaw, for example. From one perspective, she is an intersectional person, for she is both black and female. But from another perspective, she is simply an Anglo like many others. For a Latino nationalist, like some of my friends, people fall into two large categories—Anglos and us.¹⁰³ And many of our group are the true intersectional people, *mestizos*.”

“African Americans as Anglos. Now, that’s likely to raise hackles,” I said. “I hope you will think carefully before going public with it. Have your documentation ready.”

“I will. Angela Harris, a black woman, made the same point.¹⁰⁴ Jorge Klor de Alva, too.”¹⁰⁵

“Possibly, a more diplomatic approach,” I pointed out, “would be to notice how intersectionality presupposes essentialism. In other words, it requires you to be an essentialist, to a degree.”

“Now, I’m the one who could use an explanation,” my quick-witted friend said, looking puzzled.

“Here’s what I was thinking. How did Crenshaw and her friends know that black women are disadvantaged vis-à-vis black men or white women? Presumably, they heard this somewhere or read some figures showing differences in this direction, maybe in pay rates for the same jobs. But those figures were undoubtedly aggregated. Not all black men are better off than all black women. To assume so is to commit the sin of essentialism. Some black men—ex-felons, gays, high-school drop-outs, devout Muslims—may well be worse off than the average black woman, who is probably a high-school graduate, is not threatening to the average employer, and can at least

102. See DAVINA COOPER, *CHALLENGING DIVERSITY: RETHINKING EQUALITY AND THE VALUE OF DIFFERENCE* 48–50 (2004) (doubting that intersectionality is capable of being reduced to a set of simple labels that individuals can wear or not).

103. See *Our Next Race Question: The Uneasiness Between Blacks and Latinos*, HARPER’S MAG., Apr. 1996, at 55, 59–63 [hereinafter *Our Next Race Question*] (an interview by Earl Shorris with Jorge Klor de Alva and Cornel West).

104. See Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585, 1588–99 (1997) (observing that African American music, dress, art, and style are deeply embedded in American culture and that blacks are thus thoroughly American—in many cases more so than the average citizen).

105. See *Our Next Race Question*, *supra* note 103, at 59.

get a job as an office worker or hotel maid. So, the most you can say is that some black women are on the receiving end of inexcusable treatment in domestic-violence cases—just as some white women are—and at the hands of certain employers who, for unfathomable reasons, just don't like black women."

"Thanks, Professor. That hadn't occurred to me. But I agree that the case for special treatment of intersectional categories does often presuppose essentialist assumptions that a comparison group is better off when they may not be—at least, not all of them."

1. Intersectionality as a Social Construction: In Everyday Life

"Your point about the arbitrariness of categories—including that of the Anglo—reminds me, though, of a time when I taught at a certain university located in the Mountain West. I was one of the first African Americans to teach at the law school. So, I found myself appointed to practically every committee in sight."

From my young friend's sympathetic look, I gathered he had gone through something similar.

"At any rate," I continued, "at one point, a university committee on which I sat was meeting in one of the oldest buildings on campus. Old Main, as they called it, was so venerable that they had dedicated the top floor to a museum of university history. So it was that the walls of the meeting room in which we gathered around a long, polished table were decorated with oil paintings of all the university presidents, going back into the past century, some with walrus mustaches and old-style waistcoats."

Rodrigo gave a knowing smile: "Were they all men?"

"Of course, and white. And all about the same age, and for that matter, build, height, and complexion. When I pointed their similarity out to an elderly committee member sitting next to me, who was a liberal, he replied that he had known a number of the recent presidents. And they weren't the same at all. This one liked golf, that one tennis. This one was a Republican, that one a Democrat. This one was quiet and scholarly, that one garrulous and sociable."

"Where you saw similarity, he saw difference," Rodrigo said.

"Right," I concluded. "Because of my subject position, as you crits would say, I was completely blind to the intersectionality . . ."

"The diversity," Rodrigo added.

"Right—the intersectionality and diversity in the group. For my companion, it was full of diversity. Each president was intersectional in one fashion or another—white and Republican. White and a golfer. White and Jewish. White and an amateur musician, and so on. Each of these intersections was highly significant to my friend. To me, the similarities overwhelmed the differences. I wondered why the group contained no

women, blacks, or Latinos. My companion wondered why it contained no bridge player or entomologist.”

2. In Judicial Opinions

Rodrigo was silent for a moment, then, sitting forward suddenly in his chair: “Your example of the presidents’ gallery reminds me of a line of court cases that turn on something similar.”

“You mean the idea that intersectionality is, essentially, in your head—a matter of one’s point of view?”

“Exactly—a choice, corresponding to nothing objective in the real world. Are you familiar, Professor, with the line of cases having to do with whether Latinos are a legally cognizable class?”¹⁰⁶

“I think so. But I don’t see how they bear on your critique.”

“Let me explain what I mean. In a line of cases decided early in the civil-rights period, Latino litigators began insisting that their clients were a legally cognizable class.”¹⁰⁷

“I know those cases. Up until then, Latino social-betterment organizations responded to virulent stereotyping and racism by insisting that everyone treat them like white people. They demanded, in other words, the privileges of whiteness.”¹⁰⁸

“Not surprising, in a way,” Rodrigo added. “Courts to that point adhered to a black–white binary paradigm of race.¹⁰⁹ Latinos merely demanded that society position them, legally speaking, on the white side.”

“And not segregate their kids at school, make them sit in the balcony at the movies, or use the public bathroom set aside for blacks,”¹¹⁰ I said.

“And then,” he continued, “when this approach began to yield fewer and fewer gains, Latinos changed course. Drawing inspiration from the black civil-rights movement of the sixties, they began demanding recognition as a minority group in their own right.”¹¹¹

106. See, e.g., Richard Delgado & Vicky Palacios, *Mexican Americans as a Legally Cognizable Class Under Rule 23 and the Equal Protection Clause*, 50 NOTRE DAME LAW. 393, 394–404 (1975) (discussing this line of cases, which culminated in *Hernandez v. Texas*, 347 U.S. 475 (1954)).

107. See DELGADO, PEREA & STEFANCIC, *supra* note 31, at 116–25; Delgado & Palacios, *supra* note 106, at 394–404.

108. See GUTIÉRREZ, *supra* note 31, at 73–78 (noting how organizations like the League of United Latin American Citizens embraced patriotism, law-abidingness, and the American Creed and insisted that society treat their members as fellow whites); *supra* notes 31–32 and accompanying text.

109. Delgado, *Fifteenth Chronicle*, *supra* note 2. On the black–white binary of race, which divides racial discourse and law into two groups, the white and the black, see Perea, *supra* note 47.

110. On the intense racism this group has suffered over the ages, see, for example, DELGADO, PEREA & STEFANCIC, *supra* note 31, at 41–48.

111. See, e.g., OSCAR “ZETA” ACOSTA, *THE UNCOLLECTED WORKS* (Ilan Stavans ed., 1996); DELGADO, PEREA & STEFANCIC, *supra* note 31, at 832–40; LÓPEZ, *supra* note 32.

“At first, courts refused.¹¹² If I’m not mistaken, it was not until the mid-fifties that the Supreme Court permitted Latinos to bring suit under the Equal Protection Clause¹¹³ and, a little later, under federal civil-rights acts.¹¹⁴ Of course, the Latinos, during this entire period, were the same people. And their treatment at the hands of society at large was just as rude and disrespectful. It’s just their legal categorization that shifted with the times. In one era, they were white; in another, nonwhite and able to sue for discrimination. We see the same with the U.S. Census.

“So you see, Professor, how a collectivity’s characterization—intersectional or not, even white or not—changes according to what’s at stake and who is perceiving it?”

“Just like those pictures on the wall,” I said.

C. ADDING A NEW VOICE?

Just then the waiter arrived to check on how we were finding our desserts. We reported them delicious, and he poured us more water and asked if we’d like an after-dinner digestif. “Compliments of the house,” he said.

We both nodded energetically, and he rattled off a list of the free beverages. “Please stay as long as you like,” he said. “We’re unlikely to need the table any time soon.”

We smiled gratefully and ordered our beverages, a light Italian wine for me (my doctor had told me a little with dinner would be good for me), and a small decanter of hearty-sounding port for Rodrigo.

“Where were we?” he asked. “Oh yes, how intersectionality can invite unfavorable attention from one’s adversaries,¹¹⁵ as well as suffer from conceptual indeterminacy.¹¹⁶ Still, some believe that recognizing new groups gives them a voice and rallying point. If they have been suffering poor or neglectful treatment all along, the gains might well outweigh the dangers.”

1. The Voice of Color

“Well, what do you say to that?” I asked. “One branch of critical race theory, as you know, does emphasize ‘voice.’ A number of race-crits posit

112. *E.g.*, Delgado & Palacios, *supra* note 106 (detailing the struggle of Latino litigators for recognition of class standing).

113. *See* *Hernandez v. Texas*, 347 U.S. 475, 482 (1954).

114. *See* RICHARD R. VALENCIA, *CHICANO STUDENTS AND THE COURTS: THE MEXICAN AMERICAN LEGAL STRUGGLE FOR EDUCATIONAL EQUALITY* (2008); Gary A. Greenfield & Don B. Kates, Jr., *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CALIF. L. REV. 662 (1975) (describing the Chicano struggle for civil rights under federal law).

115. *See supra* notes 85–105 and accompanying text.

116. *See supra* notes 78–81 and accompanying text.

that minorities speak in a distinctive voice.¹¹⁷ Randall Kennedy energetically contested that, insisting that anyone, white or black, can speak in a black voice.¹¹⁸ But the idea has not gone away, perhaps because it resonates with other critical-race themes, such as storytelling and discourse analysis.”

“Well put,” Rodrigo said. “But, I don’t think it’s that simple for two reasons. Any small, intersectional group seeking to develop a distinctive voice will run up against obstacles inherent in its situation. And lavishing attention on voices like these is to ignore a new source of conservative rhetoric emanating from a different sector of the minority community.”

“I’ve never been a great fan of so-called voice scholarship, as you know. So, let’s hear your two critiques.”

“Building on social-science knowledge about empathy, my first critique begins by noting how intersectionality increases the social distance between the speaker and her audience.¹¹⁹ Consider how the hearer must make a double leap to understand a message that begins by proclaiming, ‘I am an X who is also a Y, and I’m saying such-and-such.’ Narrative theory holds that we receive messages favorably if they are not too discordant from ones we already have heard and find familiar.¹²⁰ Ones that ask us to sympathize with another group are apt to gain a toehold if the hearer perceives that the speaker is a person like him.”¹²¹

“A member of his clan. Or at least not too unlike him.”

“Right,” he said. “We respond readily to disasters that befall our friends and neighbors. Ones that take place on the other side of the world grip us much less.¹²² We reason, ‘Well those Africans are always suffering drought or famine. So, they must be used to it by now.’ But if our neatly dressed next-door neighbor shows up on our doorstep not having eaten in three days because she lost her job and her husband ran off with a floozie, we are immediately alarmed. This is not supposed to happen here. We fix her a

117. See Delgado, *supra* note 76.

118. See Kennedy, *supra* note 76.

119. On the role of empathy and social distance in the reception of messages advocating human rights, see Richard Delgado, *Watching the Opera in Silence: Disgust, Autonomy, and the Search for Universal Human Rights*, 70 U. PITT. L. REV. 277 (2008) (book review); and Delgado & Stefancic, *supra* note 97, at 1261–62 (coining the term “empathic fallacy” to describe the belief that new narratives by themselves can easily and quickly alter mindset).

120. LYNN HUNT, *INVENTING HUMAN RIGHTS* 35–69 (2007); Delgado, *supra* note 119, at 291–95.

121. HUNT, *supra* note 120, at 35–69 (noting that this circle of perceived kinship is widening over time); Delgado, *supra* note 119, at 291–95 (same). On the role of empathy in legal reasoning, see generally, for example, Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987).

122. See, e.g., Delgado, *Eleventh Chronicle*, *supra* note 2, at 76–77 (discussing norm theory and its relation to legal empathy).

sandwich and help her look up the number of a social-service agency that can help.”¹²³

“What you once called ‘norm theory,’ I think.”¹²⁴

“Your memory is good, Professor. And so, any speaker who begins by emphasizing how strange he or she is—how unlike the average listener—is apt to reach a very small audience.”

“Unless, of course, the listener likes and feels an affinity for that group, no?”

“I suppose that’s possible,” Rodrigo admitted. “But one had better not rely on it. Minna Kotkin points out that intersectional claims for employment discrimination lose ninety-six percent of the time.¹²⁵ Single-issue discrimination cases, brought on, say, the basis of just race or sex, win a respectable twenty-seven percent of the time.”¹²⁶

“You may have hit upon the reason,” I said. “The claims evoke little sympathy from the judge. They strike him or her as weird, exotic, the first step onto a slippery slope.¹²⁷ Too far from the narrative experiences of judges, prosecutors, and even most attorneys, they encounter an ambivalent reception. The system rebels against such claims. Anyone considering filing one should ponder bringing it on a single ground. For example, suppose I am a mother whose child dies in the middle of the night. If I add that I am a *mestiza*, does that help? Add anything? Increase sympathy?”

“You’re right, it doesn’t. Insistence on being seen in one’s full complex intersectional personhood can even backfire, making other people think you are milking them for sympathy—what Wendy Brown calls an investment in powerlessness—a sort of victim complex—and a sense of injury or violation.¹²⁸ This impedes sympathy since others will be less prone to rally to your aid if they think you are overdoing it. But it also traps you in a type of inward, morose mental state. Reproach begins to replace action.”¹²⁹

123. *Id.*

124. *Id.* “Norm theory” holds that our reaction to a person in distress is a function of how normal or abnormal we think that the distress is for that other person. *Id.*

125. See Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1443–49, 1459–63 (2009) (explaining the reasons why, including subtle bias and administrative issues); see also *id.* at 1487–98 (describing the difficulty of winning a case brought on a theory of intersectional discrimination).

126. *Id.* at 1440.

127. *Viz.*, “If we allow gay Brazilian nursing-home residents to sue for intersectional discrimination, where will it stop?” See, e.g., *id.* at 1456–63 (noting that some judges fear that the slope is so slippery that, once started, it will be impossible to stop).

128. See WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 186–91 (1995) (noting that identity claims are a kind of investment in powerlessness and injury and that they impede political action); Emily Grabham, *Intersectionality: Traumatic Impressions*, in INTERSECTIONALITY AND BEYOND, *supra* note 65, at 183, 183–96 (noting that intersectionality may simply add to law’s propensity to classify without mounting a challenge to anything important).

129. See BROWN, *supra* note 128, at 189.

After a pause, I said, “I’ll have to ponder that. You might be a little harsh. But I think you mentioned a second critique.”

2. In the Master’s Voice

“Oh, right. It’s that the voice justification for intersectionality masks a much more serious danger that is developing right now.”

“I gather that this is part of what you meant by saying that critical race scholars are failing to adapt to the times?”

“It is. Do you recall our recent conversation about California?”¹³⁰

“How could I forget? We met in that barbershop. You had just been reading some materials about the Golden State and were excited about what you found.”

“And do you remember the gist of our conversation?”

I furrowed my brow. “I think so. You described how the population of that state had recently reached the tipping point at which minorities were beginning to outnumber whites.¹³¹ You went back into the state’s early history, when a small group of Anglo settlers and adventurers encountered the region’s Mexicans and Indians.¹³² Being avaricious and expansion-minded, they quickly brought those weaker groups under control, even though the whites were initially in the numerical minority.¹³³

“Then, with the Gold Rush and advent of the transcontinental railroad, the number of whites increased rapidly, I think you said.”

“Right. Then they were able to rule by sheer force of numbers.¹³⁴ Control through the standard colonial means, such as co-optation, bribery, and promulgating a pro-Western ideology, were no longer necessary.¹³⁵ California soon became a state, with agribusiness, universities, and a powerful economy. Minorities assumed, for the most part, second-class roles as agricultural workers and in other menial jobs.”¹³⁶

“But now, you say, things are changing. Or, rather are changing back.”

“Right. And I’m sure you can see where I am going. White Californians today find themselves in an unusual position, in some ways like the one that they occupied 150 years ago. They own much of California’s wealth and hold most of the top jobs. But again, they are facing the prospect of being in

130. See Richard Delgado, *Rodrigo’s Portent: California and the Coming Neocolonial Order*, 87 WASH. U. L. REV. 1293 (2010).

131. *Id.* at 1303 (noting that the state recently arrived at this tipping point and that the schools were now nearly two-thirds minority).

132. *Id.*

133. *Id.*

134. *Id.* That is, the Anglos no longer needed to use force to wield control but could rely on the usual mechanisms of popular government, including voting.

135. *Id.*

136. *Id.* at 1303, 1313–14; see *id.* app. (showing the representation of various minority groups in different job sectors of the California workforce).

the numerical minority. Once again, their situation resembles that of a colonial power, the English in India, for example.”¹³⁷

“Or the French in Algeria,” I added. “It’s all coming back to me. But what do you draw from this? I don’t see the connection between California’s new status—soon to be that of the country at large—and your critique of intersectionality.”

“Simple,” he said. “In the new regime, whites are trying to hang on to power despite their dwindling numbers. One way they are doing this is by taking a leaf out of earlier colonial strategy. They are promoting minorities to certain mid-level positions, with the tacit understanding that they will help the majority group maintain control over their fellow countrymen and women.”¹³⁸

“Like all those educated Indian citizens the British appointed to mid-level positions in the colonial administration, where they would help the Brits maintain control over their countrymen in return for nice, safe jobs.”

“I think you know how Rodolfo Acuña has called attention to the rise of what he calls the broker class—light-skinned, college-educated Latinos who help Anglo corporations sell products . . .”¹³⁹

“Often harmful ones, like alcohol, cigarettes, or luxury items,” I interjected.

“Right, items that his working-class compatriots can’t really afford. Or, in the case of politicians, delivering votes to the ruling party.”

“I imagine he’d get a kick out of all those minority assistant deans.¹⁴⁰ Every law school seems to have one these days. Not the main deans—they have real power. But lower-level ones. Ones whose job is saying no to their counterparts: ‘No, I’m sorry Professor Jones, you can’t go to that leftist-sounding workshop. You’ve already exhausted your faculty allowance for this year. Now, if you wanted to go to AALS, we have a different rule for that.’”¹⁴¹

“It’s not only mid-level law-school administrators who sing the party line. I’ve looked at many sectors of California life, from K–12 education to prison administration and state politics. You find very few minorities at the top.¹⁴² Very large numbers in menial work, such as crop-picking, carpet-laying, or teachers’ aides.¹⁴³ Fewer as you go up the ladder. And at the top,

137. *Id.* at 1303–31 (highlighting and documenting this comparison).

138. *Id.* at 1313–14 (noting this increasing co-optation); *see also id.* app. (showing the representation of various racial groups in the California workforce, including officials).

139. RODOLFO ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS 386–421 (4th ed. 2000).

140. *See* Delgado, *supra* note 130, at 1302, 1313–14.

141. *See id.*

142. *Id.*; *see also id.* app. (Rodrigo’s Blue Binder).

143. *Id.* app. (Rodrigo’s Blue Binder).

at the level of state senator, CEO, or district superintendent, the make-up is almost entirely white.”¹⁴⁴

“And getting more so over time, you said.”

“Right. Just as my neocolonial thesis would suggest. As the population numbers become more unsettling to whites, they deputize more minorities to act as middle-men and brokers, extending their rule without being too obvious about it.”¹⁴⁵

I was silent for a moment. Then the full force of Rodrigo’s analysis hit me. “So, Rodrigo, you are saying that the most serious problem today is not the esoteric voice of a small, subdivided intersectional minority group that wants to beseech the white establishment for better treatment. It is all those minorities who speak in the master’s voice. In a way, it’s the very opposite voice we need to worry about—all those light-complexioned dress-for-success minorities who are happy to work as human-resources officers, assistant deans, and vice principals, legitimating white control after the reins of power ought, logically, to be shifting.”¹⁴⁶

“Don’t forget all those marketing agents, too,” he said. “Helping U.S. corporations get their share of the large Latino market. Selling them TV programs, encyclopedias, subprime mortgages, houses, and other things that they generally do not need.”¹⁴⁷

“That reminds me of what a colleague calls ‘affinity fraud.’¹⁴⁸ Have you heard of it?”

“Is it like white suburban ladies attending Tupperware parties?”

“Right. Except it’s black mortgage brokers in shiny suits selling variable-rate mortgages in the ghetto.¹⁴⁹ Or, Latino insurance salesmen pitching overpriced burial insurance after Mass in a Catholic service aimed at Latinos.”¹⁵⁰

“I may borrow your affinity-fraud idea. White people will be able to get it because they’ve all heard of Tupperware parties,” Rodrigo said. “Thanks for the tip. In conclusion, the real voice problem today is not turning up the megaphone for small subcategories of disempowered minorities, such as black women. It’s turning down the megaphone—or, at least, identifying it

144. *Id.*

145. *See supra* notes 138–43 and accompanying text.

146. *See supra* notes 138–43 and accompanying text.

147. On the rise of the broker class, see, for example, ACUÑA, *supra* note 139, at 386–421; and Delgado, *Corrido*, *supra* note 2, at 1713–14.

148. Interview with Bryan Adamson, Assoc. Professor of Law, Seattle Univ. Sch. of Law, in Seattle, Wash. (Feb. 12, 2010).

149. In affinity fraud, a sharp salesman takes advantage of in-group familiarity to reduce suspicion and sell a shoddy, overpriced product. *See id.* Much the same happens in Latino circles. *See, e.g.*, ARLENE DÁVILA, *LATINOS, INC.: THE MARKETING AND MAKING OF A PEOPLE* 1–4, 89–90, 109–12, 114–15 (2001) (discussing the role of Latinos in marketing to other Latinos).

150. On this broker class of Latinos, see, for example, ACUÑA, *supra* note 139; DÁVILA, *supra* note 149; and Delgado, *Corrido*, *supra* note 2, at 1714.

for what it is and learning to tune it out—for minorities who speak for the system.

“In other words,” he continued, “if we all understood our times better, we would realize that what is needed today is not endlessly refining smaller and smaller units of voice, speaking on behalf of beleaguered groups such as gay black single mothers.”

“I hope you are not going to say that these groups lack legitimate grievances,” I said.

“Of course not,” he said. “They do. They should raise their voices proclaiming those grievances forcefully. But today, an entirely different voice problem raises its head. And it’s the problem of all those minorities who agree to speak in a white voice, not make waves, be a role model, reassure their countrymen that they, too, can rise if they just work hard and bide their time. The ‘I’ve got my chances’ crowd.”¹⁵¹

“I see your point. These other voices are the mirror opposite of the isolated voices of small, deeply marginalized subgroups. But how new is this problem? Society has always had tokens, minorities whom the white establishment promoted and highlighted to prove to everyone how fair and just the system is.¹⁵² To inspire their brothers and sisters to aim high, even though few of them will ever get there.”¹⁵³

“False hopes are like school spirit in high school—powerful disciplinary devices that the powers-that-be use to keep things under control.¹⁵⁴ As for how serious the problem is, you see similar co-opting forces on a dozen fronts.”¹⁵⁵

“I see you have been thinking about this.”

“Many of us have,” he said. “I’m not the only one. We just haven’t put it all together. Take the English-only movement, for example.”¹⁵⁶

151. Everyday experience shows that self-promotion and careerism are common in every group, not just minorities. For a discussion of these concepts within outgroups, see Rachel E. Luft, *Intersectionality and the Risk of Flattening Difference: Gender and Race Logics, and the Strategic Use of Antiracist Singularity*, in INTERSECTIONAL APPROACH, *supra* note 65, at 100, 113.

152. On minority tokens and role models, see, for example, Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want To Be a Role Model?*, 89 MICH. L. REV. 1222 (1991).

153. See *id.* at 1228–30 (noting that this is mathematically impossible and a counsel of despair).

154. On school spirit as a device to siphon off youthful energy and divert attention from the authorities, see Todd A. DeMitchell & Mark A. Paige, Commentary, *School Uniforms in the Public Schools: Symbol or Substance? A Law & Policy Analysis*, 250 WEST’S EDUC. L. REP. 847, 869–70 (2010). On false hopes as a similar manipulative device, see Richard Delgado, *The Myth of Upward Mobility*, 68 U. PITT. L. REV. 879 (2007) (book review).

155. See Delgado, *supra* note 130, at 1313–14; *id.* app. (listing prison guards, teacher’s aides, and a host of other areas displaying the same disparity, which tends to increase as a region’s population approaches a tipping point).

156. On this currently popular movement, see, for example, Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV.

“It’s certainly going strong right now,” I said. “It’s part of the wave of nativism that’s sweeping the country and making things hard for our Latino friends.¹⁵⁷ But I’m not sure I see the connection between it and those minorities who are adopting the master’s voice.”

“Let’s see how I can put it,” he replied. “English-only is a metaphor for speaking in the white man’s voice. The voice of Rudyard Kipling and William Shakespeare. The establishment is eager for Latinos to take on the majority language and stop speaking their own. The English language, with words such as ‘hut,’ ‘villager,’ ‘illegal alien,’ ‘hordes of immigrants,’ ‘folk medicine,’ and the like, contains meanings that render the speaker of a non-English language one-down.¹⁵⁸ You cannot speak in that language without repudiating some of your heritage and a degree of self-respect.”¹⁵⁹

“Never mind terms like ‘greaser,’ ‘spic,’ ‘nigger,’ and ‘kike.’¹⁶⁰ And if the second generation, the children of the immigrants, neglects to learn Spanish, so much the better.¹⁶¹ That will render them unable to communicate with the elders—the grandparents, the *ancianos*—and learn stories about brutal Texas Rangers, lynching, and signs that said ‘No dogs or Mexicans.’¹⁶² They won’t learn about resistance figures like Gregorio Cortez or Joaquin Murrieta, who fought for their rights and avenged injustice to their communities.”¹⁶³

“Now I see the connection between the English-only movement and the debate over voice and co-optation,” I said. “You’re using both to highlight the powerful pull for a minority, especially one who can go either way, of agreeing to take on the role of a well-paid mouthpiece for the system. When a powerful white puts his arm around your shoulder and says, ‘You are one of us,’ it’s hard to say in response, ‘Actually, I’m not.’ If you do, you sound ungrateful or like one of those cultural nationalists who detests everything white. None of us would want that.”

269 (1992) (describing the history of official- and unofficial-language orthodoxy and its opposite—pluralism—in the United States).

157. See IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1997) [hereinafter IMMIGRANTS OUT!] (collecting essays on history and current forms of nativism and the nativist impulse).

158. See, e.g., Delgado, *Corrido*, *supra* note 2, at 1706, 1709.

159. *Id.*

160. See, e.g., DELGADO & STEFANCIC, *supra* note 97, at 47–76 (describing the history of these and similar epithets); Delgado, *Words That Wound*, *supra* note 39, at 143–48 (describing the harms that racial epithets can inflict on their victims); René Galindo & Jami Vigil, *Are Anti-immigrant Statements Racist or Nativist? What Difference Does It Make?*, 4 *LATINO STUD.* 419 (2006) (analyzing anti-immigrant statements through the lens of nativism). On hate speech and group defamation, see generally Jeremy Waldron, 2009 Oliver Wendell Holmes Lectures, *Dignity and Defamation: The Visibility of Hate*, 123 *HARV. L. REV.* 1596 (2010).

161. See Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 *HARV. C.R.-C.L. L. REV.* 297, 307–11 (2009).

162. *Id.* at 309.

163. *Id.* at 303, 309.

"Hard to draw the line," Rodrigo said, flinching a little. "We all make various accommodations with the system, as you call it.¹⁶⁴ I just hope we don't end up mouthpieces for it when it is doing the wrong thing."

"What year did you enter teaching, Rodrigo?"

"Nineteen ninety-four. Why do you ask?"

"Oh, something that a young Latino crit told me once at a conference.¹⁶⁵ Remind me, and I'll tell you later. For now, though, I'd like to hear more about intersectionality and its discontents."

D. POWER AND COERCION

"A further problem with intersectionality has to do with the times and the way that doctrine—like CRT in general—is failing to take account of current forces and circumstances.¹⁶⁶ Professor, have you ever wondered about the proper scale for understanding racism?"

"Do you mean whether it is, basically, a matter of individual frailties or transgressions or of large social forces, such as the search for profits?"¹⁶⁷

"I do," he said. "Some theorists see racism as a problem lying on the small scale of individual dynamics. You have cognitive theorists like Linda Krieger,¹⁶⁸ social psychologists like Joel Kovel,¹⁶⁹ and religious figures like

164. Rodrigo may have recoiled because he realized that every law professor, like himself, makes a living by teaching established legal doctrine and thereby legitimizing the establishment and its formal legal system. He or she participates in making admissions decisions and issuing grades, which engrain hierarchy and reify existing merit criteria. If he or she is a member of a racial minority group, he or she also serves to reassure others that the system is fair and that anyone who works hard can make it.

165. I had in mind a remark from a prominent young Latino scholar at a conference marking the twentieth anniversary of critical race theory. After the conclusion of a talk describing how liberal university administrators at elite schools had eliminated a number of white radical professors in the late sixties and early seventies to prepare for the wave of post-*Brown* minority students, the young scholar pointed out that around 1985, the good law schools began admitting minorities who were graduates of private undergraduate schools and presumably better steeped in white people's manners, ways, and aspirations. Before this time, the good schools accepted many more students from state universities like SUNY or Cal-State L.A. Interview with Anonymous, in Iowa City, Iowa (Apr. 2, 2009).

166. See *supra* notes 19–57, 77–84, 130–65 and accompanying text.

167. Advocates for this view include ACUÑA, *supra* note 139 (positing a neocolonial view of American history); ROBERT L. ALLEN, *BLACK AWAKENING IN CAPITALIST AMERICA: AN ANALYTIC HISTORY* (1969) (considering race as a function of class relations); DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* (6th ed. 2008) (same); ROBERT BLAUNER, *RACIAL OPPRESSION IN AMERICA* (1972) (positing a neo-Marxist view of race relations); and DARDER & TORRES, *supra* note 51 (same).

168. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161 (1995) (depicting race as a propensity to organize experience in terms of certain unconscious expectations or schemas).

169. JOEL KOVEL, *WHITE RACISM: A PSYCHOHISTORY* (1984) (describing the psychodynamics of white racism, including unconscious association of dark skin with dirt, danger, and feces).

Martin Luther King.¹⁷⁰ What these theorists have in common is that they identify the source of racism in individual error, habit, a dark psychological force, or sin.”

“And then you have figures like Derrick Bell, Rodolfo Acuña, or Robert Allen who see racism as a product of large-scale material forces. For them, the dominant group—in this case, whites—demonizes a minority group in order to exploit its labor or lands.¹⁷¹ In my opinion, both types of explanation are necessary to explain such a complex phenomenon as racism.”

When he nodded, I continued: “And I gather that the debate over intersectionality falls somewhere along this continuum?”

“It does—on the micro side. By emphasizing how things look to relatively small groups, it seeks to avoid what it considers the error of making sweeping judgments and generalizations. It aims for contextualization, makes a virtue of smallness, of examining the experiences of marginalized groups lying at the intersection of two or more large ones, like black women.”¹⁷²

“And I gather that you think this is a mistake?”

“Not entirely. Nothing is wrong with examining the racial experiences of small groups. Intersectionality is an effort, as one commentator put it, to ‘get the facts right.’”¹⁷³

“Then, what is your quarrel with it?”

“Nothing requires that we attend to any particular set of facts,” Rodrigo replied. “The universe is a multitude of facts. Every conceivable group has some facts on its side. No group is likely to be entirely content with the world, finding it entirely just. But as you and I were discussing once before, even with relatively large groups that everyone agrees have suffered mistreatment, intersectionality and essentialism trace a pattern that expands and contracts with the times and the social forces impinging on them.”¹⁷⁴

“So, it’s not entirely about the facts,” I said. “Instead, it’s about the facts that you choose to emphasize at a given moment.”

“Right. At times, groups will find it useful to ally with the next-larger group—say, black women uniting with women at large—to get something

170. MARTIN LUTHER KING, JR., *Letter from Birmingham City Jail*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 289 (James Melvin Washington ed., 1986) (describing a religious and ethical basis for nonviolent protest).

171. See *supra* notes 21, 139, 167 and accompanying text.

172. See *supra* notes 58–76 and accompanying text (introducing and defining intersectionality).

173. See Deborah Jones Merritt, *Constructing Identity in Law and Social Science*, 11 J. CONTEMP. LEGAL ISSUES 731, 732–34 (2001) (noting that social scientists realize that ignoring an important dimension of a population can lead to error and mentioning the case of intersectional groups).

174. Delgado, *Sixth Chronicle*, *supra* note 2, at 658–73 (discussing the intersectional impulse and the manner in which it leads to institutional subdivision).

done that all of them share an interest in accomplishing. At other times, they will need to go it alone. They may even find that the larger group—white women—is their main obstacle, on occasion.”¹⁷⁵

“So, essentialism and common cause will be in order at certain times and for certain campaigns, while at other times, hunkering down with others just like you and gathering your forces will be what is called for.”

“Your memory is good, Professor. Which brings me to the situation today. And for me at least, it’s an easy call: the times call for broad, united action—resistance, really—not small-group skirmishes in pursuit of particularized aims and objectives affecting just a few.”

“And this has to do with the times, I gather?”

“It does,” he said. “All the dangerous currents today take the form of large, impersonal forces like globalization,¹⁷⁶ outsourcing,¹⁷⁷ and nativism—the war on differences of all kinds and the extreme concern with policing our borders.”¹⁷⁸

“So you think that the few idiosyncratic whites who detest minorities who evince two or three unlucky qualities in combination are, by comparison, not-as-dangerous forces?”

“I do not, and I’ll explain why in a minute. For now, let’s just note that focusing on the micro—on what is going on at the intersection of two, three, or four categories containing smaller and smaller numbers of people—while important, is not the major task for a scholar of race and inequality today. Most oppression, these days, emanates from broad social forces, not quarrels among friends and close relatives. MacKinnon in one of her replies pointed out that she didn’t write of an essential woman who just happened to be white; rather, she was writing about experiences all women suffer, including black women, lesbians, and others at the intersections of different categories.¹⁷⁹ Those experiences had to do with male power, patriarchy, and the way men socially construct women for their own convenience, often sexual.¹⁸⁰ They affect all women, however situated, like a scythe cutting down flowers—the tall ones as well as the short ones.”¹⁸¹

“And you think something similar is true for minorities and race?”

175. *Id.*

176. *See, e.g.,* DELGADO & STEFANCIC, *supra* note 19, at 111–12 (on globalization); William Scheuerman, *Globalization*, STANFORD ENCYCLOPEDIA PHIL. (June 4, 2010), <http://plato.stanford.edu/entries/globalization/> (same).

177. *See, e.g.,* DELGADO & STEFANCIC, *supra* note 19, at 111–12; Robert B. Reich, *Op-Ed., Entrepreneur or Unemployed?*, N.Y. TIMES, June 2, 2010, at A25.

178. *See* Robert Koulisch, *Blackwater and the Privatization of Immigration Control*, 20 ST. THOMAS L. REV. 462 (2008) (describing the militarized border and the increasing role of technology and high-tech hardware in immigration enforcement); Juan F. Perea, *Introduction to IMMIGRANTS OUT!*, *supra* note 157, at 1, 1–5.

179. *See* MacKinnon, *White Woman*, *supra* note 62, at 15–16.

180. *Id.*

181. *Id.*

"I do," he said. "The rhetoric of a postracial society is relegating all of us to the margins and silencing our voices.¹⁸² Material changes in the structure of the workplace are weakening whatever leverage we once had—since we now have even less to bargain with—and widening the gap between us and whites in every respect—educationally, in terms of income, access to health care, family wealth, even political power."¹⁸³

"And these trends are intensifying in parts of the country that are approaching a demographic tipping point."

"They are," he agreed.¹⁸⁴ "Focusing on the peculiar needs of a small subgroup of minorities or women can set you up to be blindsided by larger forces that you did not see coming. While you are demanding a reckoning from your sisters and brothers, currents may be gathering that will sweep all of you aside."

"Sobering," I said. "But you implied that even at the individual level, intersectionality is not a useful way to see things."

"It may have been useful in its early years. And it may be a good idea to keep its basic cautions in mind today. It reminds you to check, from time to time, to see if your tools and concepts are leaving somebody out.¹⁸⁵ Even so, some reasons give me pause about the basic premise."

"And they are . . . ?"

1. Intersectionality and the Social Science of Race

"For one thing, the psychological theory that it presupposes is just plain wrong. Everything we know about race—at the individual level, I mean—tells us that it doesn't work that way. No one in the real world"

"No one?"

"Well, hardly anyone. I shouldn't overstate. I like the way you keep me honest, Professor. What I meant to say is that everything we know about the racist impulse tells us that it does not often focus on intersectional targets.¹⁸⁶ Racism is a psychosocial dislike of the unfamiliar, the different. It is linked

182. See BROWN ET AL., *supra* note 88 (critiquing the recent insistence on color-blind decisions); Michele Tracy Berger & Kathleen Guidroz, *Introduction to INTERSECTIONAL APPROACH*, *supra* note 65, at 1, 12 ("[T]here are times when race should be the only category under consideration."); Luft, *supra* note 151, at 109–14 (noting that sometimes it is appropriate to resist racial oppression en masse and not in small groups).

183. On the widening gap between the haves and the have-nots, see, for example, Delgado, *supra* note 154, at 879–80, 900–07.

184. See, e.g., Delgado, *supra* note 130 (documenting how this is taking place in one state).

185. See Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory out of Coalition*, 43 STAN. L. REV. 1183, 1189–90 (1991) (urging her readers to "ask the other question" (internal quotation marks omitted)).

186. See, e.g., GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (25th Anniversary ed. 1979) (classic work describing broad theories of prejudice and its source in human nature and interaction).

with the authoritarian personality.¹⁸⁷ It prefers bright lines—we versus they. Good versus evil. It enables the racist to believe himself superior to others, to maintain a class advantage over them, to feel himself the possessor of righteousness, morality, and prestige—all at the expense of those others. Sometimes it even takes a biblical dimension.”¹⁸⁸

“So, you are saying that it is seldom a quirky bias a person has against black women only, or Asian men only, or gay Muslims who speak with a certain kind of accent.”

“No, it tends to be sharper and cleaner than that. Social science tells us that it is in the nature of the racist impulse to want bright lines, not complex, situational categories that shift from week to week or month to month.”¹⁸⁹

After a pause he added, “And it often has a material base,¹⁹⁰ meaning that it is unlikely to track small, complex identity categories. It may track job categories, immigrant status, or some implicit ‘tipping point’ at which whites will move out of a residential neighborhood.¹⁹¹ But the lines will reflect material interests, not the complex constellations of traits that intersectional theorists highlight and champion.”

2. “A Peculiar Intensity”

“Let’s go back to your point about psychology,” I said. “I wanted to ask you about the debate itself, as well as the cast of characters. Has it struck you that the entire subject exhibits a peculiar kind of intensity, with all those replies and takings of oaths and symposium issues and battle lines drawn between former allies? Could social dynamics be playing a role there, too?”

“I’ve wondered about that,” he said. “Although scholars of different backgrounds have weighed in, the main proponents have shown little interest in expanding the analysis to nonblack groups. When other groups

187. On the authoritarian personality, see, for example, T.W. ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* (Norton Library 1969) (1950); and BRUNO BETTELHEIM & MORRIS JANOWITZ, *DYNAMICS OF PREJUDICE: A PSYCHOLOGICAL AND SOCIOLOGICAL STUDY OF VETERANS* (1950).

188. See *Genesis* 9:20–27 (describing the curse of Ham, one of Noah’s sons, for beholding the nakedness of his father); DAVID M. GOLDENBERG, *THE CURSE OF HAM: RACE AND SLAVERY IN EARLY JUDAISM, CHRISTIANITY, AND ISLAM* (2003) (explaining biblical tradition according to which dark people are cursed because of Ham’s aforementioned behavior).

189. See ADORNO ET AL., *supra* note 187 (classic analysis of the authoritarian personality type, including a preference for security, power, and bright lines, including the racial kind); BETTELHEIM & JANOWITZ, *supra* note 187 (same).

190. See *supra* notes 167–71 and accompanying text.

191. See BELL, *supra* note 167, at 468–69 (explaining how a critical percentage of blacks moving into a neighborhood will often precipitate white flight); see also Boris I. Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 *YALE L.J.* 1387 (1962) (same).

have signed on, it has been with the tacit understanding that the main topic of conversation will be black women and their troubles.”¹⁹²

“Do you have a theory as to why this is so?”

“I do. What do you know, Professor, about the marriage rate among highly educated black women?”

“I haven’t seen any figures, but I have the impression that it’s low.¹⁹³ Educated women across the board find it more difficult to find mates than their sisters without a college degree.¹⁹⁴ Men marry down.¹⁹⁵ It’s one of our least lovely traits. Highly educated women scare us. A male doctor, for example, is apt to hitch up with a nurse, not another physician. This can leave women at the top of the occupational ladder high and dry.”¹⁹⁶

“Might intersectionality serve as a psychic compensation for an inability to find a mate?”

When I must have looked puzzled, he explained: “Some professional-class women, particularly academics of color, remain unmarried their entire lives.¹⁹⁷ So perhaps, on some level they are searching for an internal family, a two-ness inside themselves and their own bodies.¹⁹⁸ They are black. They are women. Internally, within themselves, I mean. They contain, inside, a kind of two-ness. Each woman is a pair, a double, a twosome, even without a mate. I don’t mean that this is its only appeal, just that it may enhance the attraction for some of intersectionality’s proponents.”

“Child-rearing gets complicated, too,” I added. “Not to mention adoption.”¹⁹⁹

“Only because society imposes certain rules and expectations. Many single women are perfectly capable of raising children by themselves. But

192. See Jennifer C. Nash, *Re-thinking Intersectionality*, FEMINIST REV., June 2008, at 1, 4, 8 (observing that intersectionality has been mainly interested in one intersection: race and gender, and black women in particular).

193. See, e.g., Sam Roberts, *Black Women See Shrinking Pool of Black Men at the Marriage Altar*, N.Y. TIMES, June 4, 2010, at A12 (discussing hurdles facing black women pondering marriage).

194. See Maureen Dowd, *What’s a Modern Girl To Do?*, N.Y. TIMES, Oct. 30, 2005 (Magazine), at 50, 53; Sheba R. Wheeler, *The Love Connection: Dozens of Books Give Advice on Finding a Soul Mate*, DENVER POST, Aug. 17, 2004, at F01, available at 2004 WLNR 1011918 (discussing the dynamics of selecting a mate).

195. See Dowd, *supra* note 194, at 53.

196. See *id.*; Wheeler, *supra* note 194.

197. See, e.g., Brian Alexander, *Marriage Eludes High-Achieving Black Women*, MSNBC.COM, Aug. 13, 2009, http://www.msnbc.msn.com/id/32379727/ns/health-sexual_health/ (citing Yale researchers Natalie Nitsche and Hannah Brueckner, among others, and noting that the marriage rate of professional-class black women has declined vis-à-vis that of their white female counterparts in recent years); see also *supra* note 194 and accompanying text (noting the same tendency among the highly educated).

198. Alexander, *supra* note 197 (noting that some of the black women professionals interviewed were satisfied living without a mate but that others were disappointed).

199. See Patricia J. Williams, *Spare Parts, Family Values, Old Children, Cheap*, 28 NEW ENG. L. REV. 913, 914 (1994) (commenting on the many barriers the social-work system places in the way of unconventional adoption).

unmarried black women aren't merely at risk of poor treatment at the hands of social workers and adoption agencies. They find themselves at a material disadvantage under a multitude of laws and social arrangements, ranging from income taxation to housing mortgages to social security and widow's benefits. Inheritance law disadvantages them, too, making accumulation of wealth difficult.²⁰⁰ It's all really quite unfair."

"I read an article recently by a famous feminist who argued that the family is a metaphor and template for a dozen social arrangements, ranging from the nation to the legal system and our system of finance.²⁰¹ No wonder it exerts such a powerful force."

He paused to jot something down. Then: "And no wonder the sisters complain."

"So, Rodrigo," I continued, "even if intersectional reasoning is calculated to do little to advance a radical agenda, it does identify a legitimate complaint of those lying at a particular intersection, does it not?"

As though on cue, the waiter arrived, brown vinyl notebook in hand. "Would you gentlemen like the check?" he asked. Rodrigo and I looked at each other. I could see he was not quite finished, but he nodded yes. "Stay as long as you like," the waiter said. "We don't need the table. Incidentally, did you know that the owner of the restaurant is a woman of color?"

When we both looked up in surprise, he added, "Yes, she's a Sicilian who was raised in southern Italy and is married to an African American. They're both here in the afternoon, if you'd like to meet them sometime."

As he departed to ring up our bill, Rodrigo said, "Sounds like she and I have a lot in common.²⁰² I hope I get to meet her sometime."

"Me, too," I added. "They sound like a power couple, like you and Giannina." Then, after a pause, "Where were we?"

3. White Privilege

"I have just one more point," Rodrigo said. "I don't want to be too hard on the backers of intersectionality. They did important work in their time. But a final problem with the general theory is that it focuses all the attention on the victims of intersectional forces and categories. In doing so, it takes the emphasis off the perpetrators who devise and manipulate the categories

200. See Patricia Hill Collins, *It's All in the Family: Intersections of Gender, Race, and Nation*, HYPATIA, Summer 1998, at 62, 73-74, reprinted in DECENTERING THE CENTER: PHILOSOPHY FOR A MULTICULTURAL, POSTCOLONIAL, AND FEMINIST WORLD 156, 166-67 (Uma Narayan & Sandra Harding eds., 2000) (explaining how society likens many arrangements to the traditional-family ideal).

201. *Id.*

202. See Delgado, *Chronicle*, *supra* note 2, at 1358, which describes Rodrigo as a tall, lanky man of indeterminate ethnicity with olive skin and curly hair. His father was an African American serviceman doing a tour of duty in Italy, his mother an Italian woman. *Id.* With interracial parentage, Rodrigo identifies as both Latino and black. *Id.*

and then refuse to do anything to adjust them when they are doing manifest injustice.”

“I gather you are referring to whites?”

“Yes—and to white privilege.²⁰³ Which, as we mentioned one time, is the opposite side of the coin of discrimination and exploitation.”²⁰⁴

“A double-headed hydra, as our friend Adrienne Davis calls it,” I said.²⁰⁵ “She and her coauthor Stephanie Wildman were referring to the system of favors, courtesies, exchanges, and tacit agreements that enable whites and their friends to get ahead.²⁰⁶ A teacher writes a thoughtful three-page recommendation letter for a favorite white student with a spotty record. The letter enables the student, who is the son or daughter of a prominent suburban family, to get into a top school. The teacher does nothing similar on behalf of the Latino or black student sitting in the back row who shows occasional flashes of real talent.”²⁰⁷

“Peggy McIntosh has a list of forty-six privileges that whites can call upon.²⁰⁸ She calls this a knapsack of privileges, many of which most white people are entirely unaware of.²⁰⁹ They go through life benefiting from them and thinking that’s just the way things are.”²¹⁰

“But back to your point,” I said, conscious that the waiter might be arriving any minute. “Intersectionality may well take your eye off white privilege. But does it do so in any other than the tautologous way any topic takes your eye off another?”

“I should have explained myself,” Rodrigo said. “I mean that focusing on ever and ever smaller groups of blacks or any other disadvantaged minority takes your eye off what wealthy and empowered whites are doing to

203. See, e.g., CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 289–335 (Richard Delgado & Jean Stefancic eds., 1997) [hereinafter CRITICAL WHITE STUDIES]; Stephanie M. Wildman, *Privilege in the Workplace: The Missing Element in Antidiscrimination Law*, in PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 25, 27–28 (Stephanie M. Wildman ed., 1996); Stephanie M. Wildman & Adrienne D. Davis, *Making Systems of Privilege Visible*, in PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA, *supra*, at 7, 17–22.

204. See Delgado, *Eleventh Chronicle*, *supra* note 2, at 96–97.

205. See Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, in CRITICAL RACE THEORY: THE CUTTING EDGE, *supra* note 46, at 657, 661 (quoting Adrienne D. Davis, *Toward a Post-essentialist Methodology*; or, *A Call to Countercategorical Practices* (1994) (unpublished manuscript) (explaining how white privilege and black oppression work together to reinforce racial hierarchy and power)).

206. See *id.*

207. See RICHARD DELGADO, *Ten Arguments Against Affirmative Action—How Valid?*, in THE LAW UNBOUND!: A RICHARD DELGADO READER 365, 373–74 (Adrien Katherine Wing & Jean Stefancic eds., 2007).

208. See Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming To See Correspondences Through Work in Women’s Studies*, in CRITICAL WHITE STUDIES, *supra* note 203, at 291, 293–94.

209. *Id.*

210. *Id.*

feather their own nests. Eighty percent of all wealth in this country is inherited, not earned.²¹¹ As Oliver and Shapiro have shown, black families have almost no wealth, compared to white families, which have, on average, accumulated assets worth over sixty-five thousand dollars.²¹² Unless one dismantles both systems, white privilege and outright oppression of minorities, workers, and the poor, class and racial lines will remain the way they are forever.”

Just then the waiter arrived with the check. It was time for us to wind up. Reaching for my credit card I said, “Rodrigo, I’d like to thank you for giving voice to a concern I had long felt, if only dimly. The abstract, almost other-worldly quality of much critical race scholarship has troubled me all along. The conceptual incoherence and lack of attention to social power and coercion that you have pointed out today may be signs of broader problems plaguing the movement and its theories. I’ll be interested to see what you say in your new book.”

Flash! Quick as a magician, Rodrigo had whipped out his credit card and deposited it on the waiter’s tray. “Oh no, you don’t,” I said, quickly extracting my own and depositing it on top of his, much to the amusement of the watching waiter.

“Why don’t you two gentleman split it,” he said. “That way, the Professor can have some left over for a class party when I take his course next semester.”

Rodrigo smiled at his solution. “Maybe you can use my book. It should be ready by then. That way, I’ll have some left over, too.”

V. CONCLUSION

As I rode the long cab trip back to Teresa’s and my condo, I reflected on what we had said. I shared Rodrigo’s misgivings about critical race theory, which I had thought for some time had been going soft, perhaps for lack of serious internal criticism and self-examination. With respect to his first two tenets, narrative scholarship and coalitions, I wondered whether the reason might have had to do with their ready acceptance and popularity. The general public, with a few notable exceptions,²¹³ readily embraced these two softer approaches. Enjoying the acclaim, might the race-crits have failed

211. See Delgado, *supra* note 154, at 901 n.138 (citing DALTON CONLEY, BEING BLACK, LIVING IN THE RED 47 (1999); Laurence J. Kotlikoff & Lawrence H. Summers, *The Role of Intergenerational Transfer in Aggregate Wealth Accumulation*, 89 J. POL. ECON. 706 (1981); Daria Roithmayr, *Them That Has, Gets* (unpublished manuscript) (on file with author)).

212. See MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL EQUALITY 98–99 (2d ed. 2006) (analyzing racial differences in family wealth and their social consequences).

213. See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997) (criticizing critical race theory and similar movements for embracing irrationalism).

to push them beyond their original perimeters, so that they failed to expand analytically or even to keep up with the times?²¹⁴

With intersectionality, too, I thought his critique was largely correct, although his attribution of a reason for its appeal to some of the founders gave me pause. I did share his concern that preoccupation with the voices of smaller and smaller groups accompanied an inward tendency that threatened to sidetrack the movement and shift its attention from large social forces of the type that had called it forth originally. I recalled that Rodrigo had mentioned that he might be thinking of developing an entirely new approach to race and looked forward to hearing more about it.

I wondered whether it might have something to do with the framework he had proposed in our conversation in Joe's barbershop about California²¹⁵ and whether it could herald, at last, the merging of two great antihegemonic traditions from opposite sides of the world.²¹⁶ I looked forward to seeing his new book and sleepily made a mental note to ask him to send me a draft if he wanted comments. I thought how lucky I was to enjoy the company of students, like the waiter who wanted to take my course, and ex-students like Rodrigo, whose active, probing minds challenged mine. I thought how much Teresa would enjoy hearing about the latest from our brilliant young friend.

My reverie didn't last long. "Here we are," said the cabbie, none too politely. "That's the address you said, Professor."

Paying the bill, I opened the door and mounted the steps to my condo, thinking that Teresa and I must look for an excuse to meet with Rodrigo again soon.

²¹⁴. I wondered whether the cult of personality, which Rodrigo had been tactfully describing, and the movement's solipsistic, inward turn might have played a part as well.

²¹⁵. See Delgado, *supra* note 130 (describing neocolonial trends at work in newly multiracial states).

²¹⁶. Viz., the postcolonial tradition, in which scholars analyze the struggle of previously colonized societies to free themselves from the colonial yoke, and the American civil-rights movement, which analyzes the situation of domestic minorities.