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## RODRIGO'S REAPPRAISAL

RICHARD DELGADO\* & JEAN STEFANCIC\*\*

### INTRODUCTION: IN WHICH RODRIGO DROPS IN TO ADDRESS AN UNLIKELY PAIR OF TOPICS

I was toiling away at the dulllest task imaginable in my office on a dark winter day when a knock on my door startled me out of my torpor.

“Rodrigo!”<sup>1</sup> I exclaimed. “It’s great to see you. Come in. What brings you here?”

The smartly dressed middle-aged man of lean build gave me a smile, stepped inside, and said, “I’m picking up Gus. His program is off for three days, and he wants to spend it with Giannina and me, not in the dorm.”<sup>2</sup>

“You didn’t fly, I hope.”

“No, it’s still too dangerous.<sup>3</sup> And his dorm RA wouldn’t have allowed it. So I drove here, and”—he looked at his watch—“we were planning to head

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<sup>1</sup> See Richard Delgado, *Rodrigo’s Chronicle*, 101 YALE L.J. 1357 (1992) (book review) [hereinafter Delgado, *Chronicle*], for an introduction of Rodrigo. Born in the United States, Rodrigo and his family moved to Italy when his father, an African American serviceman, was assigned to an outpost there. Rodrigo attended grade and high school at the base school, then graduated with honors from an Italian university (“the oldest in the world, Professor”) and law school. When the reader meets him, he has returned to the States to investigate LL.M. programs in order to prepare for a career in law teaching. In the Professor’s office, he discusses his plans and ideas, including affirmative action, the decline of the West, and many other matters. Both he and his narrator and straight man, “the Professor,” are fictional characters, composites of persons we have known, not to be identified with any actual person in particular.

<sup>2</sup> See Richard Delgado, *Children’s Rights to a Livable Future*, 71 ALA. L. REV. 261, 263-65, 285-89 (2019) [hereinafter Delgado, *Livable Future*], for an introduction of “Gus,” Rodrigo’s thirteen-year-old son, who recently won admission to a four-week program for high schoolers at a dorm at the Professor’s university. Giannina, a playwright and legal services lawyer, is Rodrigo’s wife and light of his life. See Richard Delgado, *Rodrigo’s Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133, 1137 (1993) (book review) [hereinafter Delgado, *Fourth Chronicle*] (introducing Giannina).

<sup>3</sup> This Chronicle is set during the time of the COVID-19 pandemic, when flying presented a serious risk of contagion.

back an hour from now.<sup>4</sup> What's that you are working on?" He pointed at an ominous-looking pile of papers, full of charts and graphs, littering my desk.

"I've been cleared to teach my class next semester online—one of the few benefits of aging, it seems. But the central administration sent me this questionnaire asking for a breakdown of how I plan to use my time: What percentage for online instruction, how much for in-person? How much of the online portion will be synchronous and how much asynchronous? Any of it recorded? How much will proceed by question and answer, how much by lecturing? Any in-class writing assignments? How many one-on-one conferences? How many small group sessions? Have I received training in Zoom or some other online modality?"

Rodrigo gave me a sympathetic look. "My school puts us through something like that, but it's not nearly so elaborate. At yours, they seem to expect you to know all this in advance, with no room for change as the occasion demands."

"Apparently. And look at all these categories here," I said, pointing at a long column down the side of a page with blanks for my answers. "Some of them, I haven't even heard of. Others don't apply to law school at all. How will my instruction produce 'measurables' or help advance students' 'identity formation'? I suppose I'll just have to guess."

"Try putting yourself in the place of an administrator who knows little about law teaching. Then answer with their bureaucratic needs in mind. That way you won't have to change anything you do. Just describe it in admin-talk, full of words like targets, feedback, professional development, and measurables."

"And if you don't know the answer," he continued, "just guess or make one up. You're basically trying to fit your reality—your instruction and goals—into someone else's category of things that, for some reasons you cannot easily fathom, are important to them." After a short pause, he added, "Actually, I was hoping to talk to you about one aspect of that very subject—categorization. That and critical race theory. Do you have a minute?"<sup>5</sup>

"Of course. What got you to thinking about categories? It's not the kind of thing we've discussed over the years.<sup>6</sup> And how does critical race theory fit in?"<sup>7</sup>

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<sup>4</sup> Rodrigo teaches at a law school in the state next to the Professor's. See Richard Delgado, *Rodrigo's Corrido: Race, Postcolonial Theory, and U.S. Civil Rights*, 60 VAND. L. REV. 1689, 1742 (2007) (discussing his new job).

<sup>5</sup> The two characters have had many discussions, see *infra* note 6, but never about the role of research tools or categories, much less the abovementioned surveys for assessing teaching outcomes. For a scorching critique of the latter, see Karin Brown, *Anti-Intellectualism in Academia and Learning-Oriented Assessment*, AM. ASS'N OF UNIV. PROFESSORS, <https://www.aaup.org/article/anti-intellectualism-academia-and-learning-oriented-assessment> [https://perma.cc/P9JR-ZK3G] (last visited Apr. 5, 2021).

<sup>6</sup> For examples of the previous discussions between Rodrigo and the Professor, see, for example, Delgado, *Chronicle*, *supra* note 1 (discussing affirmative action and decline of the West); Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993) (discussing law and economics); Richard Delgado, *Rodrigo's*

“It’s indeed a new subject for us, so let me explain. I’m sure you read how President Donald Trump criticized critical race theory in an hour-long speech at the National Archives Museum<sup>8</sup> and followed that up a few days later with an Executive Order forbidding it in government contracting and training?”<sup>9</sup>

“I did. He described the entire school of thought in scathing terms.<sup>10</sup> I wondered if the teaching ban was constitutional.”<sup>11</sup>

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*Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CALIF. L. REV. 387 (1993) (book review) (discussing love); Delgado, *Fourth Chronicle*, *supra* note 2 (discussing legal rules); Richard Delgado, *Rodrigo’s Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581 (1993) [hereinafter Delgado, *Fifth Chronicle*] (discussing critique of normativity); Richard Delgado, *Rodrigo’s Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993) (discussing relations between men and women); Richard Delgado, *Rodrigo’s Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721 (1994) (discussing Enlightenment-style political theory); Richard Delgado, *Rodrigo’s Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994) (discussing black crime); Richard Delgado, *Rodrigo’s Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379 (1994) (discussing rule of law); Richard Delgado, *Rodrigo’s Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995) (discussing affirmative action); Richard Delgado, *Rodrigo’s Eleventh Chronicle: Empathy and False Empathy*, 84 CALIF. L. REV. 61 (1996) (discussing clinical theory); Richard Delgado, *Rodrigo’s Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667 (1997) (discussing desperately poor border settlements); Richard Delgado, *Rodrigo’s Thirteenth Chronicle: Legal Formalism and Law’s Discontents*, 95 MICH. L. REV. 1105 (1997) (discussing legal formalism); 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*] (discussing narrative jurisprudence); 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) (discussing interracial indifference). During this period, the brash, talented Rodrigo earns his LL.M. degree and embarks on his first teaching position. Delgado, *Final Chronicle*, *supra*, at 547 & n.4.

<sup>7</sup> For a discussion of this school of thought, see, for example, RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (3d ed. 2017).

<sup>8</sup> *Remarks by President Trump at the White House Conference on American History*, WHITE HOUSE (Sept. 17, 2020, 2:54 PM) [hereinafter *National Archives Museum Remarks*], <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-white-house-conference-american-history> [<https://perma.cc/5ALQ-4VYF>] (charging that critical race theory teaches that “concepts such as hard work, rational thinking, the nuclear family, and belief in God were not values that unite all Americans, but were instead aspects of ‘whiteness,’” that it “is offensive and outrageous to Americans of every ethnicity,” and that it “is a form of child abuse”).

<sup>9</sup> See Exec. Order No. 13,950, *Combating Race and Sex Stereotyping*, 85 Fed. Reg. 60,683, 60,683-85 (Sept. 22, 2020) (to be codified at 3 C.F.R.) (lamenting that the new (critical) paradigm is itself hierarchical, contrary to individual rights, deems America irredeemably racist, and is a “malign” ideology that falsifies the country’s honorable history). While the President’s speech mentions critical race theory by name, see *National Archives Museum Remarks*, *supra* note 8, the Executive Order does not.

<sup>10</sup> See *National Archives Museum Remarks*, *supra* note 8.

“If not unconstitutional, it certainly violated academic freedom.<sup>12</sup> I brought copies of both documents,” he said, unzipping his backpack and retrieving a stack of papers. “And plenty of cappuccino from the Starbucks downstairs. Do you have time?”

“For you, always,” I said, motioning toward my office couch. “Have a seat. I’m eager to hear your thoughts about classification and critical race theory. Even if I don’t see the connection.”

I. IN WHICH RODRIGO OUTLINES A THEORY OF LEGAL CLASSIFICATION AND EXPLAINS ITS RELATION TO CRITICAL THOUGHT

He placed one of the coffee cups on the desk in front of me (“Your favorite, Professor, cappuccino with frothed milk”) and began:

“I was rereading a classic article in *Stanford Law Review* in which two scholars posit that commercial research tools inhibit legal change.”<sup>13</sup>

“I know that article,” I said. “They pointed out how everyday systems, like the Library of Congress subject heading system,<sup>14</sup> the Westlaw system of headnotes for case reports, with a number assigned to each point,<sup>15</sup> and the *Index to Legal Periodicals*,<sup>16</sup> which classifies every law review article according to its subject matter, may make legal research easier. But they also make it hard to formulate new ideas or break with precedent.<sup>17</sup> They gave a number of examples.”<sup>18</sup>

“And you probably know that a few years later the same authors considered whether computerized searching, which was just then coming into use, reduced the stranglehold of research categories.<sup>19</sup> Their answer was no, since a searcher is apt to enter search terms that correspond to concepts with which the searcher is familiar from experience or past searches.<sup>20</sup> New thought replicates the old kind without our noticing how this happens.”

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<sup>11</sup> See Combating Race and Sex Stereotyping, 85 Fed. Reg. at 60,685-88 (ordering end to mandatory diversity training in federal agencies and contractors); see also *infra* notes 27-28 and accompanying text (discussing President Biden’s repudiation of Trump’s Executive Order).

<sup>12</sup> See, e.g., ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE (2012) (discussing origin and limits of academic freedom).

<sup>13</sup> Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STAN. L. REV. 207 (1989).

<sup>14</sup> *Id.* at 210-12.

<sup>15</sup> *Id.* at 214-16.

<sup>16</sup> *Id.* at 212-13.

<sup>17</sup> *Id.* at 216-19.

<sup>18</sup> *Id.* at 219-20.

<sup>19</sup> Richard Delgado & Jean Stefancic, *Why Do We Ask the Same Questions? The Triple Helix Dilemma Revisited*, 99 LAW LIBR. J. 307 (2007).

<sup>20</sup> *Id.* at 317-24.

“I’m familiar with that one, too,” I said. “And many information scientists seem to have been grappling with this problem ever since.<sup>21</sup> We all want to believe we are free in our thinking. But the closer we look, the more we see that information technologies, themselves based on existing pathways, dictate the range of what we find. I assume you have a theory for how this happens and how we can transcend these limitations?”

“I do. Suppose you are a lawyer seeking new solutions to a recurring problem such as evictions from public housing for the poor. Familiar research strategies might easily lead you to several solutions, none of which work because the other side has already found answers to them. Your situation requires a new approach, but if you merely carry out more searches using the same criteria, you are unlikely to find what you need. Even terms like ‘gentrification’ or ‘renters’ strikes’ might not have found their way into research systems yet. Much less ones like ‘housing developments—resistance to.’”

After a pause, my young friend gave me a searching look and added: “But that’s not all, Professor. Bad ideas can replicate themselves just as easily as their more conventional counterparts. They can even convert good ones into bad.”<sup>22</sup>

“This I want to hear. I assume that this is where critical race theory comes in.”

“It is. You see, legal information is not merely neutral, like the air.<sup>23</sup> Many of our colleagues think, like Aristotle, that knowledge is always good—or, at least neutral.<sup>24</sup> With the kind that arrives via commercial indexing systems, it’s easy to think so, if only because it saves you a lot of effort.”

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<sup>21</sup> See, e.g., Nicholas F. Stump, *Following New Lights: Critical Legal Research Strategies as a Spark for Law Reform in Appalachia*, 23 AM. U. J. GENDER SOC. POL’Y & L. 573 (2015); Yasmin Sokkar Harker, *Legal Information for Social Justice: The New ACRL Framework and Critical Information Literacy*, 2 LEGAL INFO. REV. 19 (2016-2017); Grace Lo, “Aliens” vs. Catalogers: Bias in the Library of Congress Subject Headings, 38 LEGAL REFERENCE SERVS. Q. 170 (2019); Julie Krishnaswami, *Critical Information Theory: A New Foundation for Teaching Regulatory Research*, in THE BOULDER STATEMENTS ON LEGAL RESEARCH EDUCATION 175 (Susan Nevelow Mart ed., 2014); Nicholas Mignanelli, *Critical Legal Research: Who Needs It?*, 112 LAW LIBR. J. 327 (2020). Several writers have pointed out that artificial intelligence and algorithms suffer many of the same shortcomings. See, e.g., SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM (2018); Alex Hanna, Emily Denton, Andrew Smart & Jamila Smith-Loud, *Towards a Critical Race Methodology in Algorithmic Fairness*, 2020 PROC. CONF. ON FAIRNESS ACCOUNTABILITY & TRANSPARENCY 501.

<sup>22</sup> See *infra* Sections II.B, II.C (discussing how this can happen).

<sup>23</sup> The following passage constitutes the mandatory “map” of the Article that editors and many readers have come to expect.

<sup>24</sup> See *Aristotle’s Ethics*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/aristotle-ethics> [<https://perma.cc/4KVG-YZCB>] (last updated June 15, 2018) (noting that for Aristotle to know the good is to will it).

"It's certainly more convenient, with everything organized under headings that you can readily access. Incidentally, the condiments are over there, if you want them." I gestured toward the cabinet. Rodrigo looked dubious, but quickly retrieved sugar and creamer and stirred minute quantities into his coffee.<sup>25</sup> "Would you like some in yours?"

"One spoonful, if you don't mind. A drop of creamer. But please go on."

"Every lawyer knows that words and concepts have many meanings, not just one. Perhaps they battled with a landlord or judge over the definition of a term such as 'reasonable maintenance of the premises.' Or, a category like 'consideration' in a contract dispute."

"Familiar ground," I said. "A commonplace, really. What's next?"

"Broad concepts and theories, too, can take on different qualities in the hands of a determined opponent. Once you let a genie out of the bottle, you can't control where it will go. Even providing more or narrower index categories won't always lead to better law, much less a better society."

I sat up straight in my chair. "This I want to hear, especially since you appear to have that Executive Order in mind. By the way, do you plan to publish something on this?"

"I do. But don't worry about me and my career, Professor.<sup>26</sup> That Order outlawing critical race theory and diversity training came down in the last few months of Trump's administration and seems not to have had much effect during its short-lived life."<sup>27</sup>

"Even so," I admonished, "it caused a commotion at a number of federal agencies and universities.<sup>28</sup> Moreover, it very likely influenced his followers. It gave them a grid, a broad systemic way to think about critical race theory. So even if the Order has been repealed, its legacy could live on."<sup>29</sup>

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<sup>25</sup> The Professor thought to himself that he and Rodrigo both relied on the familiar concept of "condiments" in order to communicate what they both understood as cream and sugar, and not cinnamon or vanilla.

<sup>26</sup> The Professor often serves as Rodrigo's mentor, offering him career advice. *See, e.g.,* Delgado, *Chronicle*, *supra* note 1; Delgado, *Fifth Chronicle*, *supra* note 6, at 1584.

<sup>27</sup> *See* Exec. Order No. 13,985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7009, 7012 (Jan. 20, 2021) (to be codified at 3 C.F.R.) (revoking Executive Orders 13,950 and 13,958).

<sup>28</sup> *See* Janelle McPherson, *Deans at Five California Law Schools Defend Critical Race Theory Against Trump Administration*, NAT'L JURIST (Oct. 1, 2020, 8:10 AM), <https://www.nationaljurist.com/national-jurist-magazine/deans-five-california-law-schools-defend-critical-race-theory-against-trump> [https://perma.cc/9832-EE5V].

<sup>29</sup> Trump's followers, for example, could easily pay great attention to the speech and executive order, overlooking that both have been repealed and passed into history. *See supra* note 27. Also, the Executive Order seems to live on at the state level. *See* Lindsay Ellis, *No 'Social Justice' in the Classroom: Statehouses Renew Scrutiny of Speech at Public Colleges*, CHRON. HIGHER EDUC. (Feb. 3, 2021), <https://www.chronicle.com/article/no-social-justice-in-the-classroom-new-state-scrutiny-of-speech-at-public-colleges> (noting that individual states have proposed bans of courses, classes, activities, or events that group students based on ethnicity, race, religion, gender, or social class or promote "division between, resentment

“I appreciate the caution. You’re always looking out for my best interest, Professor. And you’re right that the Order was not entirely toothless. At least three universities conducted an investigation and, finding that a number of departments taught or researched critical race theory, ordered them to knock it off.<sup>30</sup> Much the same happened in corporate America and in certain federal agencies.”<sup>31</sup>

“Probably unconstitutional,” I said. “But I suppose you think that depends on one’s viewpoint.”

“I do. But before we go on, I think I will have another cup of that excellent coffee. I’ve got some right here,” he said, pulling a thermos out of his backpack. “How about you?”

## II. IS INFORMATION A GOOD? RODRIGO ADVANCES A CRITICAL THEORY OF INFORMATION SCIENCE

I said maybe later, and he began: “As we’ve seen, words and concepts can have more than one meaning.<sup>32</sup> ‘Probable cause’ can mean one thing to the public defender and something quite different to the prosecutor. The same is true of legal theories or paradigms. They can take on more than one shade of meaning, depending on one’s perspective.”<sup>33</sup>

“I hope you are not saying that they are all equally worthy. For example, Darwin’s theory of evolution is far superior to creationism.”<sup>34</sup>

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of, or social justice for” any race, gender, political affiliation, or social class); Chris Quintana, *Trump’s Controversial Diversity Training Order Is Dead – or Is It? Colleges Are Still Feeling Its Effects*, USA TODAY (Feb. 6, 2021, 1:15 PM), <https://www.usatoday.com/story/news/education/2021/02/06/biden-undid-trumps-diversity-training-ban-but-its-alive-colleges/4380342001> [<https://perma.cc/SN8W-LWHY>]. Some state legislative proposals would punish colleges that violate bans on critical race courses by cutting 10% of their funding. Ellis, *supra*.

<sup>30</sup> See Colleen Flaherty, *Diversity Work, Interrupted*, INSIDE HIGHER ED (Oct. 7, 2020), <https://www.insidehighered.com/news/2020/10/07/colleges-cancel-diversity-programs-response-trump-order> [<https://perma.cc/6UR9-VQPQ>]; Geoff Herbert, *CNY Professor Creates List of Colleges with ‘Critical Race Theory,’ Says It’ll Help Parents Avoid Them*, POST-STANDARD (Feb. 5, 2021), <https://www.syracuse.com/schools/2021/02/cny-professor-creates-list-of-colleges-with-critical-race-theory-says-itll-help-parents-avoid-them.html> [<https://perma.cc/W9TT-GN6C>].

<sup>31</sup> Jessica Guynn, *‘It’s Already Having a Massive Effect,’ Corporate America Demands Trump Rescind Executive Order on Diversity*, USA TODAY (Oct. 12, 2020, 2:29 PM), <https://www.usatoday.com/story/money/2020/10/09/trump-rescind-diversity-racism-executive-order/5939538002> [<https://perma.cc/9GXP-HEFF>].

<sup>32</sup> See generally Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 B.Y.U. L. REV. 1915 (discussing use of computer-based compendiums of word usage at key points in history).

<sup>33</sup> See *infra* Sections II.B, II.C (giving examples).

<sup>34</sup> It explains the fossil record, for example; Divine Design does not, at least not without a great deal of contortion.

A. *Mexican American Studies in Tucson, Arizona*

"I'm not. But they might have struck early readers that way. Evolution and divine intervention addressed the same body of evidence. Even though Darwin's theory eventually won out, it did so only after a struggle.<sup>35</sup> Much the same goes on today."

"Could you give an example?"

"I can," he said. "Two actually. Are you familiar with the controversy over Mexican American Studies in Tucson, Arizona?"

"I read about it. As I recall, some young teachers trained in ethnic studies began teaching that subject to kids in a racially mixed high school in downtown Tucson.<sup>36</sup> The program began under a federal consent decree, then took off under its own steam."<sup>37</sup>

"Exactly. The kids, most from poor, immigrant families, learned about the great civilizations of Meso-America.<sup>38</sup> They learned about Martin Luther King, Cesar Chavez, and the modern civil rights movement.<sup>39</sup> They read books by Howard Zinn, Sandra Cisneros, Paolo Freire, and critical race theorists.<sup>40</sup> It created quite a stir."

"I can imagine. But remind me what happened."

"The kids grew excited and discussed what they had learned with their parents and friends. Many decided they wanted to become novelists, doctors, or lawyers like the ones they had been learning about.<sup>41</sup> Until then, the dropout rate among Mexican American schoolkids in that district had been about fifty percent.<sup>42</sup> Now nearly all of them were graduating, with many going on to college."<sup>43</sup>

"Sounds like a success story."

"But word reached the legislators in the state capital, who were not at all impressed. They decided the whole thing was un-American and passed a four-

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<sup>35</sup> See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (4th ed. 2012); *Thomas Kuhn*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/thomas-kuhn> [<https://perma.cc/P5Z8-46L5>] (last updated Oct. 31, 2018) (discussing Kuhn's role in the study of paradigm change).

<sup>36</sup> See generally Richard Delgado, *Precious Knowledge: State Bans on Ethnic Studies, Book Traffickers (Librotraficantes), and a New Type of Race Trial*, 91 N.C. L. REV. 1513 (2013).

<sup>37</sup> See Valerie Strauss, *Arizona's Ban on Mexican American Studies Was Racist, Court Rules*, WASH. POST (Aug. 23, 2017, 3:08 PM), <https://www.washingtonpost.com/news/answer-sheet/wp/2017/08/23/arizonas-ban-on-mexican-american-studies-was-racist-u-s-court-rules>.

<sup>38</sup> Delgado, *supra* note 36, at 1528-29, 1534-41 (describing the course of instruction).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1513.

<sup>43</sup> *Id.* at 1513, 1528.



part law forbidding courses like it.<sup>44</sup> It punished any school district that failed to comply by threatening to withhold ten percent of its budget.”<sup>45</sup>

“I read that the community was up in arms. Didn’t they file suit?”

“They did. But they lost, in part because the Secretary of Education had taken the precaution of obtaining a ruling from an administrative law judge that the program was in violation of the statute.<sup>46</sup> For good measure, he even banned six of the textbooks and a play by William Shakespeare.<sup>47</sup> The case went up and down to the Ninth Circuit, and was retried in front of the same judge that had struck down the program eighteen months earlier.<sup>48</sup> This time, he declared the statute unconstitutional, so the kids won.<sup>49</sup> The district reinstated the program in a watered-down form. In the meantime, many of the original teachers left for greener pastures.”<sup>50</sup>

“A battle of warring paradigms,” I said, “or, if you are an information scientist, of legal categories. The program was either un-American or a breath of fresh air, depending on your perspective.”

“Indeed,” he said. “You could evaluate the program solely under the four headings of the Arizona statute,<sup>51</sup> or you could see it as something legitimate and entirely helpful to an oppressed group.”<sup>52</sup>

“And I can see how this could easily become a classification problem, too,” I added. “Imagine how Westlaw or another indexer will classify the Arizona case when they get around to doing so. ‘School curricula—un-American’? Or ‘educational discrimination—remedies for’?” I drained my coffee cup and glanced at my watch. “And I bet the Trump administration’s posture toward critical race theory is your second example.”

B. *Trump’s Speech at the National Archives Museum and His Anti-Critical Race Theory Executive Order: Can Classification Invite Retaliation?*

“It is. If you take the table of contents of practically any book on critical race theory, or any syllabus on it, and examine it through the eyes of someone

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<sup>44</sup> *Id.* at 1513, 1516, 1521-22 (discussing H.B. 2281, which prohibited courses that are designed for students from a particular ethnic group, that aim to increase racial solidarity rather than treatment of persons on an individual basis, that could inculcate racial resentment, or that might encourage the overthrow of the U.S. government).

<sup>45</sup> *Id.* at 1522.

<sup>46</sup> *Id.* at 1523 n.46.

<sup>47</sup> *Id.* at 1526 & n.55 (noting that “The Tempest” was banned because it spoke unflatteringly of colonialism).

<sup>48</sup> Strauss, *supra* note 37.

<sup>49</sup> *Id.*

<sup>50</sup> E.g., Lorraine Chow, *How an Incredible Teacher Kept His Outlawed Ethnic Studies Classes Alive*, NATIONSWELL (May 7, 2014), <https://nationswell.com/curtis-acosta-mexican-american-studies-ban> [<https://perma.cc/5VJT-R6UX>].

<sup>51</sup> See *supra* note 44.

<sup>52</sup> See PRECIOUS KNOWLEDGE (Dos Vatos Productions 2011).

like Trump's friend Christopher Rufo . . ."<sup>53</sup> Rodrigo looked up at me expectantly.

"I see what you're driving at. You could easily find that each item corresponds to a type of crime or offense against the social order, at least in the eyes of someone like Trump's speechwriter who drafted that Executive Order."

"Exactly," he said, motioning toward marked-up copies of the two documents lying open in his lap. "That's indeed what you find. Notice, for example, how critical race theory's analysis of white privilege became, in Trump's eyes, evidence of hatred toward whites."<sup>54</sup>

"Quite unfair," I said. "How could they have thought that?"

"But they did. And not only that. Affirmative action and the study of implicit bias emerged as discrimination—but against whites, since they both supposedly presuppose that most whites are racists."<sup>55</sup>

"That's not all," I said. "I heard that the critique of colorblindness, a mainstay of critical race thought, emerged as placing a thumb on the scale in favor of any applicant of color."<sup>56</sup>

"You guessed it. And our teaching about systemic racism emerged as a tool for liberal brainwashing of innocent undergraduates."<sup>57</sup>

C. *Gestalt Shift: Interpreting Critical Theory Against a Background of Conservative Classification and Writing*

"We've seen this sort of inversion or flip before. I remember the many times conservatives have treated the critique of hate speech as an attack on the mighty First Amendment."<sup>58</sup>

"Some early detractors even took issue with DuBois's notion of double consciousness.<sup>59</sup> For them, it's evidence that we are obsessed with race and see

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<sup>53</sup> See Paul Kiernan, *Conservative Activist Grabbed Trump's Eye on Diversity Training*, WALL STREET J. (Oct. 9, 2020, 7:18 AM), <https://www.wsj.com/articles/conservative-activist-grabbed-trumps-eye-on-diversity-training-11602242287> (discussing how Fox News guest Christopher Rufo inspired Trump to enact his Executive Order).

<sup>54</sup> See *supra* note 8-9.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> See, e.g., Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484; NADINE STROSSEN, *HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP* (2018) (arguing against hate-speech codes). *But see* RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS?: WHY THE FIRST AMENDMENT SHOULD NOT PROTECT HATE SPEECH AND WHITE SUPREMACY* (2018) (arguing the opposite).

<sup>59</sup> See Ernest Allen, Jr., *Du Boisian Double Consciousness: The Unsustainable Argument*, 43 MASS. REV. 217 (2002) (taking issue with DuBois's notion of double consciousness, considering it a confused stand-in for several disparate traits not unique to folks of color).

discrimination everywhere.<sup>60</sup> The same is true of microaggressions, which appear on their chart as a neurotic fixation on small affronts.”<sup>61</sup>

“I see your point. It is like two indexing systems, one reflecting the point of view from inside, the other from the outside, full of faultfinding and disdain. And if you’re unfamiliar with critical race theory, the negative version has a superficial plausibility. Like a drawing by Max Escher, it invites you to perform a gestalt shift.”<sup>62</sup>

“I know what you mean. In one of Escher’s best-known drawings, a flock of birds flying to the right looks like a school of fish swimming to the left, depending on how you look at it.<sup>63</sup> So when Trump and his speechwriter composed their broadsides against critical race theory, they were writing against a background of many similar flips or inversions that their readers had heard about or discussed dozens of times with their friends.”<sup>64</sup>

“And once one takes that point of view, one can take practically any entry in a bibliography of critical race writing<sup>65</sup> and show how each item corresponds to a different and antagonistic heading in conservative mindset and belief.”

“Sure. A detractor might note, for example, that some critical race theorists find fault with capitalism.<sup>66</sup> An antagonistic reinterpretation might charge that the entire school of thought is based on Marxism.<sup>67</sup> Some actually do that, even though a lot of the most formative texts barely mention the term.”<sup>68</sup>

#### D. *Paving the Way*

“As Trump actually seems to have done,” I said. “With Escher’s drawing, preconceptions shape what the observer sees. Consciously or unconsciously, Trump drew on them, too. Conservative websites and talk radio had paved the

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<sup>60</sup> See *supra* note 8-9.

<sup>61</sup> *Id.*

<sup>62</sup> See Richard Delgado, *Rodrigo’s Portent: California and the Coming Neocolonial Order*, 87 WASH. U. L. REV. 1293, 1331-37 (2010) (describing gestalt shifts).

<sup>63</sup> *Id.*

<sup>64</sup> For example, critical race theory’s critique of neutrality emerges as the insistence that every decision maker place a thumb on the scale in favor of the minority. Its critiques of Conquest and European settlement supposedly amount to favoritism toward ignorant savages at the expense of brave pioneers and settlers.

<sup>65</sup> E.g., Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 U. VA. L. REV. 461 (1993) (classifying some of the main works under several headings and subheadings).

<sup>66</sup> See, e.g., Richard Delgado, *Rodrigo’s Equation: Race, Capitalism, and the Search for Reform*, 49 WAKE FOREST L. REV. 87 (2014) (finding fault with capitalism, particularly the liberal faith that the economic system is capable of reforming itself).

<sup>67</sup> See Yonat Shimron, *Southern Baptist Seminary Presidents Nix Critical Race Theory*, RELIGION NEWS SERV. (Dec. 2, 2020), <https://www.baptiststandard.com/news/baptists/southern-baptist-seminary-presidents-nix-critical-race-theory> [https://perma.cc/8RDM-48UZ]; see also Herbert, *supra* note 30.

<sup>68</sup> See DELGADO & STEFANCIC, *supra* note 7 (mentioning the term only once, in the glossary).

way, priming their followers to see critical race theory a certain way. That's why the Executive Order must have struck many of his followers as true and deserved."

"You might even go back further in time," I added. "To a period, just a few years earlier, when critical race theory came under attack in the law reviews.<sup>69</sup> Conservative writers performed many of the same maneuvers, standing things on their heads. Two prominent scholars read critical race theory literature and categorized what they found under headings that sound peculiar to our ears—anti-science, disrespectful of logic and rigor, and more.<sup>70</sup> Another writer took issue with the work of the legal storytelling and narrative-analysis movement by picking out snippets by respected writers and dubbing them cases of self-important posturing.<sup>71</sup> These scholars attached unfamiliar and harsh interpretations to the new scholarship. After a while, they took on the aura of truth to people already disposed that way."

### III. IN WHICH RODRIGO POSITS A DESIRE-BASED THEORY OF LEGAL CATEGORIZATION

"What lies behind all this ungenerous reinterpretation?" I asked. "Why would anyone make the gestalt switch at all? Was the movement simply unlucky?"

He shook his head. "It's a little hard to fathom if you basically agree with a new theory or concept, as you and I do. But railing at the way a critic categorizes your favorite area won't help if the critic has tucked you away firmly in a new category. A follower then will read and interpret everything in disparaging fashion, because she starts with a different desire in mind. It's a matter of priming."

"I can think of an example," I said. "A professor I know told me that he had been delighted to learn that many of the students at his new school aspired to careers in environmental law, which was then a new field. Later he learned that many of them were planning to become attorneys for mining companies or Big Oil.<sup>72</sup> You see, their desire for a comfortable job converted 'environmental lawyer' into a term that could encompass comfortable work defending corporate clients engaged in polluting the earth."

"It seems, then, Professor, that desire comes first and is prior to thought and cognition. We first want something. We then look for terms, words, concepts, and thought-paths that will enable us to describe it. Reference librarians know this only too well. One told me that they can almost always tell from a patron's facial expression and demeanor what kind of search they will want help with."

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<sup>69</sup> Viz, the period between about 1992 and 1998.

<sup>70</sup> See generally Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (criticizing critical race narratives).

<sup>71</sup> Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229, 1232 (1995).

<sup>72</sup> Interview with Anonymous in a prominent law school.

“A desire-based theory,” I said. “Nice and elegant. For one thing, it helps us understand how commercial research systems improve a searcher’s access to cases and authority—but mainly ones that will fortify and defend Western corporate capitalism.<sup>73</sup> They help the researcher perform Law, which is why they consulted the search tools in the first place. They also make it hard to find anti-Law.”

“Law and capitalism are basically the same thing, as someone put it, and a thing cannot reform itself.<sup>74</sup> Duncan Kennedy’s article on Blackstone’s *Commentaries*<sup>75</sup> points out much the same. To hope that index searching will enable you to carry out law reform is to commit a type of category mistake.”<sup>76</sup>

“As the conservative columnist Ross Douthat put it recently in connection with the 2020 election results: ‘A strong belief spurs people to go out in search of evidence, a lot of so-called disinformation is collected and circulated sincerely rather than cynically, and [thereafter] the power . . . to change beliefs is relatively limited.’<sup>77</sup> Once a reader becomes ill-disposed toward a school of thought, she is apt to declare evidence confirming it not ‘evidence’ at all, much less dignify it with a category or search term of its own.”<sup>78</sup>

#### CONCLUSION

Rodrigo looked at his watch. “It’s almost time to go. Gus hates waiting, and leaving him alone in the dorm with his friends is a recipe for trouble.”<sup>79</sup>

As he was gathering up his things, I reminded him of a biblical story in which the authorities planned to kill all the Jewish children, so they had soldiers place a mark on every house containing such a child. But the residents learned what the marks meant and changed them so that the executioners who came the next day were frustrated in their search.<sup>80</sup> Many cultures have such stories of miraculous escapes abetted by clever erasures.<sup>81</sup>

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<sup>73</sup> See Stump, *supra* note 21, at 114, 129 & n.167, 132 & n.189, 175, 184.

<sup>74</sup> See Delgado, *supra* note 66, at 87.

<sup>75</sup> Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 205 (1979).

<sup>76</sup> A category mistake is the error of assigning a quality or ability to a thing that is incapable of exemplifying it. See *Category Mistakes*, STAN. ENCYCLOPEDIA PHIL. (July 5, 2019), <https://plato.stanford.edu/entries/category-mistakes> [<https://perma.cc/S5KK-6UHP>]. An example would be a person who asked what color is the square root of pi.

<sup>77</sup> Ross Douthat, *Breaking Down the Stolen-Election Theory*, N.Y. TIMES, Dec. 6, 2020, at SR9.

<sup>78</sup> See Lo, *supra* note 21, at 183-88 (pointing out that catalogers have been notably resistant to change the heading “illegal aliens” to something more neutral).

<sup>79</sup> See Delgado, *Livable Future*, *supra* note 2, at 265-71 (describing Gus’s adventurous nature).

<sup>80</sup> See Danya Ruttenberg, *Five Myths about Passover*, WASH. POST (Mar. 28, 2015, 6:51 PM), [https://www.washingtonpost.com/outlook/five-myths/five-myths-about-passover/2015/03/28/15a059d8-320b-11e8-94fa-32d48460b955\\_story.html](https://www.washingtonpost.com/outlook/five-myths/five-myths-about-passover/2015/03/28/15a059d8-320b-11e8-94fa-32d48460b955_story.html).

<sup>81</sup> *Id.* (discussing a number of such myths and their origins).

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In turn, he reminded me that Native Americans had probably been unaware that Justice Marshall was writing an opinion, *Johnson v. M'Intosh*,<sup>82</sup> that marked them as incapable of owning land, even including territory on which they had lived and hunted for hundreds of years. Unaccustomed to reading Supreme Court reports, they missed the warning sign on the door.

He also asked me if, by chance, I had read that a member of the minority listserv had recently requested syllabuses of courses teaching critical race theory on behalf of a colleague just starting her teaching career, not realizing that an opponent of critical race theory could report each one to the tip line that Trump's Executive Order, which had just come into force, established.<sup>83</sup>

With that, we parted company, promising to be in touch again soon.

As his footsteps echoed down the empty hall, I reviewed what we had said. In particular, I wondered, if one of us indexed or discussed critical race theory breakthroughs, what would prevent right-wing operatives from using those against us by redefining them with new valences? Could government contractors not use those very terms to search for our presence, our courses, our publications, our syllabuses in a course bank somewhere?

After all, science may be good, but not in the hands of a deranged leader with his finger on the nuclear button. Similarly, I mused, information science may be good if the researcher and the librarian are on the same page and share the same general objectives, namely to create a more equal society based on mutual respect and solidarity.

As his elevator door closed outside, I thought: It's so obvious, really. How you classify something invites others to adopt one mental pathway or another. Once this happens, a user, such as a first-year law student in a legal research course, does things the same way, as a matter of course, believing that this is just the way things are done. Much like the professor filling out a form from the central administration about their plans for teaching online next semester, the classification accompanies a power move.

I resolved to send Rodrigo my thoughts and looked forward to reading the draft of his article.

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<sup>82</sup> 21 U.S. (8 Wheat.) 543 (1823).

<sup>83</sup> See Exec. Order No. 13,950, Combating Race and Sex Stereotyping, 85 Fed. Reg. 60,683, 60,686 (Sept. 28, 2020) (to be codified at 3 C.F.R.) (directing Department of Labor to establish tip line ("hotline") to identify contractors conducting prohibited trainings).