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Richard Delgado's Quest for Justice for All

Kevin R. Johnson†

It is a distinct honor to participate in this Symposium, which no doubt will be one of many, celebrating Richard Delgado's illustrious career in teaching law. A brief, simple commentary cannot do justice to Delgado's pioneering legal scholarship—he is nothing less than a legend, a sort of LeBron James or Michael Jordan among legal academics. Needless to say, Delgado's star-studded career makes commenting on his amazing string of cutting-edge scholarly publications in the most prestigious law reviews in the world, as well as many influential books, intimidating, to say the least.

One of the founders of Critical Race Theory, Delgado has literally revolutionized legal scholarship.¹ He provided intellectual legitimacy to storytelling as an alternative to traditional doctrinal, footnote-crunching, and definitely mind-numbing law review articles.² His provocative *Rodrigo Chronicles*³ exemplifies the power of high-quality narrative to dislodge the conventional mindset in thinking about the civil rights world in which we live.

The transformation of legal scholarship alone would mark an eminently successful scholarly career. But Richard Delgado has achieved much, much more. He was also at the forefront of the path-breaking efforts to restrict hate speech and attempts to put an end to its damaging psychological assaults on racial minorities.⁴

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1. See, e.g., CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 3d ed. 2013) [hereinafter CRITICAL RACE THEORY].

2. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989) [hereinafter Delgado, *Storytelling*].

3. See generally Symposium, *The Rodrigo Chronicles*, 4 HARV. LATINO L. REV. 1 (2000) [hereinafter Symposium, *Chronicles*] (analyzing the intellectual legacy of *The Rodrigo Chronicles*).

4. See Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 178 (1982)

Moreover, seeking to create intellectual space for, and recognition of, contributions by minority civil rights scholars, Delgado highlighted for the world to see the practice among many White liberal “imperial scholars” of almost exclusively citing the work of other White liberal scholars in civil rights scholarship.⁵

All told, Delgado has devoted his scholarly career to insightfully analyzing from top to bottom the subordination of racial minorities in the United States.⁶ His scholarship has ranged from analysis of the issues debated in the rough-and-tumble political arena to the more polite discussions in the ivory tower.⁷ He has done so despite frequent—at times harsh as well as shrill—criticism from mainstream scholars.⁸

Besides dramatically changing how civil rights scholars analyze the world, Delgado’s voluminous scholarship has served as nothing less than an inspiration to a generation of minority professors. His body of work has encouraged countless scholars to shoot for the intellectual stars. And, while many accomplished scholars are fiercely protective of their time, extremely few are as dedicated and nurturing of a mentor to junior scholars as Richard Delgado. Countless law professors have benefited from his gentle encouragement of their scholarly endeavors.⁹ Delgado consistently is a fount of ideas for new articles and books, thoughts and comments about a draft, and much, much more.

In this Commentary, I briefly offer some thoughts on Richard Delgado’s contributions to pushing the boundaries of Critical Race Theory—and legal scholarship generally—in seeking to create a

[hereinafter Delgado, *Words That Wound*].

5. See Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984) [hereinafter Delgado, *Imperial Scholar*].

6. See, e.g., *id.*; Delgado, *Storytelling*, *supra* note 2; Delgado, *Words That Wound*, *supra* note 4.

7. For Delgado’s discussion of the political arena, see Delgado, *Storytelling*, *supra* note 2, at 2441 (analyzing politics from perspectives of different individuals). For Delgado’s discussion of the ivory tower, see Delgado, *Imperial Scholar*, *supra* note 5, at 563 (identifying how White civil rights scholars systematically fail to cite scholarship of minority scholars).

8. See, e.g., Jeffery J. Pyle, *Race, Equality and the Rule of Law: Critical Race Theory’s Attack on the Promises of Liberalism*, 40 B.C. L. REV. 787, 792–96 & n.40 (1999) (criticizing Richard Delgado for being self-contradictory in his scholarship). See generally DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997) (offering a blistering attack on Critical Race Theory).

9. Delgado’s mentorship is demonstrated by the influence of his scholarship on that of other scholars. See, e.g., Symposium, *Chronicles*, *supra* note 3 (analyzing how Delgado’s work has influenced a generation of civil rights scholars).

more just society. This ambitious program has been the overarching theme to his scholarly agenda throughout his career.

Delgado's scholarship consistently demonstrates that his finger is firmly on the pulse of contemporary civil rights developments and thus is grounded in the world in which racial minorities live.¹⁰ Tied to the ordinary problems of everyday people, his writings are not pie-in-the-sky theory for theory's sake or, as he might put it, endless discourse about discourse. Rather, seeing a world of glaring inequalities in dire need of radical, and urgent, social transformation, Delgado critically analyzes the structures resulting in those inequalities and attempts to spell out how to bring about such far-reaching change.¹¹

Despite high hopes and laudable goals, Delgado, like Critical Race Theory scholarship generally, ultimately believes that conventional legal avenues hold limited potential for bringing about meaningful positive social transformation.¹² Let me explain. Similar to the late Derrick Bell,¹³ Delgado considers racism to be both a central organizing principle and permanent feature of American social life.¹⁴ That sobering fundamental premise has far-reaching implications for critical scholars as well as activists. Once one concedes the enduring nature of racism, the task of facilitating its elimination to bring about a more just society necessarily evaporates as a realistic and attainable goal. To borrow the phrase of one Critical Race scholar, tinkering with law reform to remedy the racial ills of American (or any) society is unlikely to "dismantle the master's house."¹⁵

If one accepts the word "permanence" as an apt description of the place of racism in American social life, then one can at best be skeptical about the ability to bring about meaningful change through the law. Ultimately, a legal scholar or lawyer who accepts the permanence of racism, and thus the inherent limited efficacy of change through the law, is at best left to try to make a difficult and unfair situation marginally better by resorting to the law and legal remedies.

10. *See id.*

11. *See* Richard Delgado, *Zero-Based Racial Politics and an Infinity-Based Response: Will Endless Talking Cure America's Racial Ills?*, 80 GEO. L.J. 1879, 1881–82 (1992) [hereinafter Delgado, *Zero-Based Racial Politics*].

12. *See, e.g.*, CRITICAL RACE THEORY, *supra* note 1.

13. *See* DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1993).

14. *See* Delgado, *Zero-Based Racial Politics*, *supra* note 11, at 1881–82.

15. *See* Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 27 (1995).

As observed by numerous commentators, political movements are more likely than litigation to result in meaningful social change.¹⁶ For advocates of fundamental social transformation, politics, not law, is where it is at. Law reform through resort to the courts can only make a difference at the margins in blunting the adverse outcomes of subordinating institutional structures. However, political action can bring about more far-reaching and enduring change than efforts by lawyers to pursue relief through existing legal channels.¹⁷

Although admitting the inability of the law to eradicate the scourge of racism and its indelible impression on American social life, Delgado and Critical Race theorists nonetheless dutifully press for progressive social change. Generally speaking, their body of scholarship seeks to push us toward envisioning novel ways to bring about a more just society.¹⁸ In that quest, Critical Race Theory has brought to our collective attention many critically important issues, concepts, and relationships, including, but not limited to: the dominance of the Black/White paradigm in civil rights scholarship;¹⁹ the physical, emotional, and other harms of hate speech directed at people of color;²⁰ intersectionality and the subordination of women of color;²¹ interest convergence as a necessary prerequisite for major changes in the civil rights status

16. See Kevin R. Johnson, *Lawyering for Social Change: What's a Lawyer to Do?*, 5 MICH. J. RACE & L. 201, 205, 217–23 (1999) (analyzing the varied roles that lawyers may play in seeking to bring about social change).

17. As an example, mass protests in 2006 across the United States helped to block the passage of an extremely tough immigration reform proposal passed by the United States House of Representatives. See Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99, 100 (2007); Sylvia R. Lazos Vargas, *The Immigrant Rights Marches (Las Marchas): Did the "Gigante" (Giant) Wake Up or Does It Still Sleep Tonight?*, 7 NEV. L.J. 780, 786 (2007). However, Congress to this point in time has failed to enact comprehensive immigration reform. See KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW Chapter 18 (2d ed., forthcoming 2015) (discussing prolonged efforts at comprehensive immigration reform and offering alternatives for reform).

18. See, e.g., CRITICAL RACE THEORY, *supra* note 1.

19. See Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181, 1189 (1997) (reviewing LOUISE ANN FISCH, *ALL RISE: REYNALDO G. GARZA, THE FIRST MEXICAN AMERICAN FEDERAL JUDGE* (1996)).

20. See Delgado, *Words That Wound*, *supra* note 4.

21. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

quo;²² and related features of the complex American civil rights terrain.

The insights of Critical Race Theory unquestionably have helped us better understand the fundamentals of the institutional structures producing, reinforcing, and maintaining racial injustice in the modern United States.²³ The movement has pushed us to consider how we might approach what Martin Luther King, Jr. called “the arc [that] bends toward justice”²⁴ (even though Critical Race theorists for the most part believe that the United States can never achieve a fully just racial society, and thus attain anything approximating full justice).²⁵

Identifying a problem is a necessary prerequisite to ultimately addressing—and hopefully solving—it. In this regard, Critical Race Theory has shed important light on salient issues of race and civil rights. It has commenced a lengthy process—which will no doubt extend for generations—seeking to moderate, if not end, the problems of race and class subordination in American society. Critical Race scholars continue to confront institutional structures of racism by, as some might characterize it, “speaking truth to power.”²⁶ Needless to say, Delgado is well-known for speaking truth to power.

In prodigious path-breaking scholarship, Delgado has consistently pushed Critical Race scholars beyond mere critique of the status quo and has pressed critical scholarship to offer positive and meaningful prescriptions for change.²⁷ He, for example, has criticized weak-kneed solutions to pressing social problems, such as the dire poverty and social subordination of Mexican immigrants in dilapidated *colonias* along the United States-

22. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 532 (1980).

23. See generally CRITICAL RACE THEORY, *supra* note 1.

24. Dr. Martin Luther King, Jr., *Remaining Awake Through a Great Revolution* (Mar. 31, 1968), available at http://mlk-kpp01.stanford.edu/index.php/kingpapers/article/remaining_aware_through_a_great_revolution [hereinafter *Remaining Awake*] (“[T]he arc of the moral universe is long, but it bends toward justice.”).

25. See BELL, *supra* note 13.

26. Charles R. Lawrence III, *Foreword to CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* xi, xiv (Francisco Valdes et al. eds., 2002).

27. See, e.g., Richard Delgado, *Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667, 675 (1997) (questioning critically the reform recommendations for remedying the blight of the decrepit shantytowns populated by persons of Mexican ancestry along the United States-Mexico border spelled out in Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179 (1995)).

Mexico border.²⁸ Producing scholarship that meets Delgado's high standards is a most challenging endeavor, even for the most accomplished scholars. As we all know, it is far easier to describe and critique existing inequalities and infinitely more difficult to offer concrete steps for pragmatic and practical change.

This ultimately takes us to the conundrum staring Delgado, as well as Critical Race Theory more generally, squarely in the eye. What, if anything, can be done to help constructively bring about positive, meaningful, and enduring change to lessen the stark racial inequalities that exist in American society? If one truly believes that raw political power—not law or simple logic—is the answer to our social ills, then one likely does not believe that a focus on legal reform will take us very far in the quest for a more just society. Similarly, if the fundamental problem with racial and class inequality in American life is the ordinary operation of global capitalism—or, for that matter, capitalism run amok—lawyers, law professors, judges, and their ilk are not particularly well-suited to bringing forth meaningful and enduring change.

Although unquestionably dedicated to social change, Delgado, like Critical Race Theory scholars generally, has not consistently offered concrete recommendations for the ultimate goal of achieving a more just society.²⁹ For example, in his groundbreaking legal casebook on Latinos and the law,³⁰ Delgado, in my estimation, missed an important opportunity to interrogate in any meaningful way areas for scholarly inquiry that demand careful scrutiny, such as how best to combat the discrimination against Latinos sanctioned by immigration and voting rights law.³¹ I recognize that outlining a prescriptive vision about how to achieve a more just society is a lot to ask of a legal casebook, but it

28. *Id.*

29. See, e.g., *LATINOS AND THE LAW: CASES AND MATERIALS* (Richard Delgado et al. eds., 2007) (collecting materials relating to the legal struggles of Latinos).

30. While briefly touching on racial profiling in immigration enforcement, see *id.* at 525–39, the casebook fails to carefully scrutinize the role of race and racism that serves as the foundation of all of American immigration law and its enforcement. See generally Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 *IND. L.J.* 1111, 1148–58 (1998) (analyzing the fundamental role that race plays throughout American immigration law and its enforcement).

31. See Keith Aoki & Kevin R. Johnson, *Latinos and the Law: Cases and Materials: The Need for Focus in Critical Analysis*, 12 *HARV. LATINO L. REV.* 73, 74–77 (2009) (identifying important substantive areas of the law, including immigration and voting rights law, that *Latinos and the Law* fails to analyze in detail).

apparently is something that Delgado requires of all scholarship—a point to which I will return in a moment.

Similarly, Delgado has championed storytelling in legal scholarship as a potentially destabilizing influence on the dominant civil rights mindset.³² However, he himself appears unconvinced that speech—through stories or otherwise—can be expected in many, if not the most important, instances to achieve the social change that he advocates; his and Jean Stefancic's critique of the reliance on freedom of expression as a possible remedy of "systemic social ills" admits that "conventional First Amendment doctrine is most helpful in connection with small, clearly bounded disputes":

Free speech and debate can help resolve controversies over whether a school disciplinary or local zoning policy is adequate, over whether a new sales tax is likely to increase or decrease net revenues, and over whether one candidate for political office is a better choice than another. *Speech is less able, however, to deal with systemic social ills, such as racism or sexism, that are widespread and deeply woven into the fabric of society. Free speech, in short, is least helpful where we need it most.*³³

More than a decade ago, Delgado bitterly complained about the seemingly never-ending discourse about discourse in contemporary Critical Race Theory scholarship.³⁴ At the same time, given his pessimism about the true potential for social change, he is not at all clear about the appropriate place of lawyers and law professors in a larger social movement to bring about the change necessary to create a more just society.³⁵ What specifically should lawyers and law professors who advocate social transformation do to facilitate such change? The problem is especially stark if one believes that racism—and thus racial injustice—is an inevitable feature of American social life.

32. See Delgado, *Storytelling*, *supra* note 2.

33. 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, 1259 (1992) (emphasis added).

34. See Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121, 122–25 (2003) [hereinafter Delgado, *Crossroads*] (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002)); see also DERRICK BELL, *ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH* (2002). For a response to the critique, see Kevin R. Johnson, *Roll Over Beethoven: "A Critical Examination of Recent Writing About Race"*, 82 TEX. L. REV. 717 (2004).

35. Delgado, *Crossroads*, *supra* note 34, at 152 ("All of these issues have a discourse dimension, of course. But how we talk about, conceptualize, and narrate these issues is only part—perhaps a minor part—of the story.")

Delgado's most recent installment of the *Rodrigo Chronicles* raises questions about, as he puts it, the "search for reform."³⁶ Through the latest colloquy between Rodrigo and the Professor, Delgado characterizes two recent books calling for law reform as being part of little more than a "cargo cult," the blind hope that the gods will deliver minorities with the gift of better—and more just—law.³⁷ Although generally presented in a respectful and thoughtful way, such a critique is nothing less than devastating if the goal of all scholarly writings should be to help facilitate social change.

Delgado demands more from critical scholarship than mere critique and asks for concrete calls to action or what might be characterized as some kind of recipe for bringing about a more just world. I wholeheartedly share those general sentiments but understand that different scholarly projects have different goals. A prescription for reform, however, was not the intent or purpose of one of the books—one that I co-authored—that he analyzes in the *Chronicle*. As set out in its preface, the book was designed "as an introductory reader on United States-Mexico migration for college and university undergraduates as well as for a more general audience."³⁸ My modest aim was to encourage undergraduates to engage in thoughtful consideration of the perplexing issues of race and class surrounding immigration law and its enforcement in the modern United States.

More specifically, *Immigration Law and the U.S.-Mexico Border*, which I have assigned in a freshman seminar on the United States-Mexico border, sought to move undergraduate students beyond reflexively reacting in a negative way toward immigrants and immigration as the drumbeat of Fox News and other news outlets press us to do on an almost daily basis.³⁹ Put simply, the book sought to foster careful and critical consideration of the complex policy issues at stake in the immigration policy

36. See Richard Delgado, *Rodrigo's Equation: Race, Capitalism, and the Search for Reform*, 49 WAKE FOREST L. REV. 87, 91 (2014) [hereinafter Delgado, *Rodrigo's Equation*]. In this *Chronicle*, Delgado also critically examines STEVEN A. RAMIREZ, *LAWLESS CAPITALISM: THE SUBPRIME CRISIS AND THE CASE FOR AN ECONOMIC RULE OF LAW* (2013).

37. Delgado, *Rodrigo's Equation*, *supra* note 36, at 92–94.

38. See KEVIN R. JOHNSON & BERNARD TRUJILLO, *IMMIGRATION LAW AND THE U.S.-MEXICO BORDER: ¿SÍ SE PUEDE?* xii (2011). This book was honored with the 2012 Latino Literacy Now's International Latino Book Awards—Best Reference Book.

39. *Id.* at xi (pointing out that political pundits often "decried the negative impacts that 'illegal aliens' were having on the 'American way of life'").

debates that have gripped the nation for more than a generation.⁴⁰ The desired prescription for change thus was narrow in focus, with an emphasis on education as a necessary first step.⁴¹

Ironically enough, that latest installment of the *Rodrigo Chronicles* alludes to deeper questions about the efficacy of law reform. Delgado mentions in the *Chronicle* that an undocumented law student “on the law review . . . worried about whether she will be able to practice law when she graduates.”⁴² Increasing numbers of undocumented law students face this problem.⁴³ It also is an issue with which I personally am familiar, having been one of the attorneys who successfully represented the State Bar of California before the California Supreme Court, which in 2014 decided that an undocumented immigrant in fact could be eligible to practice law in the state.⁴⁴ Although not designed to bring about major law reform benefitting more than a relatively small number of undocumented immigrants, the litigation did result in a significant change to the life of one undocumented immigrant as well as others who in the future might want to practice law in California.⁴⁵ Misguided or not in the attempt to improve matters at the margins, it sought in a small way to move the nation forward in the “arc . . . toward justice.”⁴⁶

It is not clear from the *Chronicle* what, if anything, Delgado thinks should be done with respect to the plight of undocumented law students such as the one overachiever who he mentions in passing. I, for one, have no doubt that he is on their side. But, the format of the *Rodrigo Chronicles* allows him to raise complicated issues like this one without really addressing or engaging them in

40. *Id.* at xii.

41. For a more far-reaching agenda for change to the current United States immigration laws, including the argument that, among other benefits, more liberal admission of immigrants would economically benefit the United States, see KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* (2007).

42. Delgado, *Rodrigo's Equation*, *supra* note 36, at 99.

43. See Raquel Aldana et al., *Raising the Bar: Law Schools and Legal Institutions Leading to Educate Undocumented Students*, 44 *ARIZ. ST. L.J.* 5, 6 (2012) (estimating that roughly one hundred undocumented law students attended about a dozen law schools in the United States at the time of the article's publication).

44. See *In re Garcia*, 315 P.3d 117 (2014). For analysis of the history of exclusion of immigrants and other undesirables from the legal profession, see Kevin R. Johnson, *Bias in the Legal System? An Essay on the Eligibility of Undocumented Immigrants to Practice Law*, 46 *U.C. DAVIS L. REV.* 1655 (2013).

45. See *In re Garcia*, 315 P.3d at 134.

46. Remaining Awake, *supra* note 24.

a meaningful, practical way.⁴⁷ That said, it is, in my estimation, far from certain whether the legal avenue that the State Bar pursued—and in which I personally participated—will help move us toward a more just society, although it represents a small step in the right direction. The same deficiency could be said about affirmative action and the many programs seeking to ensure better minority representation in universities and law schools.⁴⁸ These race-conscious programs at most push for minor incremental adjustments at the margins and are unlikely to truly transform the woeful underrepresentation of racial minorities in higher education. Still, it seems to me that concrete action that attempts to achieve something positive—even if it is relatively limited in scope—is preferable to merely identifying the issue and moving on to the next one, reminiscent of the traditional issue spotter on a law school exam.

Delgado ultimately leaves those who share his goals for a more just society with a series of questions and puzzles, if not “crossroads and blind alleys.”⁴⁹ Has Critical Race Theory brought about social change, at least as far-reaching as that advocated by Richard Delgado? Probably not. Does that failure make the movement unsuccessful? Again, probably not. Still, the answers to these questions suggest that the next generation of Critical Race theorists will face the formidable task of identifying concrete prescriptions for bringing about the change necessary for a more just society for all. Richard Delgado has blazed a trail that we should follow and move forward, a laudable goal that we should pursue, a moment in time for which we should strive.

47. See Delgado, *Rodrigo's Equation*, *supra* note 36.

48. For one of Professor Delgado's critical analyses of affirmative action, see Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995).

49. See Delgado, *Crossroads*, *supra* note 34.