

7-1-2011

LatCrit Theory, Narrative Tradition and Listening Intently for a "Still Small Voice"

Mario L. Barnes

Follow this and additional works at: <http://repository.law.miami.edu/umrsjlr>



Part of the [Civil Rights and Discrimination Commons](#), and the [Law and Race Commons](#)

Recommended Citation

Mario L. Barnes, *LatCrit Theory, Narrative Tradition and Listening Intently for a "Still Small Voice"*, 1 U. Miami Race & Soc. Just. L. Rev. 1 (2011)

Available at: <http://repository.law.miami.edu/umrsjlr/vol1/iss1/2>

This Foreword is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Race & Social Justice Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

Foreword: LatCRIT Theory, Narrative Tradition and Listening Intently for a “Still Small Voice”

MARIO L. BARNES^{*}

[B]ut the Lord was not in the wind; and after the wind an earthquake, but the Lord was not in the earthquake; and after the earthquake a fire, but the Lord was not in the fire; and after the fire a still small voice.

1 Kings 19:11-12 (New King James)

I. PROLOGUE.....	2
II. INTRODUCTION	6
III. THE CONTINUING MYRIAD USES OF OUTSIDER NARRATIVES.....	9
A. OUTSIDER NARRATIVES AND NEW ALLEGORIES.....	9
B. OUTSIDER NARRATIVES AND REFRAMING THE OLD	12
1. Unearthing and Explicating Outsider Histories	12
2. Contextualizing Outsider Histories and Accounting for Unfulfilled Promises	14
C. ACCOUNTING FOR CONTEMPORARY OUTSIDER REALITIES: OF MISSING STORIES AND COUNTER-STORIES, AND “DEFINING OURSELVES FOR OURSELVES”	17
1. Giving Voice to “Missing” Outsider Narratives	19
a. Of Autobiography, Poetry and Exclusion Stories	19
2. Not Just Fiction: The Call to Deploy “Real” Outsider	

^{*} Professor of Law and Senior Associate Dean, Academic Affairs, University of California, Irvine, School of Law; B.A., J.D., University of California, Berkeley; LL.M., University of Wisconsin. I thank Professor Frank Valdes and the student editors of the *University of Miami Race and Social Justice Law Review* for inviting me to participate in this volume and their inexhaustible patience. I thank University of Miami Professor Charlton Copeland for his keen insights, especially on religious texts, and U.C. Irvine School of Law Dean Erwin Chemerinsky for generous research support. Finally, I add my voice to many others in thanking Professor Derrick Bell for his audacious words and actions, and the inspiration he provided to generations of law students. All errors, of course, are my own.

Stories and Methods in Multiple Locations	21
IV. CONCLUSION	23

I. PROLOGUE

I begin this prologue with the above Biblical text, not only to establish a narrative foregrounding for this foreword, but also to honor the memory of beloved legal scholar, civil rights advocate, and committed “race man,” Professor Derrick Bell.¹ Professor Bell, who I was fortunate enough to meet as both a law student and junior legal scholar, was formerly a tenured law professor at Harvard Law School. At the end of his life, however, he was a long-term visitor at New York University School of Law, where he moved when Harvard refused to extend a leave from which Bell vowed not to voluntarily return until the institution made a tenured/tenure-track offer to a woman of color.²

Professor Bell often used Biblical passages and references within his work.³ The passage above is from the story of Elijah, the prophet who slayed the priests of Baal and then fled to a cave on Mount Horeb, fearing Jezebel’s threat of exacting revenge.⁴ Elijah, previously faithful and triumphant, became so despondent while secluded in the cave that he even wished death upon himself. When God ordered Elijah to leave

1. Professor Bell died on October 5, 2011. See Fred A. Bernstein, *Derrick Bell, Law Professor and Rights Advocate Dies at 80*, N.Y. TIMES, Oct. 6, 2011, available at <http://www.nytimes.com/2011/10/06/us/derrick-bell-pioneering-harvard-law-professor-dies-at-80.html?pagewanted=all>. In earlier work, I described the phrase “race men” as referring to “a generation of African Americans (mostly men at the time) who openly aligned themselves with a commitment to black excellence or ‘representing the race.’” Mario L. Barnes, *Reflection on a Dream World: Race, Post-Race and the Question of Making it Over*, 11 BERKELEY J. AFR.-AM. L. & POL’Y 6, 9 (2009) [hereinafter *Reflection on a Dream World*] (citing HAZEL V. CARBY, RACE MEN (THE W. E. B. DU BOIS LECTURES) (2000)). On Professor Bell and the phrase, in particular, I opined, “In a contemporary context, the phrase is used to connote that Bell also believes in the power and relevance, if not truth, of race.” *Id.*

2. See Bernstein, *supra* note 1. The story of Professor Bell’s protest against Harvard is also detailed in one of his books. See DERRICK BELL, CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER (1994) [hereinafter CONFRONTING AUTHORITY].

3. For representative work, see generally DERRICK BELL, GOSPEL CHOIRS: PSALMS OF SURVIVAL FOR AN ALIEN LAND CALLED HOME *passim* (1996); DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987) [hereinafter AND WE ARE NOT SAVED].

4. See 1 Kings 19:2-10 (New King James).

the cave, in successive order, he was confronted by a great wind, an earthquake, and a fire.⁵ None of these powerful natural forces, however, represented the voice of God. Only after these forces subsided did God address Elijah, but in the form of a “still small voice.”⁶

The story of Elijah resonates because Latina/o Critical Theory (LatCrit), like Critical Race Theory (CRT) before it, is not just a doctrinal or jurisprudential intervention; it is a scholarly community organized around common values and commitments.⁷ Unlike CRT, LatCrit has sustained an intentional focus not only on theory and knowledge production,⁸ but also on maintaining a strong and inclusive community.⁹ Typical in the work of LatCrit scholars, such as those in this cluster, is an abiding commitment to exposing and combating subordination among disenfranchised communities. In the conditions and challenges that face LatCrit scholars, I see parallels to Elijah’s story. Much like Elijah, many LatCrit scholars have remained faithful

5. See 1 Kings 19:10-11 (New King James).

6. See 1 Kings 19:12 (New King James).

7. The following description by LatCrit co-founder, Professor Francisco Valdes, is representative:

Also like CRT, LatCrit theory self-consciously endeavors both the creation of scholarship through community and the creation of community through scholarship. The idea of, and need for, regularized meetings accordingly have been integral to the constitution of LatCrit theory, and to the production of a LatCrit body of legal literature generated in connected, rather than atomized, conditions. Like CRT . . . LatCrit theory has undertaken the construction of structural conditions conducive to these twin objectives. And also like CRT, LatCrit theory expresses this commitment to the production of both knowledge and community specifically as a means toward an end—the attainment social justice. LatCrit theory thus seeks to combine elements of CRT’s early and formal self-conception with lessons drawn from CRT’s actual experience and practice to employ and develop its insights.

Francisco Valdes, *Afterword-Theorizing “OutCrit” Theories: Coalitional Method and Comparative Jurisprudential Experience - RaceCrits, QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265, 1301 (1999) (internal citations omitted).

8. See *id.* at 1299; see also Margaret Montoya & Francisco Valdes, “Latinas/os” and Latina/o Legal Studies: A Critical and Self-Critical Review of LatCrit Theory and Legal Models of Knowledge Production, 4 FIU L. REV. 187, 194-201 (2008).

9. CRT and feminist legal scholar, Angela Harris, has argued that it was the focus on closed summer workshops, instead of creating alternative methods for cultivating internal community that created problems for the CRT project. See Angela P. Harris, *Building Theory, Building Community*, 8 SOC. & LEGAL STUD. 313, 314 (1999).

to a righteous cause—identifying the operation of socially constructed and (often) legally sanctioned forms of hierarchy, which are ordered through social identities—in the face of adversity and backlash. Based on the often personal nature of this work,¹⁰ and the criticism it periodically attracts, they also find themselves, at times, searching for refuge—if only figuratively—and hoping for a moment of enlightenment, overcoming, or at least confirmation of the merits and wisdom of their efforts. Finally, also like Elijah, to the extent some hopeful sign is received, it is rarely communicated in the ways one might imagine.¹¹

The understanding that the work of scholars committed to anti-subordination may involve toiling for what we perceive to be virtuous causes is perhaps, the strongest link to the Bible story. This is especially so because confirmation of that struggle's worth will often come in a manner, or through a message, that is inconsistent with what at least some of us might expect. It also marks the way that Elijah's struggle mirrors the journey and wisdom of Derrick Bell. Professor Bell intentionally used his autobiography to remind outsiders within the academy of the burdens of our membership, including our responsibilities to advocate for the interests of communities we should be serving. Most importantly, he spoke of what we should be willing to risk in service to those interests.¹² These views were most clearly articulated in his two autobiographical books, *Confronting Authority*¹³

10. Over the years, CRT and LatCrit scholars have used storytelling, in general, and autobiography, in particular, as methods to challenge the ostensibly objective and neutral perspectives found in majority legal scholarship. See, e.g., Margaret Montoya, *Celebrating Racialized Legal Narratives*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 243 (Francisco Valdes et al. eds., 2002); Mario L. Barnes, *Black Women's Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941, 951-57 (2006) [hereinafter *Restating the Power of Narrative*]; Angela Harris & Leslie Espinoza, *Afterword: Embracing the Tar-Baby - LatCrit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585 (1997); Jerome M. Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding Me in the Legal Academy*, 77 VA. L. REV. 539 (1991) [hereinafter *Teaching Finding Me in the Legal Academy*].

11. While “still small voice” in the biblical text literally refers to the voice of God, I borrow the term to refer to the broader concept of enlightenment. See 1 Kings 19:12 (New King James).

12. See CONFRONTING AUTHORITY, *supra* note 2, at 157-60.

13. See *id.* I first wrote of Derrick Bell's protest and dismissal from Harvard in a book review essay of *Confronting Authority*, as a law student. See Mario L. Barnes, *Each One, Pull One: The Inspirational Methodology Behind an Impassioned Though Somewhat Flawed Protest*, 1 AFR.-AM. L. & POL'Y REP. 89 (1994).

and *Ethical Ambition*.¹⁴ In these texts, he indicated that for moral and ethical causes, those who find themselves within privileged and powerful institutions—however alienated or conflicted we may feel within these places—must have the courage to place works behind intellect and risk our comfort and station for our convictions.¹⁵ Even if we do not achieve the aim of our labors, the effort and commitment to our causes may still prove to be “soul-saving.”¹⁶ In a recent blog post commemorating Professor Bell’s life, U.C. Davis Law Professor Angela Harris perfectly captured this powerful and infectious aspect of his humanity with the following description:

[H]e had the discomfiting habit of trying to live up to his principles and expecting everyone else to, too. His account of his personal strike against Harvard Law School – his decision to take leave unless and until a qualified black woman was hired to the full-time tenure-track faculty – is the best example. Like Peter Singer, the philosopher who tries to get affluent people to use their money and privilege on behalf of the worst-off instead of benefiting their friends and family, Bell was always taking an uncomfortable but principled stand and making you have to explain to yourself why you couldn’t do the same. This Bell was an idealist, not a realist. His answer to those who criticized his “permanence of racism” thesis was similarly disconcertingly idealistic: One fights against racism, even though we know it to be permanent, simply because it is the right thing to do, because we have a moral responsibility to do so. Preachers’ kids sometimes grow up to be odd people in this way: trying to live as God wants us to live rather than making the accommodations to social norms and physical and mental comfort that the rest of us do. I have no idea whether Professor Bell was a preacher’s kid, or

14. See DERRICK BELL, *ETHICAL AMBITION: LEADING A LIFE OF MEANING AND WORTH* (2002).

15. Bell quoted the Bible for this idea as well. See *CONFRONTING AUTHORITY*, *supra* note 2, at 108 (“[I]ntellect without action, like faith without works, standing alone, is dead [*James 2:26*]”) (emphasis in the original); see also Natasha T. Martin, *Allegory from the Cave: A Story About a Mis-Educated Profession and the Paradoxical Prescription*, 9 LEWIS & CLARK L. REV. 381, 386 (2005) (reviewing *Ethical Ambition* and listing the several positions Derrick Bell gave up for ethical reasons).

16. See *CONFRONTING AUTHORITY*, *supra* note 2, at 120, 147.

whether he considered himself religious, but this aspect of his thought and life has that same unnerving quality.¹⁷

As we prepare to promulgate another set of writings, built upon LatCrit values, principles and traditions, it is important to remember Bell's example and challenge—a challenge that should call progressive, anti-subordination scholars to be vigilant to our purpose and to steadfastly advance the project of exposing the disjuncture between “law as it is imagined and law as it is experienced.”¹⁸ After all, outside of that cave on Mount Horeb, the “still small voice” which spoke to Elijah—God's voice—asked him: “What are you doing *here*, Elijah?”¹⁹ While there are likely a number of acceptable theological interpretations of the meaning of the question, my lay reading is that God communicates that even in a time of great turmoil and danger, fleeing in retreat is not the solution. Derrick Bell's repeated acts of protest reflect that he subscribed to such a philosophy. Despite circumstances that would have caused a crisis of faith for most of us, he never faltered in the face of intimidation. Therefore, in reflecting on the passing of this great and inspirational figure, his life demonstrates that those who commit themselves to work that uplifts communities, which law and society often overlook, must continue to diligently grapple with the question: What are we doing *here*? In the remainder of the foreword below, I consider what this cluster of articles from the LatCrit XV symposium suggests as an answer to this very important question.

II. INTRODUCTION

The theme of LATCRIT XV was, “The Color of the Economic Crisis: Exploring the Downturn from the Bottom Up.” The conference

17. Angela P. Harris, *The Preacher and the Pragmatist: Remembering Derrick Bell*, available at:

<http://www.concurringopinions.com/archives/2012/04/the-preacher-and-the-pragmatist-remembering-derrick-bell.html>

18. *Restating the Power of Narrative*, *supra* note 10, at 946; *see also* Nancy Levit, *Reshaping the Narrative Debate*, 34 SEATTLE U. L. REV. 751, 753-54 (2011) (“More than twenty years ago, some ground-breaking theorists in the legal academy made a case for legal scholarship to incorporate the stories—the lived experiences—of outsiders. Neutral legal principles, they observed, were not really neutral; those legal rules encompassed racist and sexist norms.”) (citation omitted).

19. 1 Kings 19:13 (New King James) (emphasis added). This is actually the second time the question was posed to Elijah as it was asked of him once, while inside the cave. *Accord* 1 Kings 19:9 (New King James).

theme and each of the writings in this cluster, in some way, bring to mind one of the foundational writings from the early history of CRT by Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*.²⁰ Professor Matsuda described “looking to the bottom” as, “adopting the perspective of those who have seen and felt the falsity of the liberal promise.”²¹ According to her, doing so “can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.”²² In that vein, much of the discourse at the LatCrit XV conference centered on examining the effects of our current global economic crisis on low-income communities—communities within which people of color have been historically overrepresented.²³ Each of these writings, whether explicitly or impliedly, takes up Professor Matsuda’s call.

Some of the writings also evoke other foundational writings from the CRT/LatCrit canon, including Professor Derrick Bell’s work. In addition to using Biblical references in his work, Professor Bell routinely used storytelling in the form of allegorical parables to explicate the operation of legal principles.²⁴ Building upon the tradition

20. See Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) [hereinafter *Looking to the Bottom*]; see also Mari Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2356-57 (1989) (with regard to speech rights the author similarly opined, “[t]he victim’s perspective requires respect for the idea of rights, for it is those on the bottom who are most hurt by the absence of rights, and it is those on the bottom who have sustained the struggle for rights in American history.”).

21. *Looking to the Bottom*, *supra* note 20, at 324.

22. *Id.*

23. For data discussing the overrepresentation of people of color among the poor, see WILLIAM JULIUS WILSON, *MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY* (2009); MELVIN OLIVER & THOMAS SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON INEQUALITY* (2006). See also Mario L. Barnes, Erwin Chemerinsky and Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 983-87 (2010) [hereinafter *A Post-Race Equal Protection*]; Reginald T. Shuford, *Why Affirmative Action Remains Essential in the Age of Obama*, 31 CAMPBELL L. REV. 503, 518-20 (2009); Richard Lempert, *A Personal Odyssey Toward a Theme: Race and Equality in the United States: 1948-2009*, 44 LAW & SOC’Y REV. 431, 441-46, 448-50 (2010).

24. See, e.g., AND WE ARE NOT SAVED, *supra* note 3; DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: ON THE PERMANENCE OF RACISM* (1993) [hereinafter *FACES AT THE BOTTOM OF THE WELL*]. In *Confronting Authority*, most of which is autobiographical, he also includes the fictional story of the Citadel. See *CONFRONTING AUTHORITY*, *supra* note 2; see also Adrien K. Wing, *Derrick Bell: Tolling in Protest*, 12 HARV. BLACKLETTER L. J. 161 (1995) (reviewing *Confronting Authority* and creating an additional passage for Bell’s Citadel story). On the centrality of narrative

of Professor Bell and other CRT/LatCrit scholars who have embraced varying forms of storytelling, the various writings in this cluster reflect the contours of narrative as a method. They, for example, engage in allegorical storytelling,²⁵ and use the experiences and stories of outsiders to problematize our current²⁶ and historical²⁷ understandings of law and policy. This engagement with substantive theory and method, however, often produces moments of tension. On the one hand, this latest group of writings makes a contribution to legal scholarship by continuing the CRT/LatCrit project of challenging subordination by representing voices and community interests that have long been ignored within dominant scholarly discourse. These writings, which build upon tradition, are also then the latest demonstration of the enduring legacy of outsider jurisprudence.

Alternatively, these writings—in style and substance—confirm that more than twenty years after the formation of CRT and fifteen years into LatCrit, there is still, unfortunately, a continuing need for outsider messages and methods. This realization that groups in the United States disadvantaged due to stigmatized identities have yet to “make it over,”²⁸ implicates another of Professor Bell’s theories: That our legal responses to discrimination should begin with the premise that racism is permanent.²⁹ Bell’s insight lingers, because as much as this cluster of writings continues the project of calling for a better future for the disenfranchised, it also proves we have not overcome the ill-effects of America’s racially-stigmatizing past. In Section III below,

method to CRT more generally, see Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365, 2378-81 (2003).

25. See Joseph K. Grant, *A Conversation with President Obama: A Dialogue About Poverty, Race, and Class in Black America*, 1 U. MIAMI RACE & SOC. JUST. L. REV. 25 (2011).

26. See, e.g., Alfredo Mirande, *Rascuache Lawyering*, 1 U. MIAMI RACE & SOC. JUST. L. REV. 155 (2011).

27. See, e.g., Jason A. Gillmer, *Lawyers and Slaves: A Remarkable Case of Representation from the Antebellum South*, 1 U. MIAMI RACE & SOC. JUST. L. REV. 47 (2011); Danné L. Johnson, *New Century Freedom for the Freedmen*, 1 U. MIAMI RACE & SOC. JUST. L. REV. 77 (2011).

28. This reference to overcoming also has religious significance. See *Reflection on a Dream World*, *supra* note 1, at 10-11.

29. See FACES AT THE BOTTOM OF THE WELL, *supra* note 24, at xiii. For a current example suggesting the resiliency of race bias, see Angela Onwuachi-Willig & Mario L. Barnes, *The Obama Effect: The Meaning of Obama in Antidiscrimination Law*, 87 IND. L.J. 325, 338-39, 343-45 (2012) (presenting cases and employment statistics, indicating that race-based employment discrimination claims have not decreased during the Administration of the country’s first black-white bi-racial president).

I analyze each essay in this cohort, including a discussion of its relatedness to previous CRT/LatCrit uses of narrative, and whether these stories include elements that are simultaneously hopeful and discouraging. Ultimately, I conclude by discussing what work of this kind suggests to me about the enduring legacy of the LatCrit project and the potential for undermining identity-based systems of privilege in the United States and beyond.

III. THE CONTINUING MYRIAD USES OF OUTSIDER NARRATIVES

A. Outsider Narratives and New Allegories

The connection between this cluster of essays and the power of narrative as a method exists in varying degrees. Perhaps the strongest connection exists for Joseph Karl Grant, *A Conversation with President Obama: A Dialogue About Poverty, Race and Class in Black America*.³⁰ In the allegorical style similar to that often employed by CRT luminaries Professors Derrick Bell and Richard Delgado, the author imagines a fictional conversation on poverty, education, and employment with President Barack Obama. Taking place on the heels of a 2012 election victory, the poverty conversation also focuses on issues of race and class.³¹ Professor Grant explores the connections between rural and urban poverty and calls for a change to tax policy that would provide a housing credit to every American—similar to, but more expansive than the homebuyer credit President Obama offered early in his administration.³² He also suggests a rehabilitation tax credit, which would provide a \$5,000 tax credit to an investor/builder purchasing a foreclosed property in a targeted community. For this credit, he would also require the investor/builder to hire locals for the project.³³ In a manner that brings to mind Professor Bell's interest convergence argument,³⁴ Professor Grant essentially endorses

30. See Grant, *supra* note 25.

31. See *id.* at 17-19. In a very small way, this Essay also includes a biblical text—Cain's question to God: "Am I my brother's keeper?" See *id.* at 18.

32. See *id.* at 23-25.

33. See *id.*

34. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 581 (1980) (the theory posits that civil rights gains for Blacks will only ever be realized when they also create some benefit for Whites, or when black-white interests otherwise converge); *FACES AT THE BOTTOM OF THE WELL* *supra* note 24, at 174 (author noting the opposite corollary that when interests diverge,

universalist approaches to eradicate poverty, meaning programs would need to be based on socioeconomic factors, rather than race.³⁵

In a fashion somewhat less committed to race-neutrality than his anti-poverty program, Professor Grant also advocates three education proposals. Consistent with his early universalist approaches, he calls for making undergraduate education free for students who volunteer for two years in a public service capacity.³⁶ The next two elements of his program, however, are decidedly race-conscious. First, he endorses an increase in federal funding for Historically Black Colleges and Universities (HBCUs). Additionally, he proposes to focus on pipeline programs for math and sciences between HBCUs and middle and high schools.³⁷

For employment, Professor Grant again returns to tax credits, encouraging them for businesses that create green and manufacturing jobs.³⁸ His final employment program is not really about employment at all. It is about reforming the prison industrial complex that all too often functions to render black men unemployable. At the end of his discussion, he also adds recommendations for improving capital access and microlending opportunities for Blacks interested in small business.³⁹

Professor Grant's exercise in storytelling intentionally continues the tradition of scholars such as Professors Bell, Delgado and Culp.⁴⁰

"black rights, black interests, black property, even black lives are expendable whenever their sacrifice will further or sustain white needs or preferences").

35. See Grant, *supra* note 25, at 25. Dean Erwin Chemerinsky and I have previously critiqued the interconnectedness of race and class through an analysis of Fourteenth Amendment suspect class jurisprudence. Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS. 109 (2009).

36. See Grant, *supra* note 25, at 35.

37. See *id.* at 36.

38. See *id.* at 38-39.

39. See *id.* at 42. This set of proposals also championed the use of public-private partnerships to "foster and engender start-up businesses in innovative technologies." *Id.* at 44.

40. For Professor Bell's use of allegory, see *supra* notes 3, 24. Professor Delgado has written extensively using his alter ego, Rodrigo. See, e.g., Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993); Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994). Professor Culp also deployed allegory in a provocative essay that queried whether black Americans could be compelled to take a pill that would turn them white. See Jerome M. Culp, Jr., *The Michael Jackson Pill: Equality, Race, and Culture*, 92

In the substance of his fictional dialogue, he raises important legal and policy points about race, class and opportunity, and holds our attention by including fictional presidential responses to his claims and proposals. While I hope we are past the stinging criticism this type of storytelling initially elicited,⁴¹ I did find a point of tension in Professor Grant's work: His proposals straddle the line between race-neutral and race-conscious approaches. First, it seems a bit counterintuitive to offer both types of remedies, because a commitment to race-neutral goals would seem to preclude a simultaneous commitment to race-consciousness—at least in terms of political perspective. Second, to the extent a portion of the proposal turns on the explicit consideration of race, Professor Grant's story ignores the country's current obsession with moving beyond race.⁴² He deals with this issue in the following passage, which sets the terms for his discussion with the President:

In what we were lead to believe was a post-racial America, race has been the 800-pound gorilla in the room that many have chosen to either ignore or brush aside. As the nation's first African American President, Obama has realized that the time to act is now; we can no longer sidestep the issue.⁴³

While the beauty of storytelling is that one may construct narratives which mitigate the hurdles that impede the goals one sets out, in this instance it would have been interesting to see a dialogue that does more to grapple with the world as it truly is, rather than the world that many Race- and Lat-Crit scholars hope for. Still, Professor Grant's attempt to craft political programs that will most help persons at the

MICH. L. REV. 2613 (1994).

41. See *Restating the Power of Narrative*, *supra* note 10, at 954-56 (discussing the criticism of the use of narrative in legal scholarship); see, e.g., Richard A. Posner, *The Skin Trade*, THE NEW REPUBLIC, Oct. 13, 1997, at 40; Daniel Farber & Suzanna Sherry, *Telling Tales Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

42. On the meaning and import of the post-race perspective, see *A Post-Race Equal Protection*, *supra* note 23; Ian Haney-Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010); Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009).

43. Grant, *supra* note 25, at 27. Constructing a president with a more nuanced response to the post-race question would have been quite interesting given the way President Obama minimized the importance of race in his 2008 campaign. See Cho, *supra* note 42, at 1591-92; Angela Onwuachi-Willig & Osamudia James, *The Declining Significance of Presidential Races?*, 72 LAW & CONTEMP. PROBS. 89, 99-100 (2009).

bottom is commendable. That he chose storytelling as his method, further speaks to the effectiveness and enduring legacy of the method.

B. Outsider Narratives and Reframing the Old

One of the goals of CRT and LatCrit has been to challenge and add context to racialized histories. This particular CRT/LatCrit intervention has often been achieved through narrative methodology. Professors Angela Harris and Leslie Espinoza have referred to this goal of narrative as the effort to “re-story the past and reimagine the future.”⁴⁴ Essays in the collection by Professors Gillmer and Johnson, which respectively address slavery and Reconstruction narratives, undertake this type of corrective or reframing endeavor.

1. Unearthing and Explicating Outsider Histories

In *Lawyers and Slaves: A Remarkable Case of Representation from the Antebellum South*, Jason Gillmer analyzes the case of *Webster v. Heard*, a slave-era testamentary story.⁴⁵ In the case, Mark Potter, an attorney from Galveston, Texas, represented Betsy Webster, a slave whose emancipation was provided for in the will of David Webster, her deceased owner.⁴⁶ Based on its narrowness, this event lacks the significance or cache likely needed to capture the imagination of most legal historians. Therefore, to the extent this piece involves the retelling of a single or local story from a long past era, the question becomes: What is the value of unearthing this type of understudied, modest narrative? Through archival resources, and in a largely descriptive manner, Professor Gillmer seeks to resurrect a history that will “illuminate a world in which local experience and intimate matters upend some of our fundamental assumptions about race, law and life during slavery.”⁴⁷ In service to this goal, and as critical scholars have previously argued, the Essay reemphasizes a point about the power of individual narratives and case studies. Moreover, it also calls to mind the sociolegal literature on how legal attitudes and everyday legal experiences inform the constituting of legal norms, which has been explored to profound effect by sociolegal scholars, such as Austin Sarat, Sally Engle Merry, Kristin Bumiller, and Patricia Ewick and

44. See Harris & Espinoza, *supra* note 10.

45. See Gillmer, *supra* note 27.

46. See *id.* at 54.

47. *Id.* at 49.

Susan Silbey.⁴⁸ In effect, one element in this story speaks to how even a subordinated person sees herself as capable of deploying law to her benefit.

Betsy and David's story included a number of interesting facts. First, when Webster died, he owned substantial property in St. Joseph and Galveston, Texas. His will first freed Betsy and then left his estate to her. This circumstance seemed to reflect the intimate character of the relationship and that she was very involved with his household and business.⁴⁹ Second, the story provided a stark example of how law and society respond to attempts by the disenfranchised to improve their social station. Local residents were troubled by what resembled more of an interracial union than a master-slave dynamic, between David and Betsy. Similarly, the Galveston community experienced difficulty accepting Betsy as a free woman. This discomfort was consistent with Texas law, which required all freed Blacks, except those that had been there either before the War of Independence or by the express permission of Congress, to leave the state.⁵⁰

In addition to the community reactions to Betsy's claims, there was ultimately a will contest brought by one of David's distant relatives.⁵¹ The contest centered both on technical issues with the will and a claim that freeing Betsy was void against public policy.⁵² Much of the remainder of the Essay explained how Betsy, who had no means to pay for her representation until she was declared free and capable of inheriting the estate, came to acquire counsel and win her case.⁵³

48. See, e.g., Austin Sarat, ". . . The Law Is All Over": *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343 (1990); SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990) (an ethnographic study of use of courts by local citizens in a New England city); KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1992); PATRICIA EWICK & SUSAN SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998).

49. See Gillmer, *supra* note 27, at 52.

50. See *id.* at 45.

51. See *id.* at 47.

52. Texas law required a will that freed a slave to also provide for extradition outside of the state, but Betsy's lawyers argued that the question of the validity of the devise of freedom, which included the possibility of extradition, was separate from the question of enforcing the extradition. See *id.* at 53.

53. Attorneys Mark Potter and William Pitt Ballinger agreed to represent Betsy, respectively, based on Potter's friendly relationship with the deceased and Ballinger believing it was a great case. See *id.* at 48-49. Betsy prevailed because the distant relative could not prove her relation to the decedent and the court appeared to ignore an earlier precedent that suggested a slave could not be freed through a will in Texas

While Professor Gillmer's Essay demonstrates the power of a singular narrative to complicate historical understandings, it also produces a number of discomfiting moments. For example, as one might expect given the unconventional nature of their relationship, the details of the life of Betsy and David were principally inferred—i.e., presumed based on what was most likely given the period.⁵⁴ This opacity leads to another issue with this small but important story: The relationship between David and Betsy—a relationship constructed in and around chattel slavery—may have been somewhat romanticized.⁵⁵ First, as the provocative work of Professor Cheryl Harris has articulated, the underpinnings of racial hierarchy and understandings of property in the U.S. have been significantly shaped by the institution of slavery serving to dehumanize black bodies.⁵⁶ Second, however well David may have treated her, the case only exists because, until he died, he *owned her*. The fact that he treated her well in the end and that the case had a positive outcome, should not obscure this circumstance. Additionally, this type of unique historical moment, where race-based disadvantage is overcome, is much less prevalent than situations where race creates historic and lasting negative consequences. This more typical story of race and the law is next considered.

2. Contextualizing Outsider Histories and Accounting for Unfulfilled Promises

In a second paper focused on slavery and its aftermath, Danné L. Johnson provocatively queries whether we should revive a version of the Bureau of Freedman.⁵⁷ The Bureau existed, immediately after the Civil War to handle issues related to abandoned lands, Freedmen and refugees in the South. According to Johnson, “it was underfunded, under-staffed and dismantled before its work was completed.”⁵⁸ With regard to former slaves, the Bureau's greatest contribution was to provide basic subsistence and to assist with social welfare concerns. The Bureau, however, set procedures for the educating of freed slaves

unless there was a provision requiring the ex-slave to leave the state. *See id.* 64-66.

54. *See id.* at 53.

55. *See id.* (describing the relationship between Betsy and David in fairly genteel terms).

56. *See* Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993) [hereinafter *Whiteness as Property*].

57. *See* Johnson, *supra* note 27.

58. *Id.* at 78.

and for parties to contract with Freedmen—especially with regard to Freedmen’s labor—as a means of facilitating their economic independence.⁵⁹ The Bureau was initially created for a year through post-war legislation. It was, however, extended for several years, until 1872. While the Bureau made limited strides in educating freed slaves, it was less than successful at protecting freed slaves’ civil liberties and property rights.⁶⁰

Johnson’s central argument is that, for American Blacks, who have lagged significantly in their progress toward societal success for the last 150 years, a large part of the problem is the lingering and compounded effects of the failed attempts to shield ex-slaves from racial subordination at the end of the Civil War.⁶¹ She supports this claim by comparing historical and contemporary deficits in the areas of education, healthcare, wealth accumulation, and incarceration rates. She essentially claims that these conditions result from the country’s racially segregated past, and persists in the form of “racial inequality gaps,”⁶² even though society has ostensibly eliminated most forms of de jure discrimination. Without taking on a Fourteenth Amendment equality argument, Johnson argues that social justice concerns should compel the state to reduce or eliminate the negative consequences of the failed attempts to initially protect freed slaves from the effects of segregation and discrimination.⁶³ The means she authorizes to achieve this goal is the formation of a commission—the New Century Freedmen’s Commission (NCFC)—to take on a role similar to that of the Freedmen’s Bureau. The proposal calls for the Commission to exist for 80 years and to be funded at the level of 2.188 trillion dollars, which Johnson identifies as the present day value of the wages of freed slaves, post emancipation.⁶⁴

Given the cost and infrastructure that would be necessary to

59. *Id.* at 82-83.

60. *Id.* at 83-88.

61. *See id.* at 89-90.

62. *See id.* at 106-07.

63. *See id.* Elsewhere, a co-author and I have made a similar point within the context of a Fourteenth Amendment argument. *See* Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059 (2011) (using the history of the moment that produced the Reconstruction Amendments to argue had Congress really been interested in removal of all the barriers slavery produced in the lives of freed Blacks, the measure of equality protected under the Fourteenth Amendment, would need to be substantive).

64. *See* Johnson, *supra* note 27, at 106.

create such a commission, Johnson's proposal likely has greater import as a thought experiment, rather than a blueprint for viable legislative action. Still, the proposal has positive and negative implications. As a narrative intervention, the proposal effectively shifts the dialogue away from the standard Fourteenth Amendment equality story into a conversation about the unfulfilled promise of post-emancipation legislation.⁶⁵ While Johnson does not explicitly make the argument, her proposal may also offer an opportunity for revisiting the meaning of the "badges and incidents of slavery" language from the Thirteenth Amendment.⁶⁶

As much as the proposal perfects an interesting reorienting of views on why racial inequality persists, it also induces concern. Most significantly, some will regard as controversial the NCFC choice not to extend its benefits to immigrant Blacks. While this limit is understandable given the proposal's literal connection to a failed Reconstruction-era program, part of the contemporary inequality gap is maintained through forms of systemic and structural racism that affect both the descendants of slaves and black immigrants.⁶⁷ Moreover, CRT/LatCrit scholar, Jerome Culp, once invited us to combat self-hatred by standing up for the rights of minorities who are not us.⁶⁸ If we accept Professor Johnson's proposal, we might also have to interrogate how we stand up for the rights of persons, who are us—at least within the perceptions of many Americans. Professor Johnson's

65. Getting past the anti-classification/anti-subordination bind would be very valuable. See, e.g., Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004). Still, there are many who would challenge the proposal, based on its similarity to reparations arguments or even because it will privilege Blacks, but not other out-groups based on their unique histories of subordination.

66. See U.S. CONST. amend. XIII, § 2. The Amendment, however, has been nearly ignored as a potential enforcement tool for Congress. See *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968) (The Court last finding that Section II of the Thirteenth Amendment reached private conduct in a suit alleging discrimination in the provision of housing.).

67. This argument that both the descendants of slaves and black immigrants are significantly negatively affected by racialized stigma has been presented in the context of Blacks being admitted to college. See Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141 (2007).

68. On the subject, Professor Culp opined: "How does one combat the seventh aspect of self-hatred? One way is to accept the multiple identities of others and to hear the power of their stories in our own lives. Hearing the oppression of others is also a first step to slaying self-hatred." Jerome M. Culp, Jr., *Seventh Aspect of Self-Hatred: Race, LatCrit, and Fighting the Status Quo*, 55 FLA. L. REV. 425, 436 (2003).

work, then, evokes a number of anxiety-inducing questions. First, as I argued above, in a country that has congratulated itself for moving from racist, to color-blind, to post-race, any form of race-conscious government intervention is unlikely to find broad-based support. Second, from a LatCrit perspective, there may be no more pressing question than whether a commitment to anti-subordination should prevent the investment in racialized remedies built around differences either in inter- or intra-group histories. In effect, perhaps all outsiders should rise together based on contemporary manifestations of bias against the various groups, rather than individual group histories. LatCrit has always been committed to progressive, coalitional politics. Professor Johnson's work, then, invites us to conceptualize anew what that might mean.

C. Accounting for Contemporary Outsider Realities: Of Missing Stories and Counter-Stories, and “*Defining Ourselves for Ourselves*”⁶⁹

If I didn't define myself for myself, I would be crunched into other people's fantasies for me and eaten alive.

—Audre Lorde⁷⁰

Part of the critical analytical project has sought to address a concern over self-definition, by providing counter-stories—narratives which represent the lived experiences of socially marginalized segments of society. According to leading CRT scholar, Richard Delgado, counter-stories serve the protective function of assisting victims in keeping their identities intact and have the power to challenge ostensibly objective and neutral majority stories.⁷¹ In light of

69. In a symposium commemorating LatCrit IX, Jacquelyn Bridgeman used this title to pose the question of how Blacks would define themselves if we were free of the oppositional identity comparison to Whites. See Jacquelyn Bridgeman, *Contemporary Racial Realities: Defining Ourselves For Ourselves*, 35 SETON HALL L. REV. 1261 (2004). While I welcome her use of the phrase, here, it is also deployed to suggest that counter-stories are used to undo the minority identity disfigurement performed by some majority narratives. See *Restating the Power of Narrative*, *supra* note 10, at 968.

70. AUDRE LORDE, *SISTER OUTSIDER: ESSAYS AND SPEECHES* 137 (1984). For a critique that Lorde, herself, was an omitted voice from rhetoric discourse, see Lester C. Olson, *On the Margins of Rhetoric: Audre Lorde Transforming Silence into Language and Action*, 83 Q. J. SPEECH 49, 50 (1997).

71. Richard Delgado, *Storytelling for Oppositionists and Others*, in *THE LATINO/A*

this, individual stories that speak to ongoing forms of identity manipulation have a greater than personal significance:

Court opinions or doctrinal narratives describing legal encounters of the marginalized, then, have a potential to de-emphasize the individual story of the legal subject and to emphasize stock stories, which are partially built upon oppressive stereotypes. This operation of unconscious bias also reveals the importance of an individual's subjective experience to understanding legal relationships—the disruption of unacknowledged distortions of identity appearing within the companion doctrinal (“official”) story.⁷²

It is crucial then that stories such as those raised by Professor Romero and Mirande in the next two essays, which reflect experiences not typically represented within the “stock stories” that populate judicial and legislative consideration⁷³ are interjected into the discourse. Interestingly, both authors find partial inspiration for their pieces from *Autobiography of a Brown Buffalo*, Chicano activist Oscar Zeta Acosta's fictionalized tale of a lawyer's search to resolve identity conflict and develop political consciousness.⁷⁴ At bottom, both essays attempt to foreground within legal discourse, the ignored or misinterpreted stories of communities who have been underserved by law and abandoned by society. While I continue to believe in the particular power of counter-stories based on the personal experiences of outsiders, I also, however, have grown increasingly skeptical that those in power will ever listen—at least without revolution. This is so because positive individual stories may be “exceptionalized” or deemed relevant to only *that* person. Also, forms of oppression are deeply rooted, and seamlessly interconnected. When, however, we fail to tell stories such as those next considered, the unchallenged stories that remain, negate and destroy us. Under these circumstances, the

CONDITION: A CRITICAL READER 238-39 (Richard Delgado & Jean Stefancic eds., 2d ed. 2011).

72. *Restating the Power of Narrative*, *supra* note 10, at 968.

73. Commentators have created varying theories to describe how courts become captured by stereotypical understanding of identity. See Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845 (1994); Ian Haney-Lopez, *Institutional Racism: Judicial Conduct and a Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000).

74. OSCAR ZETA ACOSTA, *AUTOBIOGRAPHY OF A BROWN BUFFALO* (1972) (a tale involving the narrator's quest for self discovery).

words of Audre Lorde are again instructive: “It is better to speak.”⁷⁵

1. Giving Voice to “Missing” Outsider Narratives

a. Of Autobiography, Poetry and Exclusion Stories

Tom Romero’s contribution to this collection, *The Color of Water: Observations of a Brown Buffalo in Ten Stanzas*,⁷⁶ is deeply affecting. Not only does it explicate a story of local and global inequality around access to water, it manages to do so by interweaving both personal stories and poetry into the analysis. The result is a rich and disturbing tapestry, in which he brings the “perspective of LatCrit Theory into exploring and understanding the rights, remedies, and policies associated with water resource management.”⁷⁷

In his personal narratives, which move from describing his learning to swim in irrigation ditches in Western Colorado and the struggles around water of his farm-worker grandparents to describing the utility practice at his firm, we are reminded, first, how personal stories help to reveal something about the world that may be otherwise lost.⁷⁸ Additionally, while perhaps not intentionally, stories such as Professor Romero’s remind us that outsider scholars often view the world through a “twoness” that reflects our traveling within privileged spaces,⁷⁹ which may be very different from the more modest circumstances that many outsider scholars come from.⁸⁰ In many ways,

75. AUDRE LORDE, *THE BLACK UNICORN* 31 (1995).

76. Tom Romero, *The Color of Water: Observations of a Brown Buffalo in Ten Stanzas*, 1 U. MIAMI RACE & SOC. JUST. L. REV. 107 (2011).

77. *Id.* at 110-11.

78. *See id.* at 108-09 (briefly describing his early life and firm work).

79. This reference to “twoness”, is a reference to W. E. B. DuBois and his theory of the double (multiple) consciousness of Blacks in America, which is explained in the following passage: “One ever feels his twoness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.” W. E. B. DUBOIS, *THE SOULS OF BLACK FOLK* 12 (Arc Manor 2008). I posit here, of course, that anyone marginalized as a function of racial/ethnic identity, would experience the same phenomenon.

80. Professor Sylvia Vargas has analyzed how critical scholars use their autobiographies, which include beginnings that may be modest, to engage with legal arguments. *See* Sylvia R. Lazos Vargas, *Critical Race Theory and Autobiography: Can a Popular “Hybrid” Genre Reach Across the Racial Divide?*, 18 LAW & INEQ. 419, 419-29 (2000) (analyzing the use of autobiographical stories by Kevin Johnson, Bryan Fair, and Bill Ong Hing). I have used personal narratives or experiences in varying degrees to foreground legal analysis in at least three of my previous published writings. *See, e.g., Restating the Power of Narrative*, *supra* note 10, 964-66 (the story of the

the work of LatCrit, which seeks to defend and uplift the most marginalized among us, is not an impersonal task for many of its scholars; it is service to communities that produced us and to which many of us still have connections.

Professor Romero's stories and his original poem, *El Grito de La Agua* (*The Cry of Water*), are used as stepping off points to analyze "the many insidious ways that water law and policy creates, reinforces, and reproduces the Brown, Black, White, Red, and Yellow color lines that have become so salient a feature of social inequality in the modern world."⁸¹ He supports this claim by introducing data that details that millions of people in the world live without safe drinking water and billions live without basic sanitation.⁸² In the U.S., the Essay focuses on the rights developed in and around water scarcity and the ostensible preference for "beneficial" or non-wasteful appropriations.⁸³ Professor Romero, however, provides examples of how political entities in Colorado and U.S. border towns (colonias) made decisions that were essentially designed to enforce "racially stratified cities."⁸⁴ In one notable example, he articulates the competing fortunes of a corporation that sought to drill wells and Chicano residents seeking to alter the voting district in a Southern Colorado town. Surprisingly, the residents were able to successfully create a minority-majority voting district, while the corporation was denied the opportunity to develop the area's water rights.⁸⁵ Despite the political success within this one town, Professor Romero seems to be calling for an improved legal framework to manage the patchwork set of approaches to water rights, a framework that eliminates the effects of racial bias.

In some ways, Professor Romero's Essay addresses a problem that is quintessentially of the type that would have captured the attention of early CRT scholars. Within the first wave of CRT

1967 criminal trial of my maternal grandmother); Mario L. Barnes, *Racial Paradox in a Law and Society Odyssey*, 44 LAW & SOC'Y REV. 469, 476-78 (2010) (presenting the experiences of my paternal grandmother as they related to her work as a domestic); Mario L. Barnes, "But Some of [Them] are Brave": *Identity Performance, the Military, and the Dangers of an Integration Success Story*, 14 DUKE J. GENDER L. & POL'Y 693, 735 (2008) (using personal relationships and knowledge to analyze military officer promotions for women of color within the Navy JAG Corps).

81. Romero, *supra* note 76, at 113.

82. *Id.* at 116.

83. *See id.* at 123-14.

84. *Id.* at 127-28.

85. *Id.* at 128.

scholarship significant attention was dedicated to deconstruction of socially constructed concepts such as “race,” “merit” and “equality.”⁸⁶ Here, Professor Romero attempts to expose the discriminatory practices attendant in the ostensibly unbiased practices associated with water rights. To the extent he reveals a bias for which there has been little attention paid, we can be thankful for the continued commitment of progressive, anti-subordination scholars to provide this type of insight and analysis. The need, however, to continue these reconstructive projects speaks to the ways in which the critical project may only ever be a partially successful enterprise. In other words, Professor Romero’s work reminds us that doing careful and thoughtful work to unmask previously under-analyzed discrimination, will only ever be a partially satisfying moment, endowed both with renewed hope and lingering despair.

2. Not Just Fiction: The Call to Deploy “Real” Outsider Stories and Methods in Multiple Locations

The remaining Essay in this cluster turns its attention away from the study of legal scholarship and frameworks. In *Rascuache Lawyering: A Paradigm of Ordinary Litigation*, Alfred Mirande focuses, instead, upon legal practice.⁸⁷ More than some of the other essays in this cohort, the author explicitly engages the narrative work of Professors Bell and Delgado—discussing the emergence of their respective fictional alter egos Geneva and Rodrigo Crenshaw.⁸⁸ While the article commends narrative and allegory as interventions, it criticizes CRT/LatCrit for failing to turn a sufficiently critical gaze upon the law practice arena. He provides with respect to practice, that the focus should be ordinary litigation or “*rascuache lawyering*.”⁸⁹ Professor Mirande describes *rascuache* as a uniquely “Mexicano”

86. See, e.g., Richard Delgado, *Rodrigo’s Tenth Chronicle: Merit and Affirmative Action*, 83 GEO L.J. 1711 (1994) (discussing the socially constructed nature of merit); Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 1-20 (1994) (discussing the socially and legally constructed nature of race); Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 1-23 (1991) (discussing the myriad constructions of race); Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1331-49 (1988) (discussing shifting notions of equality).

87. See Mirande, *supra* note 26.

88. See *id.*

89. *Id.*

colloquialism, which refers to an item that is poor or of inferior quality. The connotation, however, refers to the underdog. The author describes it as an attitude that is “down but not out”.⁹⁰ Without referencing the work of Mari Matsuda, in particular, the author refers to the practice as a “bottom up” view of the law.⁹¹ Rascuache lawyering, however, also encompasses the “rebellious lawyering” project advanced by UCLA Law Professor Gerald López and other scholars.⁹² Mirande describes rascuache lawyering as encompassing basic tenets/guidelines more so than being a directly applicable legal theory. Additionally, rascuache lawyering posits that the theory of practice derives from experiences and focuses upon the “personal, subjective, and particularistic.”⁹³ This last tenet of rascuache lawyering is what distinguishes it from CRT, according to Mirande. Rascuache lawyering is different from CRT in that it depends not on fiction, but on actual accounts from practice. He then uses examples from his practice to make the point and set out guidelines. The working guidelines for this paradigm focus heavily on looking to the bottom, building synergistic relationships, and making space for omitted voices.⁹⁴

While encouraging scholars to pay greater attention to practice is commendable, Professor Mirande somewhat overstates the perceived difference between rascuache and CRT/LatCrit narratives. First, as he acknowledges, CRT and LatCrit have endorsed and foregrounded “bottom up” approaches to law and policy. Second, not all of the uses of narrative methods within CRT/LatCrit scholarship embrace allegory or other fictional approaches as the preferred methods. Many outsider scholars deploy autobiography and other forms of non-fictionalized story-telling to present and engage legal arguments.⁹⁵ Additionally,

90. *Id.*

91. *Id.* at 159.

92. The author specifically references Gerald Lopez, Lucie White, and Bill Ong Hing. See, e.g., Gerald López, *Rebelling Against the War on Low-Income, of Color, and Immigrant Communities*, in *AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION* 151 (Mary Louise Frampton et al. eds., 2008); Lucie White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *BUFF. L. REV.* 1 (1990); Bill O. Hing, *Coolies, James Yen, and Rebellious Advocacy*, 14 *ASIAN AM. L.J.* 1 (2007); and Bill Ong Hing, *Rebellious Lawyering, Settlement, and Reconciliation: Soko Bukai v. YWCA*, 5 *NEV. L.J.* 172 (2004).

93. See Mirande, *supra* note 26, at 160.

94. See *id.* at 176.

95. See, e.g., Margaret E. Montoya, *Mascaras, Trenzas, Y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 *HARV. WOMEN'S L.J.* 185, 185-200 (1994); *Finding Me in the Legal Academy*, *supra* note 10; Patricia

sociolegal theory has produced numerous empirical studies whose data sets have included the stories of outsiders.⁹⁶ In the end, Mirande's paradigm seems to be far more complimentary to LatCrit—with a weighted focus on practice—rather than being a separate intervention.

IV. CONCLUSION

The writings in this cluster represent the many permutations of outsider narratives. Through telling fictional and personal stories, de- and re-constructing majority histories, and articulating missing and alternative perspectives to majority discourses, these authors have clearly made a contribution to the LatCrit project and, more broadly, to the scholarly discourse. That the authors have contributed these stories without feeling the need to greatly explain or defend their choice of methods, suggests a great improvement in the conditions under which progressive scholars work. These essays also suggest that we will tell our stories, speak our truths and not worry about the critiques of persons who just “don't get” what it is we are trying to do. The cluster, however, also reflects why outsider scholars must be vigilant to avoid the traps of essentialism, and question the intra- and inter-community consequences of our proposals.

With regard to the simultaneous hope and despair that sometimes pervades our projects, perhaps this is a necessary evil. We still exist in a world where communities of color disproportionately suffer real material disadvantage and where majority interests do not acknowledge how this disadvantage is achieved through social arrangements, often ordered or enforced through law. We are hamstrung in our ability to confront these conditions due to malaise, lack of concern, undue commitment to the role of intent in matters of bias, and the adoption of political perspectives that have prematurely embraced the overcoming of the negative effects of identity. While

Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127 (1987) (describing the now well-known story of not being “buzzed in” to a Benetton Store in New York City); *Whiteness as Property*, *supra* note 56, at 1709-11 (describing her grandmother's passing as white); *Restating the Power of Narrative*, *supra* note 10 (discussing the use of narrative, generally, and the story of his grandmother being charged as an accessory to a murder, in particular).

96. See *Restating the Power of Narrative*, *supra* note 10, at 979-83; see e.g., KAARYN S. GUSTAFSON, *CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY* (2011) (using empirical studies of welfare recipients to address how welfare is socially and legally constructed through the regime of crime).

these circumstances make it difficult to be hopeful about the work we do, we must do it all the same. Derrick Bell, who acknowledged the permanence of racism within our society, still ended one of his autobiographical works by indicating that in the tradition of slaves—who also understood there was no escaping the burdens of their conditions—while alive, we need to continue to engage ourselves in “the creation of humanity”.⁹⁷ This should be our continued project.

Returning to the passage that begins this foreword, working to create humanity, also figures in to the answer I would provide were God’s question to Elijah, posed to us. Based on what we see in this cluster, the outsider scholar’s answer to the question, “What are we doing here?” is that we are not hiding and, indeed, we remain committed to a righteous undertaking. We cannot abandon the fight, if we wish to achieve the larger goals of justice and equality for all people. We should also remember that as we toil in the privileged spaces of law school environments, we do so for the benefit of thousands of other omitted true believers. More than just looking to the bottom, our projects and scholarship should remain committed to raising those individuals up by challenging the unfavorable material conditions under which so many of them live. If we do this, LatCrit theory—a thriving scholarly movement that remains committed to community—may ultimately serve to invoke another Biblical reference: “the stone that the builder rejected becoming a capstone.”⁹⁸

97. See CONFRONTING AUTHORITY, *supra* note 2, at 164.

98. See Acts 4:11 (New International Version). In the Biblical context, the metaphor describes Jesus.