

NONCONFORMITY IN AMERICAN LAW AND LIFE:
HOW MUCH DO WE REALLY VALUE DIVERSITY?
2016 MEADOR LECTURE

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ABSTRACT

Americans believe that we are by and large a highly tolerant nation that welcomes and tolerates a lovable array of geniuses, nonconformists, eccentrics, and crackpots. The myth of individualism holds that this is a strong point of our liberal tradition because nonconformists often turn out to be major contributors to the arts, science, and other facets of national life. Using examples drawn from several areas, including a wall of portraits at a university museum, this Essay shows that our tolerance for deviance is much more limited than we like to think but that the myth of forbearance allows us to enforce harsh limits on social deviance while believing ourselves fully justified in doing so.

INTRODUCTION

In our collective imagination, we are a nation of rugged individualists.¹ We prize non-conformity. We celebrate the scientist (Galileo),² theologian (Martin Luther),³ inventor (Henry Ford),⁴ or artist (Andy Warhol)⁵ who defies orthodoxy, breaks from tradition, forges a new path, and emerges successful and, sometimes, famous and wealthy.

We dote on those who march to the tune of their own drummers in fiction as well as in real life. Novels as different as J.D. Salinger's *Catcher in the Rye*⁶ or Ayn Rand's *The Fountainhead*⁷ tout individualism and deplore suffocating conventions, parental restrictions, or petty social rules. Movies ranging from Charlie Chaplin's *The Tramp*⁸ to Clint Eastwood's *The Man with No Name* trilogy⁹ dramatize figures who did it their way. Regional lore dramatizes nonconformists, too. New England has its

1. See Michelle Dean, *For Generous Parental Leave and Great Schools, Move to Finland*, N.Y. TIMES (July 19, 2016) https://www.nytimes.com/2016/07/24/books/review/nordic-theory-of-everything-anu-partanen.html?_r=0 (reviewing ANU PARTANEN, *THE NORDIC THEORY OF EVERYTHING: IN SEARCH OF A BETTER LIFE* (2016)) (agreeing with the author's premise).

2. On his travails with the Catholic Church, see *1633: Galileo is Convicted of Heresy*, HISTORY (2009), <http://www.history.com/this-day-in-history/galileo-is-convicted-of-heresy>.

3. On the life of this theologian reformer, see *Martin Luther Biography*, BIOGRAPHY, <http://www.biography.com/people/martin-luther-9389283#related-video-gallery> (last updated Mar. 24, 2016).

4. See STEVEN WATTS, *THE PEOPLE'S TYCOON: HENRY FORD AND THE AMERICAN CENTURY* (2006).

5. See STAFF OF ANDY WARHOL MUSEUM, *ANDY WARHOL 365 TAKES* (2004).

6. J.D. SALINGER, *THE CATCHER IN THE RYE* (Bay Back Books ed. 2001).

7. AYN RAND, *THE FOUNTAINHEAD* (1943).

8. *THE TRAMP* (Essanay Film Manufacturing Co. 1915) (depicting the adventures of a lovable wanderer).

9. *A FISTFUL OF DOLLARS* (Constantin Film 1964); *FOR A FEW DOLLARS MORE* (Constantin Film 1965); *THE GOOD, THE BAD, THE UGLY* (Constantin Film 1966) (portraying the foibles of a laconic bandit, shooter, or killer).

cracker-barrel philosopher;¹⁰ Appalachia, the downhome spinner of tales;¹¹ the West, the rugged cowboy riding the range; the South, the lovable eccentric who helps everyone in her circle of friends, even, maybe, the family of her maid.¹²

Celebrities can be “characters” not just on the stage but in real life, admired for their high spirits, wisecracking, nightclubbing, or outspoken ways.¹³ University professors, too, can be adorable eccentrics, especially if they wear bow ties or elbow patches and take the trouble to get to know their students. We make movies about them—*Goodbye, Mr. Chips*¹⁴ or *The Prime of Jean Brodie*.¹⁵

The very figure after whom this essay is named was by all accounts a lovable oddball. As dean at Alabama in the late 1960s, Dan Meador was a no-nonsense administrator who demanded the best from faculty and staff and worked hard to raise the school’s standing.¹⁶ But he had a few personal quirks and after hours wrote mystery novels that won him a loyal following as well as critical praise.¹⁷ Almost all of us have memories of a favorite teacher who, like him, inspired us by sheer force of personality, keen intellect, a great sense of humor, or the ability to utter a kind word at a critical time.¹⁸ Dean Meador was indeed a remarkable man.¹⁹

Our respect for deviance often goes beyond mere nostalgia and personal recollection. Many of America’s greatest historical heroes have been figures who forged their own path. Rosa Parks demanded the right to sit in the front seats of buses in Montgomery just like white riders.²⁰ She

10. See, e.g., *Cracker-Barrel Humor*, OXFORD REFERENCE, <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803095645206> (last visited Feb. 9, 2017).

11. See LAUGHTER IN APPALACHIA: A FESTIVAL OF SOUTHERN MOUNTAIN HUMOR (Loyal Jones & Billy Edd Wheeler eds., 1987).

12. See, e.g., *THE HELP* (Touchstone Pictures 2011).

13. See, e.g., *The Rat Pack*, BIOGRAPHY, <http://www.biography.com/people/groups/the-rat-pack> (last visited Feb. 9, 2017) (describing the lives of a collection of actors and groupies who centered around Frank Sinatra).

14. *GOODBYE, MR. CHIPS* (Metro-Goldwyn-Mayer Inc. 1969) (describing an aging schoolteacher who is a strict disciplinarian but becomes a beloved figure for his students).

15. *THE PRIME OF MISS JEAN BRODIE* (20th Century Fox 1969) (describing a teacher of dubious politics who devotes special attention to her girls).

16. See Email from Wythe Holt, Univ. Research Professor Emeritus of Law, Univ. of Ala. Sch. of Law, to author (Aug. 29, 2015) (describing Meador as a strict taskmaster but beloved figure) (on file with the author); George Talbot, *Daniel Meador, Former UA Law School Dean, Dies at 86*, AL.COM (Feb. 11, 2013, 10:51 AM), http://blog.al.com/wire/2013/02/dan_meador_former_ua_law_school.html; see also DANIEL JOHN MEADOR, *THE TRANSFORMATIVE YEARS OF THE UNIVERSITY OF ALABAMA LAW SCHOOL, 1966–1970* (2012) (describing his deanship).

17. See, e.g., MEADOR, *supra* note 16, at 104–05; Talbot, *supra* note 16.

18. See Holt, *supra* note 16 (describing Meador as a rigorous leader but warm supporter of young faculty).

19. *Id.* (attesting to his generosity of spirit).

20. On Rosa Parks and the Montgomery bus boycott, see DOUGLAS BRINKLEY, *ROSA PARKS* (2000).

brought down the wrath of Southern society but today symbolizes quiet courage and the unquenchable drive for human dignity. Thirteen-year-old Mary Beth Tinker insisted on the right to wear an arm band at school signifying her opposition to a war she believed unjust.²¹ Administrators threatened her with expulsion, but years later the Supreme Court upheld her right to express herself as she had done, in the process broadening the right of free expression for all schoolchildren.²² Native Americans insisted on their right to ingest peyote in the course of religious rituals, as they had been doing long before the Europeans arrived, achieving a unity with nature and the spirit world that the invaders have yet to reach.²³ They, too, received Congressional vindication,²⁴ years later—even though many thought their practice strange and hoped that their kids would not be tempted to follow suit.

Many of these figures were not heroes at the time they first appeared before a judge or the court of public opinion; this came later. But today we are proud of them for standing up for their beliefs. As Martin Luther put it: “Here I stand, I cannot do otherwise.”²⁵ Neither could they, and most of us are now glad that they did.

Yet, if we are honest, we must admit that identity performance—especially when we encounter a new form of it—often troubles us. When we do come across it, we prefer that the one claiming it do so quietly and not too openly. We might feel uncomfortable when minorities sit together at cafeteria tables in an informal display of black solidarity,²⁶ and even more so when they begin asking about redress for ancient wrongs.²⁷ We prefer to think of America as a happy post-racial society, so that anyone who persists in dwelling on historic grievances is tiresome or, worse yet, a

21. See Mary Beth Tinker, *Mighty Times*, 68 ARK. L. REV. 895, 903 (2016).

22. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

23. Compare John H. Halpern, Letter to the Editor, *Native American Rites*, N.Y. TIMES (Dec. 29, 1997), <http://www.nytimes.com/1997/12/29/opinion/1-native-american-rites-798770.html>, with Michael E. Webber, *The Coal Industry Isn't Coming Back*, N.Y. TIMES (Nov. 15, 2016), http://www.nytimes.com/2016/11/16/opinion/the-coal-industry-isnt-coming-back.html?_r=0 (discussing the country's attachment to coal and other extractive and opposition to switching to nonpolluting sources of energy that are, for now, slightly more costly).

24. See Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012).

25. On Martin Luther's famous stand, see ROLAND H. BAINTON, *HERE I STAND: A LIFE OF MARTIN LUTHER* 185 (1950).

26. See BEVERLY DANIEL TATUM, “WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?” 52–54 (1997).

27. See JEAN BETHKE ELSHTAIN, *DEMOCRACY ON TRIAL* 53 (1995) (positing that the anger of identity politics endangers “the civility . . . that allow[s] a pluralist society to persist”); Katherine Rodriguez, *U.N. Panel: U.S. Owes Black People Reparations for History of Slavery*, BREITBART (Sept. 27, 2016), <http://www.breitbart.com/big-government/2016/09/27/un-panel-u-s-owes-black-people-reparations-history-slavery/>.

troublemaker.²⁸ Even Barack Obama, himself the son of a Kenyan father and American mother raised in Indonesia, has insisted that the country is not white and black or white and Latino.²⁹ We are all one race: the human race.³⁰ And of course, the Supreme Court has insisted on formal colorblindness in a host of settings.³¹ For many, if your skin color, cultural heritage, or identity differs from the American norm, you should please keep it to yourself and not make a fuss over it. No one should single you out for discrimination on account of it, but you should not demand special consideration for it, either.³²

In short, we do not embrace divergent identities and behavior nearly as enthusiastically as we might like to believe. And we are especially leery of people who identify with a group if we know that it is likely to make demands on us.³³ By contrast, groups that we like and are not making demands are okay. Idiosyncrasy is fine, if it basically does not matter very much or does not require us to do something we are not inclined to do. Gays in the military were okay if they kept quiet; we didn't ask, and they didn't tell.³⁴ Transgendered people were too if they didn't flaunt it too openly or try to use the bathroom when we were in there.³⁵

A single anecdote will explain what I mean and set the stage for the remainder of this Essay. I once attended a meeting of a campus committee of a well-known university. Convened in an elegant conference room in the oldest building on campus—"Old Main"—the group met to consider some arcane academic matter so unimportant that I cannot now remember what it was. I do recall the setting and building very well, however. The reason is that Old Main itself was an eccentric, a lovable old character. The most ancient building on campus, it had turrets, stained glass, and beautiful stone

28. See, e.g., DEVON W. CARBADO & MITU GULATI, *ACTING WHITE?: RETHINKING RACE IN "POST-RACIAL" AMERICA* (2013) (questioning this assumption).

29. See Cathleen Decker, *President Obama on Race, America, and the Elusive 'More Perfect Union'*, L.A. TIMES (Dec. 4, 2014), <http://www.latimes.com/nation/politics/politicsnow/la-pn-president-obama-race-america-speeches-20141204-story.html>.

30. See, e.g., *id.*; see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

31. See, e.g., ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992); Neil Gotanda, *A Critique of "Our Constitution is Colorblind,"* 44 STAN. L. REV. 1, 37–52 (1991).

32. See Girardeau A. Spann, *Affirmative Inaction*, 50 HOWARD L.J. 611, 612 (2007) (noting that the Court may expect African Americans to stop demanding special consideration soon).

33. For example, redress for past grievances or preferences in the areas of employment and university admission. See, e.g., Rachel L. Swarns, *Georgetown University Plans Steps to Atone for Slave Past*, N.Y. TIMES (Sept. 1, 2016), <http://www.nytimes.com/2016/09/02/us/slaves-georgetown-university.html> (discussing a controversy over Georgetown University's role as a former slave-owner).

34. On the history of the policy, see *A History of Don't Ask, Don't Tell*, WASH. POST (Nov. 30, 2010), <http://www.washingtonpost.com/wp-srv/special/politics/dont-ask-dont-tell-timeline/>.

35. See Jeff Brady, *When a Transgender Person Uses a Public Bathroom, Who is at Risk?*, NAT'L PUB. RADIO (May 15, 2016, 7:48 AM), <http://www.npr.org/2016/05/15/477954537/when-a-transgender-person-uses-a-public-bathroom-who-is-at-risk>.

and brick masonry. I've learned that almost every campus has one like it, probably labeled Old Main. I bet yours did, too. Maybe you remember the polished wood staircase inside, the vaulted ceilings, the period furniture dating from a more gracious time, all in stark contrast to the steel and glass towers where most mass instruction took place.

Even buildings can have their identities, you see. But there I was, on the top floor of Old Main, in an elegant conference room that, as luck would have it, turned out to be a small museum of campus history, with flags, pendants, old photographs and oil portraits hanging on the walls, and glass display cases of hallowed objects lining the perimeter of the room. A few minutes before the meeting started, an exchange took place that helps illustrate my point about identity and difference. Noticing the many portraits lining the walls of the room, I asked the person seated next to me, a senior professor who had taught at that university for many years, if they were past presidents of the university. He said yes, as I had guessed, and I commented that they looked very much the same. And to my eyes, they did. Each one was male, very European-looking, and about sixty years old. Each wore a dark suit, a neat haircut, a striped tie, and an expression that was either serious or warm. But not to my companion, who exclaimed, "Oh, no. They're all quite different." It turned out that he had known many of them. And this one was a Republican, that one a Democrat. Another liked golf, another played tennis. One was serious and scholarly. Another was humorous and gregarious. One was a scholar of English literature. Another was a well-known scientist. I noticed that not a one was a woman, an African American, an Asian American, or a Latino. My interlocutor allowed that this was so, but not particularly noteworthy, swamped as it was by all the significant differences among them. My goodness—one had even studied for the priesthood early in life, before going off in a different direction. I saw sameness; my colleague saw a riot, a profusion of difference.

Perhaps when you first attended law school, the classrooms or corridors contained photo montages of early classes. Before a certain year, I bet most of the students in these photos were white and male. Our minority or female students tend to notice that right away. Did you and I? I hope so, but speaking for myself, I'm not sure.³⁶ Probably if you ask an alum from one of these classes, he could go over the montage and tell you that Bill, over there, was from a small town. Harry was from Birmingham or Atlanta. John was serious and studious; Jason gregarious and a laugh-a-minute kind of guy. This one parted his hair on the left; that one wore it

36. The author (Delgado) is a man of color, specifically a Chicano. But he has taught in dominantly white law schools most of his life, so that seeing a sea of white faces on a law school group or class photograph might easily strike him as commonplace and normal, the everyday state of affairs.

slicked back. Matt's father was a small businessman; Jerry's, the mayor of a farm town. If any of them was gay, a socialist, or had a black ancestor, he kept it well hidden, especially when it came time for the first-week mixers and, of course, the class picture.

This is what I mean when I say that society takes note of and polices identity's borders with almost the same degree of care with which certain politicians want to guard the one with Mexico. But just as we deploy sensors, searchlights, armored vehicles, and other military equipment to keep out the hapless Mexicans, Hondurans, and Guatemalans trying to escape poverty or right-wing firing squads, we do something similar (if less dramatic) with our fellow citizens who have the bad luck or bad judgment to be saddled with identities many of us don't care for or wish would go away. With gays and lesbians, we want them to keep what they do in the bedroom well hidden. This now has a label: "covering."³⁷ With our African-American friends, we are happiest when they behave so normally that we don't even think of them as black.³⁸ When we tell them this, they grit their teeth, not considering it a compliment at all.

Our discomfort with difference not only leads to interpersonal friction and lost friendships; it can result in serious misunderstandings with legal consequences. The following sections consider a number of such examples, beginning with police-civilian encounters.³⁹ As you'll see, whether an event or a person seems acceptable often ends up turning on what kind of scripts an onlooker carries around in their head, where they shape what sort of identity she ascribes to you. It's like Martin Luther, but with a twist—the scripts determine where you stand, whether you like it or not. Often, you can do no other, at least if the second person is in a hurry and you don't have time to dispel his misimpression.

I. POLICING IDENTITY IN STREET ENCOUNTERS: THE CASE OF THE INDIAN GRANDFATHER

One recent morning in an Alabama suburb of Huntsville,⁴⁰ a thriving tech center, Sureshbhai Patel, a slightly built fifty-seven-year-old

37. See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* ix-xii (2006).

38. See Charles R. Lawrence III, *Passing and Trespassing in the Academy: On Whiteness as Property and Racial Performance as Public Speech*, 31 HARV. J. ON RACIAL & ETHNIC JUST. 7, 24 (2015).

39. See *infra* Part I.

40. Madison, Alabama is a medium-size town a few miles outside Huntsville, a major tech and aerospace center that employs many computer specialists and scientists, some of them on immigrant visas. See *Economic Development*, MADISON, ALA., <http://www.madisonal.gov/index.aspx?nid=325> (describing its location, amenities, economy, and relation to nearby Huntsville).

grandfather, went out for a walk.⁴¹ Patel, who had arrived recently from India, was from a small town in that country⁴² and did not speak English. He was staying with the family of his son, a tech worker, with the hope of getting to know a new-born grandson.⁴³ The street was flat and suburban; the morning brightly lit.⁴⁴ Dressed in a neat but nondescript windbreaker and black jeans, Patel was walking on the sidewalk a few houses down from his son's, when a police car with two officers pulled up in response to a neighbor's call complaining about a black man standing in driveways and eyeing garages.⁴⁵ A much-watched video shows what happened next.⁴⁶ The police get out of their cruiser and order Patel, who is not black and was not standing in driveways but strolling along the sidewalk, to stop what he is doing and approach.⁴⁷ They use idiomatic English, a form of cop-speak: "Hey, bud. Let me talk to you real quick. Come here. What's going on?"⁴⁸ Patel looks confused, but when the officers gesture him to come closer, he grasps their meaning and does what they say.⁴⁹

The officers ask him for identification and whether he lives in the neighborhood.⁵⁰ He replies, "India. India," and says that he does not speak English.⁵¹ When one asks him what he has been doing, he responds "walking, walking," points in the direction of his son's house, and takes a few slow steps in that direction in order to point it out.⁵² On seeing him retreat, one of the officers becomes animated, but the other one comments, "He don't speak a lick of English."⁵³ The first officer, however, orders Patel to stop.⁵⁴ When Patel does not instantly comply, the officer throws his leg across Patel's trunk and, using it as a lever, forcefully throws the slightly built gent to the ground.⁵⁵

41. Richard Delgado & Jean Stefancic, "Alto, Cabron. A Ver Las Manos": A Police Officer's Expectation of Instant Obedience When a Civilian Does Not Speak English—A Comment on *United States v. Parker (The Indian Grandfather Case)*, 68 ALA. L. REV. ONLINE 7, 9 (2016).

42. Namely, Pij in Gujarat. *Id.*

43. *See id.*

44. *Id.* at 9–10 (describing the encounter); VLADTV (djvlad), *Alabama Cop Pleads Not Guilty to Beating Up Indian Grandfather*, YOUTUBE (Feb. 22, 2015), <https://www.youtube.com/watch?v=AxgrgGH03kA> (depicting the scene) [hereinafter DJVLAD].

45. Delgado & Stefancic, *supra* note 41, at 9–10; DJVLAD, *supra* note 44.

46. DJVLAD, *supra* note 44.

47. Delgado & Stefancic, *supra* note 41, at 10.

48. *Id.* at 16–18 (discussing cop-speak, a brusque, no-nonsense jargon that the police use, often with civilians of low social rank, to demand instant compliance).

49. *Id.* at 10 (describing his initial confusion).

50. DJVLAD, *supra* note 44.

51. Delgado & Stefancic, *supra* note 41, at 10.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

After Patel lies prone, unable to stand, the officers call for an ambulance, which takes him to a local hospital.⁵⁶ There, doctors diagnose swelling of the spine, which they treat by removing one of his vertebrae and fusing two others.⁵⁷

Alabama did not charge Patel with anything. After all, what would they accuse him of—felonious slowness to respond to orders he did not understand? But, the U.S. Attorney for that region brought charges against one of the officers, a fellow named Parker, for violating Patel’s civil rights by throwing him to the ground and injuring him.⁵⁸

At the trial, the Department of Justice encountered the usual hurdles one meets in cases of this kind, including proof of specific intent and the reasonable-officer standard of conduct.⁵⁹ In their own defense, the officers insisted that they were merely checking out the only likely suspect in the aftermath of a citizen’s phone call about a dark-looking man eyeballing his neighbor’s houses, presumably with larceny in mind.⁶⁰ And when Patel was slow to react to commands, they concluded that he was trying to evade them or even pull out a weapon.⁶¹ Any reasonable officer would, or so Parker’s attorney argued.⁶²

After two juries hung, the U.S. attorney filed a third set of charges against Parker. This time, however, the federal judge dismissed the case.⁶³ The government was unlikely to win a conviction, she ruled, in part because Patel contributed to his own predicament.⁶⁴ He had travelled to the United States, an English speaking country, more than once without having taken the trouble to learn that language first.⁶⁵ In particular, he was woefully ignorant of cop-speak, the patois that the police often use with civilians they don’t particularly like or respect—such as that elderly, plainly dressed, confused-looking, brown-skinned immigrant from India who had the misfortune to be walking down the sidewalk in a neat suburban neighborhood of a medium-sized Alabama town populated by families working in the tech and aerospace industries.⁶⁶ In particular, he

56. *Id.*

57. *Id.* at 10–11.

58. *United States v. Parker*, No. 5:15-cr-55-MHH-HGD, 2016 WL 165713, at *2, *36 (N.D. Ala. Jan. 13, 2016) (noting that the government had two previous opportunities to secure a conviction and failed).

59. *Id.* at *4, *12, *21–22, *25–26, *34–35.

60. *Id.* at *4, *6–7, *18 (describing the dispatch call and the officers’ state of mind when they encountered Patel).

61. *Id.* at *10–11, *12–14.

62. *Id.* (describing the judge’s reasoning).

63. *Id.* at *21–22 (explaining her reasons for the dismissal).

64. *Id.* at *19 (noting that Patel had an ample opportunity to learn English).

65. *Id.* (noting that Patel had visited his son in Alabama twice before and “had the opportunity to become familiar with simple English commands”).

66. *See supra* notes 40–44 and accompanying text (describing the town and neighborhood).

had been in the United States for several days and not picked up phrases like, “Hey, Bud,” “Do you have some ID,” and “real quick”—or maybe pretended that he had not.⁶⁷

When the police appeared on the scene in response to a neighbor’s report that a suspicious-looking black man was peering at the open garages in their nice neighborhood,⁶⁸ they were primed for trouble, ready to do battle with a serious miscreant.⁶⁹ Maybe all of us, if we were in their shoes, would have been ready to do so, too.

The only trouble was that Mr. Patel was not a miscreant but merely a mild-mannered, middle-aged grandfather out to stretch his legs in his son’s neighborhood, perhaps to shake the cobwebs loose after a long plane flight.⁷⁰ What to do? The federal judge unsurprisingly sided with the forces of law and order, and let Officer Parker off the hook.⁷¹ Even his commanding officer came in for a reprimand for intimating to some of his subordinates that if they were asked to testify in the case, he expected them to tell the truth—thereby violating the judge’s gag order that he not discuss the case with anyone during the run-up to the trial.⁷²

What is wrong with this picture? Both the police officer, who has since returned to duty in Madison, and the judge drew inferences about Mr. Patel’s identity and behavior that were not only dubious but wrong. The police officer’s error was the most serious because it condemned an innocent man to years in a wheelchair; the judge’s, the least excusable because it was based, as we shall see, on an error of law. Each of these errors turns on identity confusion. The officer interpreted Mr. Patel’s incomprehension as defiance and disobedience, which it was not.⁷³ The officer’s error could have been easily corrected by asking a simple follow-up question such as “Who are you?” or “Do you understand me?” or “Do

67. On the stereotype of the devious Asian or Mexican, see Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1273, 1276 n.141 (1992).

68. See *supra* notes 40–44, 66 and accompanying text. If the caller, who was preparing to head out to work, had taken the time to say hello to Patel, all of this might have been avoided. Fear of difference probably motivated his overreaction and call to the police dispatcher.

69. See *supra* note 60 and accompanying text. The amygdala is a primitive part of the brain that activates when we face danger; it readies the body for a fight-or-flight response. RICHARD M. CASH, *ADVANCING DIFFERENTIATION: THINKING AND LEARNING FOR THE 21ST CENTURY* 39–40 (2011). Along with a few neighboring structures, it forms part of what is often termed the “reptilian brain.” See *id.*

70. He had recently made the long trip from India to northern Alabama. See *supra* note 42 and accompanying text.

71. *United States v. Parker*, No. 5:15-cr-55-MHH-HGD, 2016 WL 165713, at *10–19 (N.D. Ala. Jan. 13, 2016) (dismissing the government’s case against the officer).

72. See Ashley Remkus, *Madison Police Chief Resigns After Contempt Conviction in Indian Grandfather Trial*, AL.COM, (Nov. 17, 2016), www.al.com/news/huntsville/index.ssf/2016/11/alabama_police_chief_resigns_a.html.

73. See *supra* notes 64–70 and accompanying text.

you know what I am telling you to do?” But he asked no such question, feeling no need to do so.

The judge’s opinion compounded the officer’s error when she laid much of the responsibility for the encounter on Mr. Patel’s failure to learn English.⁷⁴ Contrary to popular belief, that language is not the official one of the United States.⁷⁵ It is merely the one that is most commonly spoken. For a judge to rule, or even to intimate, that a non-English speaker may be manhandled by law enforcement authorities merely because his reaction to commands is slower than those to which the officer is accustomed, would in effect make English the official language—one which any civilian must know on pain of suffering serious injury at the hands of an officer of the peace. Language orthodoxy of that kind would violate the First Amendment, at least insofar as it covers essential communications between state officials and their constituents.⁷⁶

An Arizona case, *Ruiz v. Hull*, recently dealt with this very question.⁷⁷ In *Ruiz*, the Arizona Supreme Court considered a constitutional provision declaring English the state’s official language and requiring that “all government officials and employees performing government business . . . ‘act’ only in [that language].”⁷⁸ Any state employee who spoke to a member of the public in the course of official duties in a language other than English was subject to a civil action.⁷⁹ The Arizona Supreme Court invalidated the provision as a violation of the First and Fourteenth Amendments of the U.S. Constitution.⁸⁰

The Alabama court’s ruling in the Patel case creates a regime that is even harsher than the one struck down in Arizona. That state had only required that legislators, social workers, and other official actors speak in English when carrying out their duties.⁸¹ Even if the official were multilingual and knew that a constituent only spoke a foreign language, such as Spanish or Mandarin, she was prohibited from using that language to communicate with the underling.⁸² This prohibition may have been

74. “Trial testimony indicates that Mr. Patel had the opportunity to become familiar with simple English commands . . . because [he] had visited his son in Alabama twice before.” *Parker*, 2016 WL 165713, at *19.

75. See Juan F. Perea, *Demography and Distrust: An Essay on Official English*, 77 MINN. L. REV. 269, 276–79 (1992).

76. That is, the officer’s action was not so unreasonable and excessive as to establish his criminal liability beyond a reasonable doubt. Is English-speaking a trait that an officer may reasonably expect from a subject? At least initially, no. See *Ruiz v. Hull*, 957 P.2d 984, 1000–02 (Ariz. 1998).

77. *Id.* at 996–1000.

78. *Id.* at 987 (describing the amendment).

79. *Id.* at 1000.

80. *Id.* at 1000–02.

81. *Id.* at 987.

82. *Id.* at 987, 993.

senseless, insulting, and harsh—but the only consequence for violating it was a civil suit against the Arizona official who violated it.

In invalidating this provision, the Arizona court reasoned that English is important in our diverse American society to foster common bonds⁸³ and conceded that a number of federal statutes require minimal proficiency in it.⁸⁴ But even so, the court struck down the provision as an unnecessary restriction on the use of *other* languages. Our tradition of tolerance, the court reasoned, “recognizes a critical difference between encouraging the use of English and repressing [that] of other languages.”⁸⁵

It noted that Arizona’s law was much harsher than English-only provisions in other states, which are either merely declaratory (like provisions naming an official animal or flower) or else govern only the speech of state representatives while deliberating with each other, such as at hearings or caucuses.⁸⁶ Unlike Arizona’s, these other statutes allow non-English speech between state officials and their constituents, clients, or patients.⁸⁷ Arizona thus unconstitutionally restrained participation in governmental affairs “without materially advancing a legitimate state interest.”⁸⁸ Promoting English as a uniting language did not require a broad prohibition of non-English languages.⁸⁹

In Alabama, following *Parker*, a non-English-speaking civilian or visitor is potentially in an even worse situation than that of an Arizona resident who could not understand her social worker, legislator, health care provider, or other state official. A non-English-speaking civilian in Alabama, like Mr. Patel, faces the odds of encountering police with the risk

83. *Id.* at 990.

84. *Id.* at 990–91. For example, the Sixth Amendment permits courts to require jurors to demonstrate proficiency in English as a condition of service. *United States v. Benmuhar*, 658 F.2d 14, 18–20 (1st Cir. 1981). It is also a requirement for naturalization. 8 U.S.C. § 1423 (2012). And the Equal Education Opportunity Act of 1974 requires that school districts offer English-language classes for non-English-speaking students. 20 U.S.C. §§ 1701–1758 (2012).

85. *Ruiz v. Hull*, 957 P.2d at 991 (quoting *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 923 (9th Cir. 1995), *vacated sub nom. Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997)).

86. *Ruiz*, 957 P.2d. at 994–95, 1000; *see also* Perea, *supra* note 75 (discussing the campaign for language orthodoxy and its history). States that make English their official language nevertheless protect the right to speak other languages. *See*, for example, Montana’s official English law, which provides:

This section is not intended to violate the federal or state constitutional right to freedom of speech of government officers and employees acting in the course and scope of their employment. This section does not prohibit a government officer or employee acting in the course and scope of employment from using a language other than English, including use in a government document or record, if the employee chooses.

MONT. CODE ANN. § 1-1-510(3) (West 2015).

87. *See* § 1-1-510.

88. *Ruiz*, 957 P.2d at 987, 1000–02.

89. *Id.* at 1000–02.

of being manhandled for failing to comply immediately with orders that the civilian does not grasp and fully understand.

If English is not the official language of the United States but merely the one in most common use,⁹⁰ a police officer is entitled, at most, to a presumption that a given civilian probably has some command of that language—a presumption that would dissolve if the civilian looks confused or repeats “India,” over and over, as Patel did.⁹¹ An officer is especially likely to evoke this reaction if he persists in using “cop-speak,” as many officers do when speaking to individuals with whom they feel little affinity, for example a person wearing drab clothing of an unfamiliar style and behaving in a tentative fashion. During their ill-fated encounter with Patel, the officers employed a good deal of this patois, including “hey, Bud” and “real quick,” which are not standard English. Moreover, the officers accompanied some of their commands, such as “come here,” with gestures, such as beckoning. When Patel obeyed some of their commands, it seems likely that the officer’s gesture was what communicated to Patel what they wanted him to do and that he (Patel) was the “Bud” in question.⁹²

But my contention does not center so much around language orthodoxy or whether English-only rules and expectations violate the First Amendment. Nor do I merely suggest that police officers in Alabama or anywhere else use standard English rather than cop-speak in bossing civilians around. Rather, I call attention to the role of mindset and the way an educated person, such as a federal judge, can easily see typical immigrant behavior as so problematic as to justify impatient, even violent treatment. That behavior, which in Patel’s case included wearing nondescript clothing, a somewhat self-conscious manner, and a halting response to shouted commands by beefy police officers, fell outside the norm. Most Americans, unless they were up to no good, would have faced the officers with forced smiles painted on their faces and hopped to it, obeying commands such as “come here,” “I want to talk with you,” “what are you doing,” and “do you have some ID” with exaggerated alacrity. Mr. Patel did not—and paid with a life in a wheelchair.

Other cases of police–civilian interactions present very similar issues, usually with the same result—the judge sides with the police. Deaf people often find themselves handled roughly when they do not respond quickly to

90. See *supra* note 76 and accompanying text.

91. *United States v. Parker*, No. 5:15-CR-55-MHH-HGD, 2016 WL 165713, at *9, *17, *29 (N.D. Ala. Jan. 13, 2016). Patel was, for example, not carrying copies of Shakespearean plays, whistling a popular American song, or carrying on a conversation in English with a friend on his cellphone. He was, in short, doing nothing that justified the police in believing that he spoke English well and was merely feigning incomprehension.

92. See *supra* notes 65–67, 91 and accompanying text (discussing “cop-speak,” an argot that police officers often use to communicate with suspects that they instinctively dislike); see also Delgado & Stefancic, *supra* note 41, at 16–18, 32 n.171 (same).

commands or, worse, wave their hands in an attempt to indicate that they cannot hear or hold out a card explaining that they are deaf.⁹³ The New York Times reported such a case only a short time before this Essay went to press.⁹⁴

These cases—whether of foreign visitors or deaf persons—turn on identity confusion. The police assume a common identity and set of responses, and calibrate their response accordingly. When things go wrong—the civilian turns out to be a foreigner or deaf—the case can end up in front of a judge. Then, case law arms police with a wide degree of discretion. Who would have known that the sidewalk stroller did not know English or that the motorist was deaf? As a society we prefer our pedestrians well-acclimated, English-speaking, not-hearing-impaired, and familiar with cop-speak. If their identity does not match up, too bad for them.

A. A Thought Experiment: President Wellington Takes a Late-Night Stroll Across Campus

But times are changing, and society is now more diverse than it was when the cop and the judge in the Patel case were growing up. To see this, imagine, as a thought experiment, that one of the university presidents on the wall in Old Main comes to life, steps out of his oil portrait, and fresh from a long meeting in his conference room late into the evening with representatives of the graduate students' union, goes for a stroll around the darkened campus to clear his head. This actually happens from time to time. We just don't know about it; only the janitor at Old Main does. (That's why the building came to be called "Old Main.")⁹⁵ But back to our president: it had been a long day, so after stepping out from the wall, he goes into the executive bathroom down the hall, takes off the sweat-drenched suit he has been wearing and puts on comfortable walking clothes, namely a light-colored windbreaker and black jeans.

While traversing a favorite path through an ancient grove of trees, his gaze cast downward, his hands shoved into his pockets, lost in thought,

93. See Delgado & Stefancic, *supra* note 41, at 27–28.

94. Daniel Krieger, *Deaf and Hard of Hearing Fight to be Heard*, N.Y. TIMES (Mar. 25, 2016), <http://www.nytimes.com/2016/03/27/nyregion/deaf-and-hard-of-hearing-fight-to-be-heard.html>.

95. Buildings carrying this name are frequently the oldest or the original ones on campus and are often occupied by provosts, presidents, and other high-level administrators. They frequently lack classrooms, laboratories, or other instructional facilities, so that the only denizens are administrators like Wellington, maintenance staff, and the occasional museum curator. *List of Old Main Buildings*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_Old_Main_buildings (last visited Feb. 4, 2017); see also *The 100 Most Beautiful College Campuses in America*, BEST C. REVS., <http://www.bestcollegereviews.org/features/most-beautiful-college-campuses/> (discussing a number of buildings named "Old Main").

President Wellington (2003 to 2012) comes across a campus police officer whose cruiser is parked nearby. Preoccupied with the union problem that had landed on his desk that day, he ignores the officer's order to stop. He, of course, speaks perfect English, but at this moment he is functionally deaf, having taken his hearing aids out of his ear canals and put them in his pocket. Apart from being hard of hearing without his electronic aids, he is perfectly normative, indeed a prominent scientist, and fifty-seven years old, the same age as Mr. Patel.

The officer, though, misinterprets Wellington's slow response as defiance, and after a brief exchange throws him to the ground, much as the Alabama patrolman did to Mr. Patel, but fortunately with a less dire result since the president lands on a soft bed of eucalyptus leaves, not a sunbaked Alabama front yard. The officer, a young Latino, on learning that the suspect lying at his feet and holding his elbow is a university administrator of some sort, takes him to the Student Health Center, where he receives expert treatment for his cuts and bruises from Vik Nanda, the doctor on duty, who is of Asian-Indian descent and who, before discharging him, diplomatically suggests he get a different pair of hearing aids that would fit him more comfortably so that he wouldn't feel a need to take them out when going for a walk.

At the administrative hearing, the campus officer, whose name is Garza, receives a two-week suspension without pay and a warning to be more careful in handling suspects, even ones he encounters in circumstances like those that evening. The campus police chief issues a profuse apology to the president, along with the suggestion that he telephone the campus police in the future before going for an evening walk in deserted parts of the campus—"For your own safety, as well as that of others, President Wellington."

The chief, whose name is Habib, was not content with the sentence Garza received from the administrative board, believing it too light. In addition to docking him two weeks' pay as the hearing officer had done, he made him undergo de-escalation training and told him he, of all people, should have known better.

Why the difference in how the two cases—Parker's and Garza's—came out? Perhaps we want an officer whose beat is covering a cathedral of learning to be on the lookout for identities like those of a college president who looks and acts very much like a confused immigrant but is not one. But perhaps we also want university officials, even high ones like President Wellington, to realize that their own police force is coping with the demands of a multiracial, multicultural campus and under pressure by women to make it safer for them at night, particularly in light of increased awareness of campus sexual assaults. In particular, the campus police need to be on the lookout for furtive-looking solitary men lurking in dark areas

of the campus, their hands in their pockets. Fortunately, the college president took the good-natured warning in stride and modified his late-night walking habits, calling the campus police in advance on each occasion. By the same token, Officer Garza, when he returned to the force, had learned his lesson, too, and from that point on was much more careful about arresting or manhandling elderly gentlemen with their heads in the clouds, aware that they could be a Nobel Laureate or university president.

II. POLICING IDENTITY AND CULTURE IN SCHOOLS: MEXICAN-AMERICAN STUDIES IN TUCSON, ARIZONA

While you are pondering what we should take away from the cases of Mr. Patel and our imaginary college president manhandled by a member of his own campus police, a little further west a different identity struggle has been unfolding in connection with a popular Mexican-American Studies course at a Tucson, Arizona high school. The enforcement arm in this second case is not a pair of muscular police officers, but a red-faced, somewhat imperious state superintendent of education and a cohort of like-minded legislators in the state capital one hundred miles away on the far side of the Sonora desert.⁹⁶

With a high proportion of Mexican-American students, many of them from poor immigrant families, Tucson High School hoped to reverse the high dropout rate for this group, which until then had hovered around 50%.⁹⁷ Taught by enthusiastic young teachers, many of them graduates of University of Arizona's well-regarded ethnic studies department, the Mexican-American Studies (MAS) program offered classes on Latin American history, literature, and culture.⁹⁸ Children learned about the Aztec calendar and the great cities of Mesoamerica, some of which had running water before their counterparts in Europe did.⁹⁹ They read books by Latino novelists like Sandra Cisneros, author of *House on Mango Street*,¹⁰⁰ and by Chicano historians like Rodolfo Acuna.¹⁰¹ They learned about icons like Cesar Chavez, who organized the farmworkers union,¹⁰² Martin Luther King, Jr., and the black civil rights movement.¹⁰³ They

96. I am not making any of this up; it is a true story. See 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, 1521 (2013).

97. *Id.* at 1513.

98. *Id.* at 1528–29.

99. *Id.*

100. *Id.* at 1529; see also SANDRA CISNEROS, *HOUSE ON MANGO STREET* (1984).

101. Delgado, *supra* note 96, at 1523 n.48, 1529. See RODOLFO ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* (8th ed., 2007).

102. Delgado, *supra* note 96, at 1529.

103. *Id.*

studied colonial and postcolonial theory and learned how the United States stole Mexican lands in the wake of an imperial war of conquest.¹⁰⁴

Attendance and morale were sky high. The students began to see connections between what they were learning and ordinary life. The graduation rate climbed from barely half to close to 90%.¹⁰⁵ Many of them now aspired to go to college and become teachers, lawyers, mayors, or even congressmen.¹⁰⁶ Their families lived in rundown neighborhoods full of graffiti and uncollected garbage, many in fear of deportation raids.¹⁰⁷ The students resolved to set things right, studied hard, and earned As not only in classes on Chicano literature but also in algebra and science.¹⁰⁸

In Phoenix, the state capital, Arizona's rulers were not at all amused, particularly Tom Horne and John Huppenthal, Superintendents of Public Instruction during this period.¹⁰⁹ Like the Alabama police officer who received a message from the dispatcher about a questionable character wandering the streets of a neat Alabama neighborhood, the two figures had heard something about Latinos, namely that they were trying to retake the state and return it to Mexico, which had ruled the area before the white people arrived.¹¹⁰ Many of their colleagues and acquaintances in conservative circles read the same websites,¹¹¹ so that the two superintendents must have felt certain that the threat of a La Raza takeover of the state was genuine. So did many of the legislators in that conservative state.¹¹²

Perceiving a dire threat to the state's way of life, the legislature enacted H.B. 2281,¹¹³ prohibiting any school program that catered to just one group, that treated students as members of collectivities rather than as individuals, that fostered racial resentment, or that taught the overthrow of the United States government.¹¹⁴ The superintendent quickly pronounced

104. *Id.*; see also AMY S. GREENBERG, *A WICKED WAR: POLK, CLAY, LINCOLN, AND THE 1846 U.S. INVASION OF MEXICO* (2012).

105. See Delgado, *supra* note 96, at 1513.

106. *Id.* at 1530 & n.73. For interviews of the newly energized students, see the film *PRECIOUS KNOWLEDGE* (Dos Vatos Productions 2012).

107. See *PRECIOUS KNOWLEDGE*, *supra* note 106.

108. *Id.*

109. See *id.* (interviewing Horne's successor, John Huppenthal).

110. *Need to Know: Banned in Arizona* (PBS television broadcast Feb. 15, 2013) (transcript), <http://www.pbs.org/wnet/need-to-know/transcripts-full-episode/transcript-february-15-2013/16346/>.

111. See *Need to Know: Banned in Arizona* (PBS television broadcast Feb. 15, 2013), <http://www.pbs.org/wnet/need-to-know/video/need-to-know-february-15-2013/16294/>. They also believed that Chicanos refused to assimilate and embrace the American melting pot. See LEO CHAVEZ, *THE LATINO THREAT: CONSTRUCTING IMMIGANTS, CITIZENS, AND THE NATION* (2008).

112. See CHAVEZ, *supra* note 111 (noting that this view is widespread among conservative whites in the state).

113. ARIZ. REV. STAT. ANN. § 15-112 (2014 & Supp. 2016), *declared unconstitutional in part by Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015).

114. Delgado, *supra* note 96, at 1516, 1521–22 (discussing the statute).

the Tucson program in violation of the new law and notified the school board that it would lose its state funding if it failed to disband it.¹¹⁵ A local administrative law judge upheld the finding¹¹⁶ and, believing it was required to do so, Tucson school authorities removed a number of key texts,¹¹⁷ including Acuña's *Occupied America*,¹¹⁸ Paulo Freire's *Pedagogy of the Oppressed*,¹¹⁹ Howard Zinn's *A People's History of the United States*,¹²⁰ William Shakespeare's *The Tempest*,¹²¹ and a book on critical race theory.¹²² Threatened with loss of its funding, Tucson authorities sent staff to the classroom where the offending books resided on shelves, boxed them up in front of crying students, and shipped them off to a book depository outside of town.¹²³

The Mexican-American community exploded in indignation, students marched and sat in, and a local attorney filed suit, with the case currently in the early stages of retrial in federal court.¹²⁴ Many civil rights organizations weighed in with amicus briefs siding with the students, as did a number of library and bookseller organizations concerned with the overtones of censorship.¹²⁵ After a documentary film company made an hour-long film entitled *Precious Knowledge*, which aired on PBS,¹²⁶ a legal writer accused the authorities of committing what Charles Taylor calls a "recognition harm" by denying the Latino schoolchildren the opportunity to learn about their own history and culture,¹²⁷ and a community college professor in Houston organized a caravan of "librotraficantes" carrying what they called

115. *Id.* at 1522 & n.44 (discussing this penalty).

116. *See id.* at 1523 n.46.

117. *See* Matthew Rothschild, *Banned in Tucson*, PROGRESSIVE (Jan. 19, 2012), progressive.org/dispatches/banned-tucson/.

118. *See* ACUÑA, *supra* note 101.

119. *See* PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (Myra Bergman Ramos trans., Bloomberg, 30th Anniversary ed. 2000).

120. *See* HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* (1980).

121. WILLIAM SHAKESPEARE, *THE TEMPEST* (1610). Banned, presumably, because it painted colonialism in a poor light.

122. *See* Roberto Cintli Rodríguez, *Arizona's 'Banned' Mexican American Books*, GUARDIAN (Jan. 18, 2012), <https://www.theguardian.com/commentisfree/cifamerica/2012/jan/18/arizona-banned-mexican-american-books> (discussing the seven banned books, including one by the very author you are now reading).

123. *Id.*

124. *See* Cindy Carcamo, *Judge Upholds Arizona Law Banning Ethnic Studies Classes*, L.A. TIMES (Mar. 12, 2013), articles.latimes.com/2013/mar/12/nation/la-na-nn-ff-ethnic-studies-arizona-20130312.

125. *See, e.g.,* *Acosta v. Huppenthal*, No. CV 10-623-TUC-AWT, 2013 WL 871892 (D. Ariz. Mar. 8, 2013), *aff'd in part, rev'd in part sub nom.* *Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015).

126. *Precious Knowledge*, *supra* note 106.

127. *See* Delgado, *supra* note 96, at 1540–45 (discussing political-theory argument for cultural self-knowledge, especially in early education).

“wet books” all the way to Tucson, where they gave them away to young people on the sidewalks of that city.¹²⁸

It is possible that the case of the knowledge-thirsty Latino students will have a happier ending than Patel’s did, but years may pass before we know the answer. Which is exactly my point: nonconformity seems intolerable and strange at first sight. It’s only much later that we wonder why it generated such a fuss.

III. NO MAS—IDENTITY POLITICS AND THE WAR AGAINST CRITICAL RACE THEORY

My third and final example of identity-based conflict has to do not with litigation but legal scholarship. Like the other two events, it concerns a comparatively recent movement—critical race theory—one of whose signature innovations is legal storytelling and narrative analysis.¹²⁹ This example, too, in one way of looking at it, represents a struggle over identity.

As you may know, critical race theory sprang up in the mid-1970s when a number of civil rights scholars and activists across the country realized, all at once, that the heady gains of the 1960s civil rights era had stalled and were beginning to be rolled back.¹³⁰ New theories and approaches were necessary to cope with the subtler forms of discrimination that were emerging and a public that seemed tired of hearing about race.¹³¹ The movement builds on previous schools of thought such as critical legal studies and radical feminism, as well as certain European philosophers such as Antonio Gramsci and Michel Foucault and, of course, classic American figures such as Martin Luther King, Cesar Chavez, and Sojourner Truth.¹³²

One of the signature themes of the new movement was legal storytelling and narrative analysis, which emerged in 1985.¹³³ Many critical scholars invested high hopes for the transformative potential of two kinds of stories. First-person tales,¹³⁴ they thought, could help awaken conscience and inform readers what it is like to be on the receiving end of discrimination. Advocates of the second variety—counter-storytelling—believed that by exposing and challenging comfortable majoritarian myths

128. See *id.* at 1526; Editorial, *Books Without Borders*, N.Y. TIMES (Mar. 15, 2012), <http://www.nytimes.com/2012/03/16/opinion/books-without-borders.html>.

129. See RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 10, 43–52 (2d ed. 2012).

130. *Id.* at 4.

131. *Id.*

132. *Id.* at 4–5.

133. *Id.* at 10, 43–52.

134. *Id.* at 43–48. Critics sometimes refer to these as “agony” tales.

such as “without intent, no discrimination,” one could cast doubt on legal theories and doctrines that implicitly favor the majority group at the expense of minorities.¹³⁵ Patricia Williams wrote about shopping in white stores or struggling to raise a black child as a single parent in Manhattan.¹³⁶ Derrick Bell wrote the annual *Harvard Law Review* foreword in the form of a dialogue with fictional super-lawyer Geneva Crenshaw.¹³⁷ I borrowed Geneva’s family tree and created the *Rodrigo* series of chronicles featuring a mixed-race young upstart who gives his straight man alter ego, “the Professor,” fits.¹³⁸

The attacks were not long in coming. Daniel Farber and Suzanna Sherry questioned our deviation from conventional syllogistic, densely footnoted legal analysis in an article in the *Stanford Law Review*,¹³⁹ which they later expanded into a book.¹⁴⁰ How can we evaluate a first-person agony tale like Patricia Williams’s account of her experience at the hands of a teenage clerk at a Benneton store, they asked? How can we be sure that her story is typical, common, or even true?¹⁴¹

Stories challenging standardized testing and other conventional measures of merit might even be implicitly anti-Semitic, the two argued.¹⁴² Since Jews and Asians tend to score highly on these tests, while blacks and Latinos do not, attacking the ladder by which the former have climbed is thus racist and anti-Semitic since it implies that these groups (Jews and Asians) got to where they are through cheating or taking unfair advantage.¹⁴³ Since the two high-scoring groups in fact come by their success through studying and taking their test preparation seriously, any criticism is a form of carping or, even, racism or anti-Semitism.¹⁴⁴

135. *Id.* at 48–51.

136. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 44–46 (1991).

137. Derrick Bell, *The Supreme Court 1984 Term: Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 13–17 (1985).

138. *See, e.g.*, RICHARD DELGADO, *THE RODRIGO CHRONICLES* (1995); Richard Delgado, *Rodrigo’s Chronicle*, 101 YALE L.J. 1357 (1992) (book review).

139. Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 807 n.2 (1993).

140. DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997).

141. *See id.* at 76–86, 88–117.

142. *Id.* at 52–71.

143. *Id.*

144. *Id.*

CONCLUSION: HOW THE MYTH FUNCTIONS TO SUPPRESS THE VERY
QUALITY IT PROFESSES TO UPHOLD

My argument today has been that American society professes to value individualism and a wide range of identities. But more often than not, it proves willing to accept nonconforming identities and performances that fall only within a narrow range. Students wishing to take unconventional courses, scholars pursuing new pathways to knowledge, and fifty-seven-year-old Indian grandfathers merely wishing to visit a new grandchild quickly learn that our collective patience for diversity wears thin rather quickly. None of these three groups of people violated criminal law or did anything that ought to have taxed our patience. But the immigrant went to the hospital. The students turned in their books. The scholars suffered a torrent of criticism in the law reviews and faculty lounge. My imaginary university president is the only one who survived relatively unscathed, and even he received a mild scolding from his police chief and a reminder that, these days, one must be alert to how one's actions may look to others.

Why the myth, then? Why don't we straightforwardly acknowledge that we like everyone to be pretty much the same and that we coerce and sometimes punish those who love, speak, walk, or want to learn and study in unconventional ways?

As Joseph Campbell told us long ago, most heroic myths celebrate a value or form of behavior that is key to our core identity and deepest beliefs.¹⁴⁵ Myths are a form of wish fulfillment. They enable us to declare an ideal and rather quickly assume that we are well on our way to achieving it. But often we're not all we're cracked up to be. We're all mixed up, with different races, colors, sizes, sexual orientations, and language preferences, and not yet comfortable with the new world we inhabit.

Myths of a tolerant society, full of lovable characters, curmudgeons, eccentrics, and crackpots, all coexisting happily and peaceably, enable us to come down with a vengeance on those who visit our shores without taking the trouble to learn English, who love someone of the same sex, who want to learn history of a different type, or who want to look at the underlying narratives of a white-themed legal system.

When we do this sort of thing, we deny ourselves a benefit—Indian cuisine, access to Derrick Bell's chronicles, and little Chicano kids who grow up to be mayors and senators instead of dropouts. In an alternate reality we would lighten up about identity and stop pummeling those who look or act or dress differently from the way we do. I have a feeling that a

145. See generally JOSEPH CAMPBELL, *MYTHS TO LIVE BY* (1972).

certain law school dean who wrote mystery novels in his spare time would have agreed.

Instead, too often we're like my seatmate in Old Main. I looked at the portraits on the wall and saw sameness. He saw plenty of difference—quite enough, for his taste. The myth of tolerance made it hard for us to have a conversation because he believed he held all the cards. Dean Meador, who told his students to push deeper into a question, would want all of us to look carefully into the function that our self-congratulatory myth of tolerance for different forms of identity performs, be clear about when we fall short of our ideals, and try harder to live up to them. Our society treats people like Mr. Patel that way innumerable times. But celebratory myths and texts, including ones like *To Kill a Mockingbird*,¹⁴⁶ which describe lovable eccentrics and brave lawyers who defend black suspects who have been unjustly accused, enable us to avoid facing how very often we display behavior that is not particularly tolerant and how *Go Set a Watchman*¹⁴⁷ may be in some respects a truer account of our world.¹⁴⁸

A photographic depiction of what I mean hit the national press just the week that I gave the lecture on which this Essay is based. The photograph showed a young boy eating lunch at a deserted table in the school cafeteria.¹⁴⁹ The other tables were teeming full of students who were talking and laughing.¹⁵⁰ The boy was by himself, his only companion an African-American football star who had been visiting his school that day and had, on an impulse, decided to ask the boy if he could sit with him.¹⁵¹ The boy, who was autistic, was unpopular with his fellow classmates, who had been avoiding him at lunchtime.¹⁵² The football player, who towered above everyone else, was an oddball on that occasion. The two nonconformists were left to eat with each other. Their conversation was probably interesting—don't you think?—but the others missed out on it entirely.¹⁵³

146. HARPER LEE, *TO KILL A MOCKINGBIRD* (1960) (recounting the adventures of a young Southern girl, "Scout," and her family and neighbors in a small town).

147. HARPER LEE, *GO SET A WATCHMAN* (2015) (a prequel to the above book, telling a different story in which the heroic father is a bigot and the friendly town not much better).

148. *But see* Jonathan A. Rapping, *It's a Sin to Kill a Mockingbird: The Need for Idealism in the Legal Profession*, 114 MICH. L. REV. 847, 862–63 (2016) (book review).

149. *See FSU Football Player Joins Boy with Autism Eating Lunch Alone*, ABC NEWS (Aug. 31, 2016), abcnews.go.com/US/fsu-football-player-joins-boy-autism-eating-lunch/story?id=41767989.

150. *Id.*

151. *See id.*

152. *See id.*

153. *See id.*