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Recommended Citation

Richard Delgado & Jean Stefancic, *Radical Method*, 24 U.C. Davis Soc. Just. L. Rev. 3 (2020).

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Radical Method

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Abstract

Should traditional liberals and insurgent scholars who disdain "the system" nevertheless work together? They start at different points, build on clashing presumptions, and follow different methodologies. Nevertheless, they often come out the same way. Indeed, practitioners of the standard cases-and-policies approach sometimes end up instinctively applying radical techniques, such as the flip or shift of point of view, to great effect.

After analyzing a number of examples, we conclude that progressive scholars should not reflexively reject lawyering that proceeds in the time-honored manner merely because it strikes them as quaint or square. By the same token, neither should they ignore those even further to the left than they, merely because those circles may contain a Marxist or two. We conclude by describing a second source of support for progressive agendas that is even easier to ignore, namely the far left. This examination shows that progressive scholars, including our fellow race-crits, would do well to heed the powerful insights of critical legal studies even if those insights strike them as deracinated or unrealistic.

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Introduction

Progressive legal scholars from different schools of thought often work in isolation, as though those of other persuasions hardly existed. Loyalty to group and method, in other words, divides even those who work to advance very similar goals. Those on the far left tend to cite texts by authors such as Duncan Kennedy, Catharine MacKinnon, Antonio Gramsci, and Derrick Bell. Traditional liberals consult decisions by their favorite judges, such as Earl Warren or Harry Blackmun, and policy declarations from authorities such as John Hart Ely, W.E.B. DuBois, or Cass Sunstein. To be sure, scholars from each of these groups often register major breakthroughs.¹ But rarely do they join forces, even on a level of theory. By re-analyzing a course of litigation that unexpectedly turned out, years later, to reinforce the worldwide youth revolt against climate change, we show that critical and conventional analysis can sometimes coincide—and when they do, the combination is far more persuasive than either one alone.²

Thus, the lessons we draw from this are twofold. One, that progressive scholars should not reflexively reject lawyering that proceeds via the traditional case-and-policy approach merely because it strikes them as quaint or square, an insight we develop in Part I. Two, that neither should progressive scholars ignore those even further to the left than they, merely because those circles may contain a Marxist or two. To test our intuition, in Part II, we describe a second source of support for progressive agendas that is even easier to ignore, namely the far left.³ This examination shows that progressive scholars, including our fellow race-crits, would do well to heed the powerful insights of critical legal studies (CLS), even if those insights strike them as deracinated.⁴

We show how a classic CLS technique—asking “who benefits?”—reveals how many of our system’s promises turn out to be hollow, much like small-print consumer contracts in which the seller guarantees a

¹ See, e.g., Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980), for Bell’s interest convergence hypothesis; MARI MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993), for Matsuda’s counterhegemonic analysis of hate speech); and Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990), for Harris’ writing on essentialism and intersectionality).

² See *infra* Part I (A Case of Left-Center Synthesis).

³ See *infra* Part II (Constitutional Carve-Outs – Or, Is Your Toaster Really Under Warranty?).

⁴ E.g., Alan D. Freeman, *Racism, Rights, and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295 (1988) (noting that much CLS scholarship takes too little account of race).

product's performance for a period of years, with a few inconspicuous exceptions that turn out to be quite significant when the product breaks down.⁵

This technique, part of the repertory known as “trashing,” exposes how celebrated freedoms come with exceptions that quietly limit their efficacy.⁶ We offer a number of examples of this technique in Part IIA. In Part IIB, we show that with only a slight adjustment, the same approach can highlight the false promises of equal treatment that our system makes to minorities in hopes of gaining their acquiescence.⁷

Far from being demoralizing, insights like these are helpful, even bracing. Once one realizes that the political system has little intention of making good on its promises, one is free of unwarranted reliance on the kindness of strangers—a realization that, for the disempowered, can be a first step toward concerted action and change.

Insurgent scholars should look, then, for support and inspiration where they find them, sometimes from doctrinal scholars with liberal instincts—e.g., one of us in a former life—and other times from radicals who analyze social currents without special consideration of race or are even disdainful of it as a unit of analysis. As someone once put it, an idea is an idea, no matter whence it comes.⁸

I. A Case of Left-Center Synthesis

Not long ago, the law school from which one of us graduated invited him to take part in a videotaped interview focused on his life and career.⁹ Part of a series devoted to scholars who have made contributions to the law and society movement, the interview inadvertently taught Delgado a lesson about how critical theory and conventional case analysis can sometimes coincide.¹⁰

The one-hour interview was taped in front of a live audience that

⁵ See *infra* Part II A(1) (Carve-Outs in our System of Civil Liberties).

⁶ See Mark Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984). See also MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987) (discussing trashing, deconstruction, and other critical techniques).

⁷ See *infra* Part IIA (2) (Carve-Outs in our System of Civil Rights Protections).

⁸ See Jennifer Risi, *Q&A with Donna Sanker*, HUFFPOST, (Nov. 8, 2017, 12:01 PM), https://www.huffpost.com/entry/qa-with-donna-sanker-a-go_b_12844180.

⁹ See generally *CSLS – A Conversation in Law and Society with Richard Delgado*, U.C. BERKELEY SCHOOL OF LAW (Apr. 24, 2019, 2:00 PM), <https://www.law.berkeley.edu/event/conversation-richard-delgado/>.

¹⁰ See *supra* note 1 and accompanying text; *infra* notes 12–47.

had an opportunity to ask questions. The recording is currently available in an online archive preceded by some evocative Baroque music and an introduction from the center's director.¹¹ A few minutes into his interview, his host extracted a "who was your favorite professor?" answer out of a reluctant Delgado, who described an unnamed, dignified professor who let his torts class into his thinking, especially on emerging or new torts. As a student, Delgado thought this remarkable—no other of his professors did this so nakedly—and took careful notes in his class. One such tort, the professor posited, was interpersonal racism—what we now call hate speech.¹² Another possible development was expansion of causation-in-fact rules to cover complex cases and toxic torts. Delgado took note of this one, too, and wrote about each—hate speech and toxic torts—early in his teaching career.¹³

The interviewer then asked Delgado that he name this professor, which he did. John Fleming had been unpopular with Delgado's fellow students but a towering figure in the minds of the faculty. The conversation then went off into many directions, including Delgado's family history, his contribution to founding the critical race movement, and his work on behalf of Latinos in the South. After the interview concluded, Delgado reflected on how he had built on Fleming's teaching when, years later, he wrote *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*,¹⁴ the first law review article to call attention to this social problem.

By coincidence, the very year in which *Words That Wound* appeared, the California Supreme Court handed down *Sindell v. Abbot Laboratories* in 1980.¹⁵ Building on *Summers v. Tice*,¹⁶ the Court approved

¹¹ See Conversations in Law and Society Featuring Richard Delgado, KALTURA.COM (Apr. 24, 2019), https://www.kaltura.com/index.php/extwidget/preview/partner_id/1368891/uiconf_id/41443412/entry_id/0_x4ut40y8/embed/iframe; *Conversations in Law and Society*, U.C. BERKELEY SCHOOL OF LAW, <https://www.law.berkeley.edu/research/center-for-the-study-of-law-society/conversations-in-law-and-society/> (for other live interviews in the series, including conversations with Kitty Calavita, Marc Galanter, Robert Kagan, Stewart Macaulay, Sally Falk Moore, Laura Nader, Austin Sarat, Susan Silbey, and David & Louise Trubek).

¹² See, e.g., Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L.L. REV. 133, 181 (1982) (proposing a tort remedy for one-on-one hate speech); RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND (2004).

¹³ See Conversations in Law and Society Featuring Richard Delgado, *supra* note 11, at 14:54 (describing Dr. Fleming and the helpful tips he gave in the class).

¹⁴ Delgado, *supra* note 12.

¹⁵ 26 Cal.3d 588, 607 (S. Ct. CA 1980).

¹⁶ 33 Cal.2d 80 (1948) (the well-known two-hunters case).

a substantial award for a 29-year-old woman who had contracted DES (diethylstilbestrol) syndrome as a result of her mother having taken the drug years earlier when pregnant with her.¹⁷ Unable to prove which of many pharmaceutical companies had sold the dose in question, Ms. Sindell sued nine of the larger ones, arguing that each should bear the burden of proving that it had *not* produced the drugs the mother ingested years earlier. When many could not, the court held each liable in proportion to its share of the DES market at the time.¹⁸

Employing a standard postmodern technique—the flip or reversal—Delgado wrote a second article—*Beyond Sindell: Relaxation of Cause-in-Fact Rules for Indeterminate Plaintiffs*—which the *California Law Review* published as its Supreme Court Foreword for 1982.¹⁹ The article suggests that the same policies the Court used to broaden causation rules in *Sindell* also supported recoveries for plaintiffs who are uncertain that defendant’s conduct injured them—i.e., do not suffer a signature disease like that associated with DES exposure—but were nevertheless in the zone of exposure.²⁰ These plaintiffs, each of whom is ill, are in a class that is larger than usual—so much so that an expert epidemiologist can confidently assert that some are victims of the defendant’s actions.²¹ In that event, Delgado argued, a court should find the defendant responsible for the additional injuries and distribute a proportional award to all those it exposed to the risk of one.²² In short, these “indeterminate plaintiffs” deserve a fractional recompense, even though each one is uncertain that he or she is, in fact, a victim of the defendant’s negligence.²³

Although *Words That Wound* produced an immediate impact, including a book,²⁴ a number of university hate-speech codes,²⁵ and a great

¹⁷ See *Sindell*, *supra* note 15, at 594-95.

¹⁸ See *Id.* at 593.

¹⁹ Richard Delgado, *Beyond Sindell: Relaxation of Cause-In-Fact Rules for Indeterminate Plaintiffs*, 70 CALIF. L. REV. 881 (1982).

²⁰ See *id.* at 882-84.

²¹ See *id.* at 885 n.19.

²² See *id.* at 899.

²³ See *id.* at 899 (“[t]he principal barrier facing ‘indeterminate plaintiffs’ is the requirement of causation in fact—the rule that in a tort suit, the plaintiff must show that defendant’s conduct contributed to his or her injury”).

²⁴ See generally Matsuda, *supra* note 1.

²⁵ See, e.g., *UWM Post, Inc. v. Board of Regents of University of Wisconsin System*, 744 F Supp. 1163, 1165 (E.D. Wis. 1991) (striking down a speech code at the University of Wisconsin that was drafted by Delgado and others).

deal of opposition in both liberal and conservative circles,²⁶ Delgado's article about indeterminate plaintiffs would turn out to have an even greater impact, but years later. To understand why, we explain a trail of seven intervening events that occurred over a number of years, culminating in two noteworthy real-world consequences. This chain of events led us to reflect on critical method and its relation to other progressive approaches, including critical race theory.

THE FIRST EVENT. As the law review was completing its edit of Delgado's article, he received a letter from an environmental lawyer named Stewart Udall, who was litigating and would go on to win *Allen v. United States*²⁷ on behalf of a "downwind" group of over 1100 sick people who had been exposed to radioactive fallout from the U.S. Army's program of above ground testing near Las Vegas, Nevada during the 1970s.²⁸ Udall asked for a copy of Delgado's page proofs, which he gladly provided.

THE SECOND EVENT. Relying on Delgado's reasoning, Udall won a substantial award.²⁹ But no money changed hands, because the Tenth Circuit reversed when Delgado's former torts professor—the very one whose teaching he had found inspirational years earlier—testified for the government that the case fell under the *Feres* doctrine, a form of sovereign immunity.³⁰ The U.S. Army deserved the benefit of the doubt inasmuch as its decision to test bombs above ground—rather than below or on an isolated Pacific atoll—was a discretionary act beyond the power of a court to second-guess.³¹

THE THIRD EVENT. The opinion's tort analysis remained intact, however, and years later U.S. Federal District Court Judge Jack Weinstein found himself engaged in settling a large class action known as *In re Agent*

²⁶ See generally Richard Delgado, *Legal Realism and the Controversy over Campus Speech Codes*, 69 CASE W. RES. L. REV. 275 (2018) (discussing some of this opposition).

²⁷ *Allen v. United States*, 588 F. Supp. 247 (D. Utah 1984); *rev'd*, 816 F.2d 1417 (10th Cir. 1987).

²⁸ See Howard Ball, *Downwind from the Bomb*, N.Y. TIMES, Feb. 9, 1986 §6, 33, available at <https://www.nytimes.com/1986/02/09/magazine/downwind-from-the-bomb.html>.

²⁹ *Id.* (describing the award).

³⁰ See *Allen*, 816 F.2d at 1417 (ruling that official acts, like the Army's, of a discretionary nature are immune from suit). See *Feres v. United States*, 340 U.S. 135, 144-45, 95 L. Ed. 152, 71 S. Ct. 153 (1950).

³¹ *Id.*

Orange.³² This case was structurally similar³³ to the situation Delgado posited in his article, and Judge Weinstein cited it extensively on his way to approving the settlement, which at the time was the largest in the history of American law.³⁴

THE FOURTH EVENT. During the past few years, children and their attorneys have been striving to hold polluting industries to account for global warming,³⁵ employing both novel legal theories³⁶ and mass action.³⁷ Two prominent law professors, including one who took issue with Delgado years ago,³⁸ have gone on record, however, as saying they doubt this will happen.³⁹ Global warming is too diffuse, with crisscrossing chains of causation, they reasoned. It is virtually an “anti-tort,” which no court is

³² See *Agent Orange Products Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984) (memo justifying the settlement). See also Ralph Blumenthal, *How Judge Helped Shape Agent Orange Pact*, N.Y. Times, May 11, 1984, at A1, available at <https://www.nytimes.com/1984/05/11/nyregion/how-judge-helped-shape-agent-orange-pact.html>.

³³ That is, it contained a large number of plaintiffs, U.S. servicemen and women who suffered neurological and other injuries in the wake of exposure to this highly bioactive chemical defoliant. Their number was larger than one would expect in a population of young, previously healthy persons. But Agent Orange is not a signature disease that arises from contact with the defoliant. That is, the abovementioned disorders can result from other sources, such as heredity, smoking, or poor health habits.

³⁴ Under class action rules, a judge must review a proposed settlement for fairness to the absentee parties. See, MANUAL FOR COMPLEX LITIGATION § 21.62 (4th ed. 2004) (explaining that the judge needs to be satisfied that, were the case to go to trial in front of him, the plaintiff’s chances, while not perfect, were good enough to justify the proposed settlement. This required that Weinstein be convinced that the law regarding recoveries for indeterminate plaintiffs was advancing in a direction favorable to the vets.)

³⁵ E.g., *Juliana v. United States*, 217 F. Supp. 3d 1224, 1242-48 (D. Or. 2016) (ruling that the plaintiffs have standing).

³⁶ E.g., Brooke Jarvis, *Climate Change Could Destroy His Home in Peru. So He Sued an Energy Company in Germany*. N.Y. TIMES MAGAZINE THE CLIMATE ISSUE (Apr. 9, 2019), <https://www.nytimes.com/interactive/2019/04/09/magazine/climate-change-peru-law.html>; See also, John Lanchester, *Two New Books Dramatically Capture the Climate Change Crisis*, NY TIMES (2019) (Reviewing NATHANIEL RICH, *LOSING EARTH* (2019) (noting Rich’s findings that “the big fossil fuel firms knew the realities of human-caused climate change but chose to ignore them and to lobby for the right to damage the environment.”)).

³⁷ E.g., Richard Delgado and Jean Stefancic, *Children’s Right to a Livable Future*, ALA. L. REV. (forthcoming).

³⁸ See David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Torts System*, 97 HARV. L. REV. 849 (1984).

³⁹ See Jarvis, *supra* note 36 (quoting Yale professor Douglas A. Kysar describing climate change as the “paradigmatic anti-tort”).

likely to recognize any time soon.⁴⁰

THE FIFTH EVENT. However, confronted by children's cases like *Juliana v. United States*,⁴¹ one of these lawyers recently changed his mind, saying that the need to combat global warming is so urgent that the law may need to rethink responsibility for environmental damage.⁴² Despite the barriers of distributed liability and widely shared injury, society simply must do something to ward off catastrophe on a worldwide scale.⁴³

THE SIXTH EVENT. The two of us developed an initial insight leading in this direction⁴⁴ in an article about children's right to a livable future.⁴⁵ The article employs a postmodern trope, namely, switching the point of view (POV) from one group to another as a preface to cost-benefit analysis. Specifically, we posited that children's interests in a future world free of global warming exceed those of adults by a considerable margin, for the simple reason that the children will have to live with the consequences of climate change far longer than will the adults.⁴⁶ Standard risk-benefit balancing that yields a positive result for the adults might well turn out negative for a young person facing a life in a toxic, polluted environment.

THE SEVENTH EVENT. In addition to the POV question, the law appears poised to take a closer look at the behavior of major polluters, including causation, where modern thought and medieval cases of odors from pig farms appear to be converging.⁴⁷

A tiny Peruvian village high in the Andes situated a few thousand feet below an Alpine lake fed by melting waters from an age-old glacier is suing an A-list of world polluters for the anticipated cost of extensive measures that the villagers will need to take to guard against flooding when runoff overwhelms the lake's natural defenses, which it is likely to do soon.⁴⁸ With the aid of an expert accountant prepared to allocate the costs

⁴⁰ *Id.* at 33.

⁴¹ *Juliana*, 217 F. Supp., *supra* note 35.

⁴² Planetary Damages, *supra* note 36, at 33, quoting Douglas A. Kysar ("a fair number of things have changed.").

⁴³ *Id.*

⁴⁴ Namely, the need to "do something" about global warming. See *supra* Parts I and II, illustrating how conventional case analysis and critical thought can occasionally combine in powerful fashion.

⁴⁵ Livable Future, *supra* note 37.

⁴⁶ *Id.*

⁴⁷ See text and notes 1, 8, 12-47 *supra* (describing how various forms of reform-minded legal thought occasionally reinforce each other); Planetary Damages, *supra* note 36, at 31.

⁴⁸ See Planetary Damages, *supra* note 36, at 20, 30, 57 ("In the mountains far above the red-brick city is a great, green valley. Its high stone walls are streaked by waterfalls; its

pro-rata fashion among the top 90 polluters, which are together responsible for two-thirds of the world's greenhouse gases emitted since 1751, the villagers have found a European court that seems not only willing, but interested, in hearing their claim. The amount of money that the townspeople demand in order to build a series of dams and spillways that will guarantee their continued survival is comparatively modest—\$19,000 dollars.⁴⁹ The defendants include some of the richest petroleum and utilities companies in the world, some with annual budgets larger than those of most nations. The village comes to court with relatively clean hands. No extractive industry takes place inside it, and its contribution to world greenhouse gases is near zero.⁵⁰

The dubious reader might bear in mind that the early cases of cigarette liability saw the tobacco companies victorious.⁵¹ Then, a single claim won and the tide turned in plaintiffs' favor.⁵² Thus, if the Peruvian villagers win, all bets—which until now favored Goliath against the children—may be off.⁵³ Poor regions, especially in the global South (like the villagers in Huaraz), may be able to recover damages for climate-change-induced flooding. Countries like those in the Northern Triangle—

floor dotted with flowers and grazed by horses and cows. Six boulder-strewn miles beyond the gate, the valley ends abruptly at an enormous wall of rock and ice. Beneath it lies a stretch of calm, bright water. . . Lake Palcacocha. Though few of its residents have seen this lake, the city below lives in fear of it. On Dec. 13, 1941, a piece broke off a hanging glacier and fell into Palcacocha, creating a great wave that overwhelmed a natural dam and sent a flood surging toward Huaraz. A third of the city was destroyed, and at least 1,800 people were killed. In response, the government reinforced the natural dam and installed drainage tubes to lower the level of the lake. In 2009, glaciologists found that amid the widespread melting of Andean ice, the amount of water held in Palcacocha had increased by 3,400 percent.”).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 31.

⁵² See Kathleen Michon, *Tobacco Litigation: History and Recent Developments*, <https://www.nolo.com/legal-encyclopedia/tobacco-litigation-history-and-development-32202.html> (describing the first breakthrough in individual cases (2000) and subsequent wave of successful litigation by state attorneys general).

⁵³ Other cities and states seem poised to weigh in. See, e.g., Planetary Damages, *supra* note 36, at 31 (noting that lawyers are exploring additional theories, such as misleading shareholders in violation of securities law, *id.* at 32, and even nuisance, harking back to ancient lawsuits concerning pig farm odors, *id.* at 57). With the cigarette litigation, “the tide [turned]. . . once subpoenaed documents showed a longstanding conspiracy to cover up the harms of smoking.” *Id.* at 58. Note that Delgado is not the only race-crit who on occasion turns to mainstream scholarship for parallels or support. See, e.g., Devon Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 *YALE L. J.* 1757 (2003).

Guatemala, Honduras, and El Salvador—where villagers are fleeing climate-induced drought, may be able to demand recompense. Immigration to the United States may slow somewhat, easing the pressure on domestic minorities and freeing the welfare safety net to look after U.S. poor and residents of inner cities.

As demonstrated by the above effective use of civil legal proceedings, leftist scholars can sometimes gain a great deal from knowledge that arrives via centrist approaches. Left-center synthesis and cooperation are not only possible but, on occasion at least, may be highly productive. Application of critical tools such as the flip and switch of point of view, can have real-world consequences, suggesting that crits and case-law specialists may have much to learn from each other and, indeed, may have been on the same track all along.

II. Constitutional Carve-Outs—Or, is your Toaster Really Under Warranty?

What about wisdom emanating not from the moderate left in the form of manipulation of legal rules, but from far-left or radical sources? We offer two examples. The first consists of exposing traps and pitfalls inherent in our political system, especially for minorities of color. The second consists of transforming old options in novel ways.

A. *Trashing—Taking Note of Constitutional Carve-Outs*

A standard radical technique, part of the “trashing” repertory, consists of showing that remedial law often turns out to contain a series of carve-outs.⁵⁴ These carve-outs, or exceptions,⁵⁵ serve to reconcile our system’s sweeping promises and the needs of corporate capitalism. Like a consumer guaranty or warranty, the carve-outs allow hegemony to make a show of providing for workers, ordinary citizens, minorities, and the poor, while keeping their own position carefully protected.

1. Carve-Outs in Our System of Civil Liberties

In civics class, we learn that the Constitution guarantees the right of free speech.⁵⁵ We learn only later that this right is sharply limited: One cannot speak disrespectfully to a judge, police officer, or other authority

⁵⁴ See Kelman, *Trashing*, *supra* note 6 (describing trashing).

⁵⁵ U.S. CONST. amend I (providing that Congress shall make no law violating the freedom of speech).

figure.⁵⁶ One cannot utter defamatory words, words of threat, or ones that are too much like what another has spoken or written.⁵⁷

Those and many others are the carve-outs. Practically every right that the Constitution guarantees, often in sweeping terms, has its share of them. For example, our system guarantees equality of voting rights: “One man, one vote.”⁵⁸ But your right to vote is worth much less than another’s if you live in a large, rather than small state,⁵⁹ live far from rather than near a poll place (as many minorities and rural residents do),⁶⁰ lack a driver’s license,⁶¹ or live in a district that is gerrymandered so as to pack or crack your vote and minimize its impact.⁶²

Our system also guarantees that you have the right to be secure from unlawful searches and seizures.⁶³ But the police may stop and search your car or backpack if they say you look like somebody they saw on a wanted poster,⁶⁴ if you have a broken tail light,⁶⁵ or are driving a type of car or in a part of town that they associate with drug dealers.⁶⁶

⁵⁶ See, e.g., Richard Delgado, *Campus Anti-Racism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 377 (1991) (listing a number of exceptions).

⁵⁷ *Id.*

⁵⁸ See *Baker v. Carr*, 369 U.S. 186 (1962).

⁵⁹ Populous states like New York or Texas, and thinly populated ones, like Montana are each entitled to two senators.

⁶⁰ See *New Voting Restrictions in America*, BRENNAN CTR. <https://www.brennancenter.org/sites/default/files/legal-work/New%20Voting%20Restrictions.pdf> (last updated July 3, 2019) (outlining new voter laws in states that are restricting access to voting).

⁶¹ *Id.*

⁶² Michael Li & Annie Lo, *What is Extreme Gerrymandering?*, BRENNAN CTR. (March 22, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/what-extreme-gerrymandering>.

⁶³ U.S. CONST. amend IV (providing the right to be free from unreasonable searches and seizures).

⁶⁴ See *United States v. McDonald*, 606 F.2d 552, 553-54

⁶⁵ See *Heien v. North Carolina*, 574 U.S. ___ (2014) (holding that even if an officer mistakenly believes that a non-working tail light violates the law, the stop is legal).

⁶⁶ See *United States v. Whren*, 517 U.S. 806, 809-16 (1996).

You have the right to privacy in your home.⁶⁷ But the police may surveil your premises from outside,⁶⁸ go through your garbage,⁶⁹ or obtain a warrant to enter based on hearsay evidence.⁷⁰

The Constitution says that the state shall not establish any religion or interfere with the practice of one.⁷¹ But it may recognize certain religious holidays, such as Christmas,⁷² or allow a state Capitol to post seasonal displays honoring the majority religion, so long as it professes a nonsectarian intent.⁷³ If your religion is associated in the public mind with terrorism, you may find yourself subject to a travel ban, detention, interrogation, or worse.⁷⁴ Critical legal studies, then, helps citizens notice how our system of civil liberties is riddled with exceptions and special doctrines that weaken its majestic protections.

2. Carve-outs in our System of Civil Rights Protection

But just as examination reveals carve-outs in our system of civil liberties, it can show the same in connection with civil rights. For example, a state agent can get away with treating you unequally if you cannot prove intent.⁷⁵ The intent rule, then, is a major carve-out in the system of laws that you might have thought protected you, or another person of color, from discrimination.

It also turns out the President of the United States can keep people like you from travelling here, if he can maintain that you are part of a group, such as Muslims, that supposedly poses a national security problem.⁷⁶ In similar fashion, Congress may enact immigration rules that are overtly

⁶⁷ See *Olmstead v. United States*, 277 U.S. 438, 466 (1928).

⁶⁸ See Andrew Tan-Delli Cicci, *Mass Surveillance Begins At the Local Level: So Does the Resistance to It*, THE NATION, Sept. 27, 2018, <https://www.thenation.com/article/mass-surveillance-begins-at-the-local-level-so-does-the-resistance-to-it/>

⁶⁹ See *California v. Greenwood*, 486 U.S. 35 (1988).

⁷⁰ FED. R. CRIM. P. 41(d) (2019).

⁷¹ U.S. CONST. amend I (providing that no state shall deny the right to freedom of religion or establish an official one).

⁷² See *Lynch v. Donnelly*, 465 U.S. 668, 680-85 (1984) (finding that a city may incorporate religious iconography into holiday decorations because it has not “impermissibly advanced religion”).

⁷³ *Id.*

⁷⁴ See generally Shalini Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L. J. 13 (2019) (discussing the operation of the plenary power doctrine in immigration law).

⁷⁵ *Washington v. Davis*, 426 U.S. 229, 240 (1976) (ruling that an allegation of unconstitutional racial discrimination requires proof of intent).

⁷⁶ See Ray, *supra* note 74.

racial, and you will find yourself barred from seeking judicial relief because of the plenary power doctrine.⁷⁷ Writers and speakers may label you inferior because of your genes or culture, and you will go without recourse and with little opportunity to prove them wrong, because that is free speech.⁷⁸ If the New Deal, G.I. Bill, or FHA programs offer assistance of a kind you could really use, you may find that the program is only available to middle-class whites and not people like you.⁷⁹ Finally, if you are queer or a woman of color, you may learn that equality jurisprudence does not protect you because you are not a member of a suspect class warranting strict scrutiny,⁸⁰ or—if you are a black woman—because your intersectional identity does not afford you full protection.⁸¹

The advantage of enumerating these and other exceptions is that once one realizes our system of remedies is not designed primarily to discourage unequal treatment, one learns not to rely exclusively on that system but seek other avenues for protecting one's interest. One learns to seek help from those who understand how things work and want to work in solidarity with you to make them better. One learns that law is only one avenue—and not always the best one—for protecting one's interest.

B. Positive Options—Finding Practical Applications for Leftwing Thought

1. An Example of a Far-Left Option to Achieve a Civil Liberties Breakthrough

As mentioned, sometimes showing that your toaster has an imperfect warranty will lead you to suspect that the toaster itself is probably defective, so that you should choose a better one next time. The same caution applies in connection with our system of civil liberties. One area of civil liberties protection that is shot through with carve-outs is the right to

⁷⁷ See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (declaring that immigration law and policy are beyond judicial purview).

⁷⁸ See ACLU, *Speech on Campus*, <https://www.aclu.org/other/speech-campus> (last visited Dec. 1, 2019).

⁷⁹ See, e.g., Juan Perea, *Doctrines of Delusion: How the History of the GI Bill and Other Inconvenient Truths Undermine the Supreme Court's Affirmative Action Jurisprudence*, 75 U. PITT. L. REV. 583, 585 (2014).

⁸⁰ See, e.g., Ronald Rotunda, *Shooting a Wedding is Different From Taking a Passport Photo*, NAT. REV. (July 9, 2015), <https://www.nationalreview.com/2015/07/obergefell-sexual-orientation-strict-scrutiny>.

⁸¹ See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1246 (1993).

be free from forceful, nonconsensual police interrogation and torture.⁸² Noticing that many environments are inherently coercive, scholars like Devon Carbado,⁸³ David Cole,⁸⁴ and Barry Feld⁸⁵ have demanded changes in the way we think about police-civilian interactions. Today, the police are somewhat more cautious about interrogating particular suspects, such as juveniles or drivers of color, than they were in former times, and even the government has given occasional thought to abolishing extraordinary rendition, waterboarding, and Guantanamo.⁸⁶

2. An example of A Far-Left Option Employed to Achieve a Civil Rights Breakthrough

As incarceration mounted and the jails began to fill up with black men, Paul Butler proposed a means by which black jurors may sometimes throw a wrench into the machinery of state.⁸⁷ He resurrected an ancient remedy, jury nullification, that can enable a black juror to avoid convicting a black defendant whom the juror believes would be more useful to the black community free than behind bars.⁸⁸ Jury nullification emerged as an affirmative tool, based on ancient law, that the minority community can deploy to slow the rush to incarcerate. Currently, radical scholars and community activists are exploring alternatives for cash bail,⁸⁹ devising new arguments for racial reparations based on reinterpretation of

⁸² See U.S. CONST. amend. V (providing that no one shall be compelled to testify against him or herself); See also *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (elaborating on the meaning of this protection during police interrogations).

⁸³ See Devon Carbado, *From Stopping Black People to Killing Black People: Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017) (noting the many points of police contact that contain elements of coercion and risk for motorists and pedestrians of color).

⁸⁴ DAVID COLE, *TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE* (2009) (noting the tendency of empowered actors to rationalize brutal conduct).

⁸⁵ Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219 (2006) (noting that police interrogation of children is inherently problematic).

⁸⁶ See, e.g., U.S. SENATE JUDICIARY COMMITTEE, *Testimony by David Cole before the Senate Judiciary Committee* (Jan. 11, 2017), <https://www.judiciary.senate.gov/imo/media/doc/01-11-17%20Cole%20Testimony.pdf>.

⁸⁷ Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L. J. 677 (1995).

⁸⁸ *Id.* at 679, 715-22.

⁸⁹ See Chisolm Allenlundy, *Democratizing Bail: Can Bail Nullification Rehabilitate the Eighth Amendment?* 71 Ala. L. Rev. 577 (2019.) See also Christine S. Scott-Hayward and Sarah Ottone, *Punishing Poverty*, 70 Stan. L. Rev. Online 167 (2018).

history,⁹⁰ and making new/old arguments for open borders.⁹¹ The radical or far-left, then, is a potential source of both negative and positive options for social change.

Conclusion

Once one realizes that the establishment frequently has little intention of carrying through on its promises, one is free of unwarranted reliance on a system that is full of implicit exceptions and is then free to take steps toward real relief.⁹² That relief may sometimes arrive as a result of ingenious lawyering that lands in front of a sympathetic judge at the right time.⁹³ If not, it may take tens of thousands of children clamoring for a better future to get everyone's attention.⁹⁴

Alternatively, aid may arrive from the other direction, in the form of a radical new/old proposal put forward by a genius like Paul Butler. By expanding one's range of options and being open to novel approaches from both the left and the right, one's chances of prevailing increase. Radical method, then, can and should be multiple and pragmatic: Try everything, and see what works.

Progressive scholars should look for helpful ideas where they find them, whether from doctrinal scholars with an intriguing juxtaposition ready to run past a sympathetic judge, or from radicals even further left than they who analyze social currents without special consideration for race, which they may deem epiphenomenal and an unhelpful way of organizing one's thoughts.⁹⁵ As mentioned, an idea is an idea, no matter who broaches it.

This is not to say that a person or group that is the source of a fine idea on one occasion will be in solidarity with you on another. Some liberals

⁹⁰ Suketu Mehta, *Why Should Immigrants 'Respect Our Borders'?* *The West Didn't Respect Theirs*, N.Y. Times (June 7, 2019), <https://www.nytimes.com/2019/06/07/opinion/immigration-reparations.html?action=click&module=MoreInSection&pgtype=Article®ion=Footer&contentCollection=Opinion>.

⁹¹ *Id.* at 20; See also KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* (2009).

⁹² See Part II *supra* (Constitutional Carve-Outs, Or Is Your Toaster Really Under Warranty?).

⁹³ See text and notes 27-34 *supra* describing two such cases, one having to do with atomic fallout, the other with Agent Orange; 47-49 *supra*, describing another (the Peruvian case) that may do so in the near future.

⁹⁴ See *Livable Future*, *supra* note 37 (describing mass demonstrations by tens of thousands of children worldwide).

⁹⁵ *Id.*

may think that colorblindness is a good way to deal with systemic discrimination. It is not.⁹⁶ Marxists and old-time lefties may think that race divides the working class and that racism, like capitalism, will wither away once workers come to control the means of production. This is no more likely than the converse.⁹⁷ As someone once put it, we are fated to enjoy no permanent friends, no permanent enemies.⁹⁸

⁹⁶ See Ian F. Haney Lopez, “A Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness”, 59 STAN. L. REV. 985 (2007) (demonstrating the futility of colorblind remedies for racism).

⁹⁷ Namely, the hope that economic inequality will come to an end if we merely banish racism.

⁹⁸ See Henry John Temple Palmerston, *The Treaty of Adrianople—Charges Against Viscount Palmerson: Remarks in the House of Commons* (Mar. 1, 1848), 97 HANSARD’S PARLIAMENTARY DEBATES 3d, 122, <https://api.parliament.uk/historic-hansard/commons/1848/mar/01/treaty-of-adrianople-charges-against>.