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# DISCERNING CRITICAL MOMENTS: LESSONS FROM THE LIFE OF DERRICK BELL TITLE

Jean Stefancic \*

## INTRODUCTION: DISCERNING AND ACTING

Critical race theory seeks to explain the shifting tides of racial fortune.<sup>1</sup> Most of the movement's scholarship concerns history writ large—changes in immigration policy affecting thousands,<sup>2</sup> changes in media images and stereotypes,<sup>3</sup> and alterations of Supreme Court doctrine with respect to proof of discrimination, for example.<sup>4</sup> But it also teaches lessons and modes of thought that can help one understand events in everyday life and respond intelligently.<sup>5</sup>

Understanding and taking action are, of course, separate things. One might know that a critical moment is impending but put it out of mind because one is distracted or paralyzed by indecision. For example, suppose I know that the electricity in the meeting room in which I am preparing to give a talk is unreliable

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<sup>1</sup> See, e.g., RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2d ed. 2012) [hereinafter DELGADO & STEFANCIC, *INTRODUCTION*] (discussing these and other topics falling within this school of thought); DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); Kimberlé Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 *CONN. L. REV.* 1253 (2011).

<sup>2</sup> See DELGADO & STEFANCIC, *INTRODUCTION*, *supra* note 1, at 84–87, 125–26, 164; KEVIN R. JOHNSON, *IMMIGRATION LAW AND THE U.S.-MEXICO BORDER* (2011); MICHAEL A. OLIVAS, *NO UNDOCUMENTED CHILD LEFT BEHIND* (2012).

<sup>3</sup> See DELGADO & STEFANCIC, *INTRODUCTION*, *supra* note 1, at 9, 33–34, 173; Daniel G. Solorzano, *Images and Words that Wound: Critical Race Theory, Stereotyping, and Teacher Education*, 1997 *TCHR. EDUC. Q.* 5.

<sup>4</sup> See Charles Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317 (1987).

<sup>5</sup> See *infra* Parts II–III (discussing examples).

because a storm is raging outside. Maybe a technician who works for the conference center mentions it to me as he is explaining how to adjust the microphone. I might put this information out of mind, being too busy testing the volume with the aid of a friend standing in the back of the room. It might cross my mind that if the electricity quits, the main lights will go out, my laptop may crash, the elevator may stop working so that the next speaker will arrive late, and my co-panelists and I will have to improvise with the aid of the dim lighting provided by a back-up generator.

In other words, simply knowing about the electricity is not enough; I need to take action, such as consulting with the panel chair about what to do in case the electricity fails.<sup>6</sup>

This article is about both problems—discerning critical moments and taking action. After considering, in Part I, a recent era (the Sixties) that featured a host of social advances, followed by a conservative backlash—critical moments for both sides—I discuss, in Part II, examples from the lives of a number of progressive academics, including Derrick Bell. These show how familiarity with radical social analysis can enhance the ability to act effectively in daily life.

How does this happen? In Part III, I show that this ability is a function of a well-stocked mental repertory of critical themes and tools—a veritable checklist for reflection and action. Beginning with the events that set the stage for the founding of the critical race theory movement itself, I show how facility with critical analysis advantages the holder, suggesting lines of investigation, disclosing possibilities for group action, revealing connections between events on a broad scale, and showing historical linkages between events occurring now and in the past. Critical race theory emerges, then, as much more than an interesting way of looking at social reality. It is a guide for a thoughtful life and judicious participation in one's society.

## I. THE SIXTIES AND THE CONSERVATIVE REACTION TO IT

The sixties and early seventies were a time of social ferment, when minorities, women, gays, lesbians, the disabled, prisoners, and other disempowered groups challenged long-standing oppressive social structures and relations.<sup>7</sup> Artists, teachers, students, activists, and many others participated in ushering in the changes that marked those times. Although those changes took on an air of historical inevitability, they were not at all necessary or predetermined. Instead, they required intelligence and commitment. Not everyone even recognized their

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<sup>6</sup> That is to say, recognizing a critical moment and acting upon it are two separate things. One may recognize a critical moment but lack the courage or will to act upon it. Or, one may act in response to a situation without realizing that one is addressing what will appear later to have been a critical event.

<sup>7</sup> See, e.g., TODD GITLIN, *THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE* (1987); TERRY H. ANDERSON, *THE SIXTIES* (4th ed. 2011).

significance. Some thought they were a fad and would not last. Others recognized but opposed them.<sup>8</sup> Thus, these occasions required the ability to intuit that times were ripe for changes, as well as the will to take to the streets or sit down at one's typewriter and contribute to them. Those who did take action, of course, succeeded in putting in place innovations that survive until today, including new civil rights legislation and case law, integrated schools, and affirmative action policies that, although now much weakened, survive in many settings.<sup>9</sup>

Today, we see a similar ferment, some of it in the opposite direction, as conservative forces urge that with the election of the nation's first black president, we are now a post-racial society, so that no further changes are in order.<sup>10</sup>

We are living, perhaps, through several critical moments—inflection points—and may well live through still others in the years ahead. We may even have lived through some in the recent past without knowing it. One can look at societal life as a succession of curves—some of them intersecting—the crest of each bringing possibilities for events to resolve one way or another. How many Americans know, for example, how William Simon, secretary of the treasury under Presidents Nixon and Ford, in 1978 called for a radical rethinking of conservative principles? His book *A Time for Truth* urged the right to rise above the banalities of both classical liberalism and Goldwater-era conservatism and create a new set of institutions capable of leading America into a new era.<sup>11</sup> He urged corporations to support conservative intellectuals in the struggle to come.<sup>12</sup>

A few years earlier, corporate lawyer and future Supreme Court Justice Lewis Powell, in a confidential memorandum to the U.S. Chamber of Commerce, had similarly warned that the free enterprise system was in trouble and that American businesses needed to apply their skills to its preservation.<sup>13</sup> These two declarations,

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<sup>8</sup> Some, for example, believed that the Free Speech Movement was an anarchic display of youthful high spirits, which would pass. See, e.g., *THE FREE SPEECH MOVEMENT: REFLECTIONS ON BERKELEY IN THE 1960S* (Robert Cohen & Reginald E. Zelnik eds., 2002) (discussing the widespread public revulsion among some of the public and many in government over perceived student excesses of the times).

<sup>9</sup> On the legacy of the Sixties, see GITLIN, *supra* note 7; ANDERSON, *supra* note 7.

<sup>10</sup> See generally TIM WISE, *COLORBLIND: THE RISE OF POST-RACIAL POLITICS AND THE RETREAT FROM EQUITY* (2010) (discussing current racial attitudes); ELLIS COSE, *THE END OF ANGER: A NEW GENERATION'S TAKE ON RACE AND RAGE* (2011) (same); MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLORBLIND SOCIETY* (2003) (same).

<sup>11</sup> WILLIAM SIMON, *A TIME FOR TRUTH* (1978).

<sup>12</sup> See JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA 3-5* (1996) [hereinafter STEFANCIC & DELGADO, *NO MERCY*] (discussing this conservative critical moment).

<sup>13</sup> Confidential Memorandum from Lewis F. Powell Jr. to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce (Aug. 23, 1971), available at [http://www.reclaimdemocracy.org/powell\\_memo\\_lewis](http://www.reclaimdemocracy.org/powell_memo_lewis); see also STEFANCIC & DELGADO, *NO MERCY*, *supra* note 12, at 137.

one by William Simon, the other by Lewis Powell, led to the formation of a host of well-funded conservative think tanks, foundations, and training centers for young talent. This included the Federalist Society, which in turn yielded dozens of Supreme Court clerks, with training in law and economics and, right on schedule, a few decades later, an increasingly conservative Supreme Court.<sup>14</sup> The late seventies and early eighties provided critical moments for the right. Yet few on the left recognized it at the time.

A few years ago, financiers developed mortgage-backed securities and collateralized debt obligations to capitalize on the housing boom and prices that looked as though they would never stop rising.<sup>15</sup> Most recently, the Supreme Court, in *Citizens United v. Federal Election Commission*, held that money is speech, and since the First Amendment grants individuals free speech and corporate donors are individuals too,<sup>16</sup> it follows that corporate donors (as well as billionaires and labor unions) are free to contribute unlimited amounts of money, with little oversight or reporting to super-PACs and non-disclosing nonprofits, for use in advertising. This, in turn, has led to a huge inflow of cash to the political campaigns of business-friendly candidates.<sup>17</sup> Those were critical moments, although not many realized them then.

Recognizing critical moments is not always easy, particularly at the time one is living through them. Sometimes this will require knowledge of events that are not widely known, such as the speech and memo by the two conservative icons and the gush of corporate money that followed in their wake.

At other times, the challenge will be interpretive or conceptual. One may see certain events occurring but not appreciate their significance or what lies behind them. For example, is the Tea Party Movement a major shift in U.S. politics or a momentary fad that will end after an election cycle or two and the inevitable economic recovery arrives?

Existential philosopher Søren Kierkegaard once said that we are doomed to lead life forward but only to understand it backward—after the fact or in retrospect.<sup>18</sup> This is especially true with respect to acknowledging critical moments,

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<sup>14</sup> STEFANCIC & DELGADO, *NO MERCY*, *supra* note 12, at 110–11, 131.

<sup>15</sup> SIMON JOHNSON & JAMES KWAK, *13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN* 76–77 (2010).

<sup>16</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 348–66 (2010).

<sup>17</sup> Mike Ludwig, *Four Years After Citizens United: Is Campaign Cash Buying Justice in State Courts?*, TRUTHOUT (Jan. 22, 2014), <http://www.truth-out.org/news/item/21368-four-years-after-citizens-united-is-campaign-cash-buying-justice-in-state-courts>.

<sup>18</sup> See 1 SØREN KIERKEGAARD, *SØREN KIERKEGAARD'S JOURNALS AND PAPERS* 450 (Howard V. Hong & Edna H. Hong eds., 1967).

which of course makes their recognition both challenging and important. Consider now, a few examples from daily life.

## II. CRITICAL MOMENTS IN ACADEMIC LIFE

### A. *Example Number One: Derrick Bell at Oregon*

Sometimes one may understand events well enough and interpret them correctly but lack the courage or energy to confront them. For example, Derrick Bell writes of a stunning episode that befell him in mid-career. The first African American tenured professor at Harvard Law School, and one of the founding figures of the critical race theory movement, Bell had been serving as dean of the University of Oregon Law School for a happy five-year period in the early 1980s, when he resigned over his faculty's refusal to hire a highly qualified Asian American female law professor, who would have been the country's first.<sup>19</sup> The timing of Bell's resignation at Oregon left him with a gap to fill. Finding himself between jobs, he was delighted when he received an offer to teach as a visiting professor at Stanford Law School.<sup>20</sup>

At Stanford, Bell was enjoying teaching constitutional law to a group of first-year students when, part way through the semester, he received an invitation from the law school dean to give a lecture in a new public series, sponsored by the law school, on constitutional law. Seeing the offer as an expression of confidence on the part of his new colleagues, he happily accepted.<sup>21</sup>

His pleasure vanished, however, when a delegation of black students informed him a few days later that the lecture series was aimed at his own deficiencies as a professor.<sup>22</sup> Evidently, a number of his white students had complained to the administration about having to take an important first-year course from this little-known black man from "Oregon State."<sup>23</sup> Bell, who had taught that subject many times, did so in a slightly unorthodox fashion, beginning with the Slavery Compromises—several provisions, still in the Constitution, which safeguarded the institution of slavery. Bell showed how those clauses structured the entire American legal system during its formative years, elevating property above liberty and equality in a way that leaves traces even today.<sup>24</sup>

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<sup>19</sup> See INTRODUCTION, *THE DERRICK BELL READER* 10 (Richard Delgado & Jean Stefancic eds., 2005).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 10–11.

<sup>22</sup> *Id.* at 11.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

The students were discontented. They had expected to take constitutional law from one of two famous Stanford professors, both of whom were on leave that year and who taught the course in a more conventional manner.<sup>25</sup> The administration had responded to their complaints by scheduling the public lectures in order to guarantee them their money's worth. And Bell's invitation was designed to dispel any suspicion that the series was aimed at him, although it was.<sup>26</sup>

Most of us would have felt like going into seclusion. Bell, however, capitalized on the occasion to write a column for the Stanford Law School newspaper. Entitled "The Price and Pain of Racial Remedies,"<sup>27</sup> it addressed the racist subtext behind the lecture series and called on the school to reckon with its own race and class bias. This in turn led to a series of community meetings that continued long after Bell returned to Harvard and left Stanford a better place.

Back at Harvard, Bell's life was calmer for a time, after which he experienced yet another critical moment, having to do with the lack of black female professors on his faculty. This in turn led to a second protest, a student rally, and a quick public hug, caught on tape, by the young Barack Obama, which years later would become a cause célèbre when a conservative website, Breitbart.com, publicized it<sup>28</sup> and CNN summoned a critical race theorist, Dorothy Brown, to appear on the air explaining it.<sup>29</sup> My point is that life confronts most of us with a bewildering series of obstacles and irritations, so that the challenge often lies in determining which ones are worth confronting and speaking out quickly enough to do some good. Bell seized the moment at Stanford and Harvard in the 1980s and led the way to lasting changes at two institutions.

### B. *Example Number Two: Michael Olivas and His "Dirty Dozen" List*

Affirmative action in law school hiring brought substantial numbers of black, Latino/a, and Asian American professors into the legal academy for the first time.<sup>30</sup> Beginning in the late 1960s, the numbers grew until they began to approach

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<sup>25</sup> *Id.* (noting that the class was traditionally taught by regular members of the faculty).

<sup>26</sup> *Id.* at 11–12.

<sup>27</sup> *Id.* at 12.

<sup>28</sup> See David A. Graham, *Breitbart.com's Massive Barack Obama-Derrick Bell Video Fail*, THE ATLANTIC (Mar. 18, 2012, 3:02 PM), <http://www.theatlantic.com/politics/archive/2012/03/breitbartcoms-massive-barack-obama-derrick-bell-video-fail/254213>.

<sup>29</sup> See *A Lesson on Critical Race Theory*, STARTING POINT (Mar. 12, 2012, 10:35 AM), <http://startingpoint.blogs.cnn.com/2012/03/12/a-lesson-on-critical-race-theory>.

<sup>30</sup> See WILLIAM BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998) (describing the early years of affirmative action).

population parity in the early 1980s, at which point the growth tapered off. When the number of Latino/a professors started to decrease and remained very low at certain top schools, a group of Latino/a law professors led by Michael Olivas, professor of law at the University of Houston, decided to take action. Olivas compiled a list of top schools, and ones in parts of the country with heavy Latino populations, that had no Latinos/as on the regular teaching faculty. With backing by the national Hispanic Bar Association, Olivas publicized the list in major newspapers, hoping to spur lagging law schools into taking action.<sup>31</sup> Many resisted at first, asserting that they had done enough or that the pool of qualified Latinos/as was very small. When Olivas persisted, year after year, updating and expanding his list, many law schools grudgingly fell into line and took seriously the candidacies of Latino faculty. Few schools acknowledged Professor Olivas's efforts, much less thanked him for calling the problem to their attention, but eventually almost every school appointed at least one such candidate.

### C. *Example Number Three: Precious Knowledge and Book Bans in Arizona*

In Tucson, a large public high school had been offering a program of Mexican American Studies (MAS) for over a decade, enjoying considerable success.<sup>32</sup> Taught by energetic young instructors, many of them graduates of university-level ethnic studies departments, classes introduced Latino youth, many of them from impoverished immigrant families, to Latino culture and history.<sup>33</sup> Students read authors like Sandra Cisneros and Paulo Freire.<sup>34</sup> They studied social analysis through the writings of critical race theorists and historians such as Rodolfo Acuña.<sup>35</sup>

They learned about the U.S. War with Mexico and the theft of Mexican lands and ranches that followed,<sup>36</sup> Operation Wetback,<sup>37</sup> and school districts that segregated Mexican-origin schoolchildren from the Anglo children because they feared that the Mexicans were dirty, immoral, or too slow to learn anything but the

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<sup>31</sup> See, e.g., Marie McCullough, *A Plea for Hispanic Law Teachers*, THE INQUIRER (May 7, 1993), [http://articles.philly.com/1993-05-07/business/25963705\\_1\\_hispanic-students-law-schools-olivas](http://articles.philly.com/1993-05-07/business/25963705_1_hispanic-students-law-schools-olivas).

<sup>32</sup> See, e.g., Richard Delgado, *Precious Knowledge: State Bans on Ethnic Studies, Book Traffickers (Librotraficantes), and a New Type of Race Trial*, 91 N.C. L. REV. 1513 (2013).

<sup>33</sup> *Id.* at 1527–30, 1534.

<sup>34</sup> *Id.* at 1529.

<sup>35</sup> *Id.* at 1529 n.70.

<sup>36</sup> *Id.* at 1528–92, 1534–35.

<sup>37</sup> Several of the books in the curriculum cover this incident. See RODOLFO F. ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS (7th ed. 2010); DELGADO & STEFANCIC, INTRODUCTION, *supra* note 1.



most basic material.<sup>38</sup> The students learned of the great empires of Mesoamerica and the high civilizations that preceded the continent's European invasion.<sup>39</sup>

Achievement soared, with many of the program's graduates going on to college, bent on becoming doctors, lawyers, or politicians.<sup>40</sup> Grades increased even in classes outside the MAS curriculum, such as math and science.<sup>41</sup>

When conservative authorities in the state capital learned of what was happening in Tucson, they prevailed upon the legislature to enact a law (HB2281) aimed at eliminating MAS. The new law banned any classes that advocated the overthrow of the U.S. government, catered to one ethnic group only, encouraged thinking of human beings as groups rather than individuals, or stirred up ethnic resentment.<sup>42</sup> After two outside audits found that the program violated none of these provisions, state authorities secured a ruling by a like-minded administrative judge that the program was, indeed, in violation.<sup>43</sup>

Faced by the prospect of losing millions of dollars in state funding, the Tucson Unified School District discontinued the program, swiftly collected its offending textbooks from the classrooms in front of crying students, boxed them up, and sent them to a depository outside of town.<sup>44</sup>

When the book ban came to the attention of Tony Diaz, a Houston-area community college teacher, he sprang into action. With a group of friends, he organized a caravan of *librotraficantes* (book traffickers) carrying trunkfuls of "wet books" all the way from Houston to Tucson, where they gave them away to youthful bystanders.<sup>45</sup> His act of improvisational theater brought national attention to the predicament of the MAS teachers and students and resulted in backing by library groups and liberal organizations that continues to this day.<sup>46</sup>

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<sup>38</sup> Delgado, *supra* note 32, at 1534 n.92.

<sup>39</sup> *Id.* at 1528.

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

<sup>41</sup> *Id.* at 1535–40.

<sup>42</sup> H.R. REP. NO. 2281, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

<sup>43</sup> Delgado, *supra* note 32, at 1524 n.46. See *In re* Appeal of Tucson Unified Sch. Dist., No. 11F-002-ADE, at \*33–36 (Dec. 27, 2011).

<sup>44</sup> Delgado, *supra* note 32, at 1523.

<sup>45</sup> *Id.* at 1526.

<sup>46</sup> *Id.*

### III. THE RECOGNITION PROBLEM: A CRITICAL TOOLKIT

Let us pause, now, to consider the recognition problem a little further. How do you *recognize* critical moments and distinguish them from the ordinary irritations that any mature person needs to learn to take in stride, such as the flickering lights in a conference room where you are due to give a talk? Consider how exposure to critical scholarship and theory can make the task easier, as it may have done for Derrick Bell at Stanford, Michael Olivas at Houston, or Tony Diaz in Houston and Tucson. Ethnic studies may do so as well. In general, any course of study that acquaints one with the history of social change may provide one with the tools to spot a new opportunity. But it is not enough to know about social change, one must learn how to think critically about it.

#### A. *The Origins of Critical Race Theory: Taking Cues from Foundational Moments*

The very origins of the critical race theory movement suggest a mechanism. The founding moments of other critical disciplines, such as critical legal studies<sup>47</sup> or critical legal feminism,<sup>48</sup> would undoubtedly suggest others.<sup>49</sup> With respect to race, the seventies and early eighties, unlike the sixties, were times of retrenchment, in some respects like our own era.<sup>50</sup> The gains of the civil rights era had stalled and were beginning to be cut back.<sup>51</sup> School desegregation was proceeding at no deliberate speed as white families moved out of cities soon after busing arrived, bringing black children to their mostly white neighborhood schools. Conservative think tanks were beginning to challenge affirmative action and other accomplishments that liberals had taken for granted.<sup>52</sup> Across the country, small groups of civil rights lawyers and scholars began searching for new tools, concepts, and litigation strategies to counter subtle forms of institutional or unconscious racism that were developing and an American public that seemed to have no interest in race and racism.<sup>53</sup>

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<sup>47</sup> On critical legal studies, see generally *THE POLITICS OF LAW* (David Kairys ed., 3d ed. 1998).

<sup>48</sup> See CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LAW AND LIFE* (1998).

<sup>49</sup> See *infra* Part A. The reason is that the very challenges and dissatisfaction with the current order that give rise to the new movement lead to breakthroughs in thinking that those versed in the movements can apply to daily life.

<sup>50</sup> The similarities are many, including the current obsession with deracializing events (finding a nonracial reason for discrimination), higher incarceration, and cutbacks on long-held protections such as voting rights. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

<sup>51</sup> See DELGADO & STEFANCIC, INTRODUCTION, *supra* note 1, at 4.

<sup>52</sup> STEFANCIC & DELGADO, NO MERCY, *supra* note 12, at 45–81.

<sup>53</sup> *Id.* at 3–5.

One such person, Derrick Bell, posited that racism is normal, not abnormal, and is the usual way America organizes itself.<sup>54</sup> As a corollary, he proposed that racial oppression serves important majoritarian interests. Bell applied this insight in his famous article “*Brown v. Board of Education and the Interest Convergence Dilemma*”<sup>55</sup> in the *Harvard Law Review*. With this widely lauded ruling of American Supreme Court jurisprudence in mind, he posited that *Brown v. Board of Education*<sup>56</sup> arrived not solely out of a belated spasm of judicial conscience so much as out of the self-interest of the establishment.<sup>57</sup> He noted that the NAACP Legal Defense & Education Fund, his former employer, had been litigating school desegregation cases in the South, and getting nowhere, for years—or registering, at most, narrow victories.<sup>58</sup>

Yet, in 1954, the dam burst when the Supreme Court granted them everything they had been hoping for. Why just then? In an answer that shocked many of his readers, Bell noted that when the Supreme Court decided *Brown* in 1954, the United States was in the early stages of a Cold War against Soviet communism, competing for the hearts and minds of the Third World, most of which was brown, black, or Asian.<sup>59</sup> Worldwide press coverage of Klan violence and lynching enabled our communist adversaries to score political points at our expense.<sup>60</sup> So it was that the U.S. foreign policy establishment prevailed upon the U.S. Justice Department and Supreme Court to arrange a spectacular breakthrough for blacks, thereby burnishing America’s image abroad.<sup>61</sup> This was another critical moment, but not fully understood as such at the time.

Years later, legal historian Mary Dudziak corroborated what Bell posited.<sup>62</sup> Through archival material obtained by Freedom of Information Act requests, she showed that the State Department had sent a series of memos to the Justice Department, imploring them to intervene on the side of the NAACP.<sup>63</sup>

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<sup>54</sup> DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 46–52, 66–69 (6th ed. 2008).

<sup>55</sup> Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

<sup>56</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>57</sup> BELL, *supra* note 54, at 524–25.

<sup>58</sup> *Id.* at 520, 524.

<sup>59</sup> *Id.* at 524–25.

<sup>60</sup> See MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE AMERICAN IMAGE OF DEMOCRACY* (2000); DELGADO & STEFANCIC, *INTRODUCTION*, *supra* note 1, at 22–23.

<sup>61</sup> Bell, *supra* note 55, at 520–25.

<sup>62</sup> See DUDZIAK, *supra* note 60.

<sup>63</sup> *Id.* at 106–51.

Subsequently, Richard Delgado showed that much the same happened with *Hernandez v. Texas*,<sup>64</sup> a foundational case establishing Latino civil rights. In *Hernandez*, policymakers on the Supreme Court and elsewhere feared that communism and people's movements were beginning to gain force in Latin America.<sup>65</sup> Domestic labor leaders with leftwing leanings like pecan picker and union organizer Emma Tenayuca were beginning to rally support.<sup>66</sup> Delgado's research in the personal writings of Supreme Court justices showed that fear of Latin American people's movements and domestic counterparts played a large part in the decision to hand down a major breakthrough for Latino civil rights just then.<sup>67</sup> Through scholarship such as this, interest convergence emerged as a powerful tool to explain the shifting tides of racial fortunes.

Building on the early body of scholarship, writers such as Charles Lawrence put forward legal theories for understanding unconscious racism.<sup>68</sup> Richard Delgado identified a new harm—racist hate speech—and proposed legal remedies for it.<sup>69</sup> Alan Freeman, a contemporary of Bell's, had shown how traditional civil rights law, aimed at yielding a series of incremental gains, instead legitimized racial discrimination and demonstrated how the Supreme Court performed that role.<sup>70</sup>

Critical race theorists Kimberlé Crenshaw and Angela Harris developed theories of intersectionality and essentialism to explain how anti-discrimination law provides scant relief for women of color, gay Latinos, or others who sit at the intersection of two or more categories, receiving weak legal protection as a result.<sup>71</sup> Other writers examined the roles of legal narratives, counter-narratives, and tropes

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<sup>64</sup> See *Hernandez v. Texas*, 347 U.S. 475 (1954).

<sup>65</sup> See Richard Delgado, *Rodrigo's Roundelay: Hernandez v. Texas and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23, 43–48 (2006).

<sup>66</sup> *Id.* at 43; THE LATINO/A CONDITION: A CRITICAL READER 51 (Richard Delgado & Jean Stefancic eds., 2d ed. 2011).

<sup>67</sup> Delgado, *supra* note 65, at 52–55.

<sup>68</sup> See generally Lawrence, *supra* note 4.

<sup>69</sup> See Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND (2004).

<sup>70</sup> See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

<sup>71</sup> See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

such as the welfare queen, lazy Mexican, or innocent white victim of affirmative action.<sup>72</sup> Cheryl Harris demonstrated how whiteness became a property right.<sup>73</sup>

Revisionist historians examined the course of racial progress, showing how society racialized different groups in different ways at different times, sometimes casting them against each other in competition for small rewards.<sup>74</sup> The value law assigned to whites in the legal construction of race came under examination.<sup>75</sup> Recently, critical race theory has expanded to other countries and other fields, including sociology, political science, and education, where writers use it to analyze hierarchy in the schools, tracking, high-stakes testing, school finance, school discipline, migrant and bilingual education, and the debate raging in Arizona over ethnic studies.<sup>76</sup> All these advances began with recognition that the situation required a new interpretation or response. All this occurs on an intellectual level and arrives through reflection on the times. Like the lecturer preparing to speak during a gathering storm, one ponders one's situation, gathers facts, and asks what they demand in the way of a response. Sometimes, the response will consist of concerted action along with others.

### B. *Discernment Can Spur Group Action*

Critical race theory, as a movement, took a major leap forward when a young scholar, Kimberlé Crenshaw, convened a meeting at the University of Wisconsin to bring some of the insurgent scholars just mentioned together at a convent outside Madison.<sup>77</sup> Meeting for three days in intense sessions, the group gave itself a name (Critical Race Theory) and agreed on a program and some common themes that all seemed to subscribe to. During that time, student groups at the University of California at Berkeley Law School and at Harvard Law School were organizing against felt deficiencies in the faculty and course offerings at their schools.<sup>78</sup> Three

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<sup>72</sup> On narrative analysis and legal storytelling, see PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2711 (1984); Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1 (1990).

<sup>73</sup> Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 *passim* (1993).

<sup>74</sup> See DELGADO & STEFANCIC, INTRODUCTION, *supra* note 1, at 24–25 (discussing revisionist history); Juan F. Perea, *A Brief History of Race and the U.S.-Mexican Border: Tracing the Trajectories of Conquest*, 51 UCLA L. REV. 283 (2003).

<sup>75</sup> See generally IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (rev. ed. 2006).

<sup>76</sup> See, e.g., FOUNDATIONS OF CRITICAL RACE THEORY IN EDUCATION (Edward Taylor et al. eds., 2009).

<sup>77</sup> See DELGADO & STEFANCIC, INTRODUCTION, *supra* note 1, at xvii–xix, 4 (describing this event).

<sup>78</sup> See Richard Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 IOWA L. REV. 1505, 1510–14 (2009) [hereinafter Delgado, *Liberal McCarthyism*] (discussing three stories of origin); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé

young scholars requested an audience at a national conference of critical legal studies in an old hotel in Los Angeles to discuss new, emerging ideas about race and power.<sup>79</sup>

Rallying behind student leaders and faculty such as Crenshaw, Jose Bracamonte (at the Los Angeles event), and Charles Ogletree (Harvard), groups of law students and faculty identified strands in legal scholarship and used them to form a movement that would become critical race theory—which in turn generated more scholarship and eventually branched out into other disciplines.<sup>80</sup>

The development of critical race theory, like that of critical legal studies, radical feminism and other reform movements, illustrates how a small group of scholars and students can sometimes seize the moment to offer useful insights, even amounting to a change in paradigm. Organization and scholarship then synergized each other, creating new theories and ideas, expanding the movement in unforeseen directions.

### C. Noting Connections

Other critical moments arrive when someone notes connections between seemingly disparate events. Take the Columbine school shootings of a decade ago. Media writers and pundits immediately scrambled to find a meaning and cause, some placing it in peer pressure and bullying, others in a culture of guns, others in architectural isolation, still others in overindulgent parents or violent movies, music, and video games.<sup>81</sup>

Two critical theorists who had been writing about Colorado's racial history<sup>82</sup> saw a different connection. Harkening back to the period when, in the aftermath of *Brown v. Board of Education*, school desegregation litigation finally expanded

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Crenshaw et al. eds., 1995) (giving a further description of the movement's origin); Sumi Cho & Robert Westley, *Critical Race Coalitions: Key Movements that Performed the Theory*, 33 U.C. DAVIS L. REV. 1377 (2000) (discussing the Berkeley story).

<sup>79</sup> Delgado, *Liberal McCarthyism*, *supra* note 78, at 1513; *see generally* 23 HARV. C.R.-C.L. L. REV. (1988) (containing articles that grew out of the Los Angeles panel).

<sup>80</sup> Delgado, *Liberal McCarthyism*, *supra* note 78, at 1513.

<sup>81</sup> *See, e.g.*, KATHERINE S. NEWMAN ET AL., RAMPAGE: THE SOCIAL ROOTS OF SCHOOL SHOOTINGS (2005); Jackie Craven, *Does Suburbia Breed Violence? Urban Designers Seek Solutions Teen Shooting*, <http://architecture.about.com/od/communitydesign/a/teenshootings.htm> (last visited Feb. 22, 2014); Brad Plumer, *The Social Roots of School Shootings*, WASHINGTON POST WONKBLOG (Dec. 18, 2012, 11:36 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/18/the-small-town-roots-of-school-shootings/>.

<sup>82</sup> *See* Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado's Embrace—and Denial—of Equal Opportunity in Higher Education*, 70 U. COLO. L. REV. 703 (1999) [hereinafter Delgado & Stefancic, *Home-Grown Racism*].

beyond the South,<sup>83</sup> they recalled what happened in Denver. The first major challenge to school segregation took place in that city when a coalition of Latino and black parents sued the school district in 1969 for deliberate, *de jure*, discrimination in pupil school assignments.<sup>84</sup> The case was long and contentious, featuring angry white parents, fire bombs that damaged forty-six school buses, and an explosion outside the home of the federal judge hearing the case.<sup>85</sup>

After a series of hearings and appeals, the outcome was in sight: Denver had intentionally segregated black and Latino children, and the court would soon order it to desegregate. When it became clear that busing would come to the first major U.S. city outside the South, white families began moving out of Denver in large numbers and settling in surrounding communities such as Littleton and Boulder.<sup>86</sup> Formerly commuter towns with a small mixed population including blacks, Latinos, and working class people, these towns became much whiter and wealthier, and of course much larger when white flight set in.

The culture of the schools in these towns followed suit, becoming much more competitive, with the newcomers vying for the highest grades, places on the cheerleading squad and student government, and to see who could earn the highest SAT scores and get into the most elite college or university.<sup>87</sup> Social pressures, too, heightened, as students competed to see who could wear the latest clothes, drive the best cars, or be accepted by the groups with the most popular kids.<sup>88</sup>

Predictably, a few years later, two goth kids, after months of bullying, insults, and social marginalization, exploded in deadly rage, killing a teacher, twelve of their classmates, and finally themselves.<sup>89</sup>

It turns out that if one's child is going through the turbulent years of adolescence, the safest and healthiest community may be one whose schools contain a diverse student body. Young people fear social ostracism more than practically anything else. And in a mixed school, most students will be able to find likeminded souls. A teen who is entranced with theater, for example, is apt to find

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<sup>83</sup> See, e.g., *Keyes v. Sch. Dist. No. 1, Denver Colo.*, 413 U.S. 189 (1973).

<sup>84</sup> *Id.* at 191–95.

<sup>85</sup> See Delgado & Stefancic, *Home-Grown Racism*, *supra* note 82, at 778.

<sup>86</sup> This is, of course, a common phenomenon called white flight, in which white families move to the suburbs to avoid having their children attend school with inner-city black and Latino children. See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 781 (1974) (White, J., dissenting) (expressing concern with respect to the imposition of a desegregation plan conducive to white flight).

<sup>87</sup> Richard Delgado, *White Interests and Civil Rights Realism: Rodrigo's Bittersweet Epiphany*, 101 MICH. L. REV. 1201, 1214–15 (2003) (describing the events leading up to the shooting).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1214.

others (theater groupies) who share that interest. One who is interested in heavy metal or Chicano rap is likely to find others of similar dispositions. Goths will find goths to hang out with, and not just one or two. Chess devotees can find others who are crazy about chess. Few social isolates will brood silently for months about their marginalization, dreaming of revenge.

Few shootings or serious mayhem take place in diverse urban schools, like Berkeley High School or Garfield in Seattle, with large numbers of minorities and kids from all classes—for the simple reason that there almost every kid is apt to have a peer group.<sup>90</sup> Schools like these may see fistfights and shouting matches but will see little deadly violence. In particular, they are apt to be safer than all-white suburban schools where a social isolate can nurse a grievance for months. Paradoxically, the parents who fled Denver in search of safety found little of it for their children in the suburbs. Practically every serial shooting has taken place in suburban schools, like Littleton, that were all white and highly competitive.<sup>91</sup>

#### D. Critical History and Research

Sometimes, challenging a prevailing myth requires close historical research. For example, the High Court of Australia announced a major decision in the area of indigenous land rights when, in 1992, it handed down *Mabo v. Queensland*.<sup>92</sup> The case began in 1978 during one of many conversations between Eddie Mabo and Henry Reynolds. The two men had developed an uncommon friendship at James Cook University where Mabo was a gardener and Reynolds a historian. Over many lunchtime conversations, Mabo had frequently reminisced about returning to his homeland on one of Australia's outlying islands. Reynolds finally told him that according to Australian law, neither he nor any other aborigines had ownership rights in their native lands. Reynolds writes: "I still remember the look that came over his face—it was a look of incredulity; how could anyone be so mistaken about the land not belonging to his family? He was horrified that what I had said might indeed be the case."<sup>93</sup>

Reynolds and Mabo worked together for the following five years gathering black oral history. Soon afterward, Mabo asserted legal ownership to land that had

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<sup>90</sup> *Id.* at 1215.

<sup>91</sup> *Id.* See also Hannah Rosin, *Even Madder Men*, N.Y. TIMES, Nov. 24, 2013, at 12 (reviewing MICHAEL KIMMEL, *ANGRY WHITE MEN: AMERICAN MASCULINITY AT THE END OF AN ERA* (2013), in which Kimmel reports on men who, after a series of economic and political shifts, feel emasculated and humiliated).

<sup>92</sup> *Mabo v. Queensland* (No. 2), 175 CLR 1 (Austl.), reprinted in RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 268–81 (Juan F. Perea et al. eds., 2d ed. 2007) [hereinafter RACE AND RACES].

<sup>93</sup> Henry Reynolds, *The Mabo Judgment—Its Implications*, in MABO: ITS MEANING FOR AUSTRALIA 9, 10 (Gerard Gupton ed., 1993).



been continuously inhabited and cultivated by his people beginning long before the white settlers arrived after Admiral Cook claimed Australia for Britain.<sup>94</sup>

Before then, the aborigines had inhabited Australia in small settlements with a basic government and a system of informal land tenure emphasizing communal use. The British settlers quickly displaced them from the most valuable lands and established cities, farms, and ranches, pushing the aborigines to the less desirable areas where their numbers dwindled and living conditions languished.<sup>95</sup> The Australian court system, naturally, followed suit.

In *Mabo*, the Australian Supreme Court, for the first time, revisited the question of aboriginal title, which until then had rested on the legal notion of *terra nullius*—null or empty land.<sup>96</sup> Somewhat related to the American Discovery Doctrine,<sup>97</sup> *terra nullius* provided that all of Australia was, essentially, up for grabs because no one was really occupying it. It was lying there fallow, fair game for any industrious white settler willing to fence it, develop it, build a house on it, and establish with others of his kind a system of roads, villages, and government, which, of course, the Australian settlers did.

What about the Australian aborigines? *Terra nullius* meant that the settlers were entitled to disregard their rights to the land. It's as though you were walking along the sidewalk one day and spotted a five-dollar bill lying next to a dog. You would be under no obligation to ask the dog, "Excuse me, Mister Dog. Is that your five-dollar bill?" You could simply take it. You might be under an obligation to look around to see if a human being could have accidentally dropped it. But a dog is incapable of saving, spending, or making any ordinary use of a dollar bill. For that reason, no dog can assert any ownership rights in one.

It was that comforting but one-sided notion that came before the court in *Mabo*. Informed by the historical research of Henry Reynolds, whose book *Law of the Land* subjected the law of *terra nullius* to searching analysis,<sup>98</sup> the Australian Supreme Court declared that the principle by which Australians had asserted title to indigenous lands for nearly two centuries was no longer valid. During the

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<sup>94</sup> See RACE AND RACES, *supra* note 92, at 268; see also Reynolds, *supra* note 93.

<sup>95</sup> See generally HENRY REYNOLDS, THE LAW OF THE LAND (1992) [hereinafter REYNOLDS, LAW OF THE LAND].

<sup>96</sup> *Id.*

<sup>97</sup> See, e.g., Johnson v. M'Intosh, 21 U.S. 543 (1823) (articulating this doctrine, according to which native land belonged to the first European nation to arrive and claim it).

<sup>98</sup> See REYNOLDS, LAW OF THE LAND, *supra* note 95 (documenting that the Crown did not, in fact, regard Australia as *terra nullius*, essentially uninhabited and desolate terrain. Instead, the Crown realized that aborigines lived on it and expected the white settlers to negotiate land acquisition with them in light of the natives' land practices and customs and stage of government).

settlement period, the Crown did not, in fact, consider Australia *terra nullius*. It knew full well that it was occupied and expected the settlers, upon arrival, to negotiate with the inhabitants like civilized people.<sup>99</sup> Perhaps a bit of interest convergence as well came into play, since Australia was vying with China and Germany to be the site of the Olympic Games in 2000.<sup>100</sup>

Eddie Mabo died four months before the decision came down, but his legacy lived on in Australia and elsewhere. In Canada, in the wake of *Calder v. British Columbia*, the country has been returning large reaches of Canadian land to native people.<sup>101</sup> And the Colorado Supreme Court recently upheld fishing, firewood, and timbering rights of Mexican American farmers in the southern part of that state to a substantial parcel of land called the Taylor Ranch. The decision required determining the validity of an ancient land grant predating that region's becoming a part of the United States in the months following the War with Mexico.<sup>102</sup> Subsequently, at the request of Congress, the Government Accountability Office recently issued a 500-page report on longstanding land claims in the Southwest, concluding with five options, including returning the land to heirs of the original owners, the Mexican ranchers who had been living on and farming it before the Anglos arrived.<sup>103</sup>

An inquisitive academic historian carried out the research that laid the foundation for the Australian *Mabo* decision. Some of the research which led to the Taylor Ranch victory for the Mexican farmers was done at the University of Colorado Law School and was probably inspired by the investigations of itinerant preacher Lopez Reies Tijerina, who led a land revolt in New Mexico, just the other side of the Sangre de Cristo Mountains, a decade earlier.<sup>104</sup> All three movements proceeded when thinkers and historians saw something not quite right in a historical record, appreciated its relevance, and seized—or created—a critical moment.

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<sup>99</sup> *Id.*

<sup>100</sup> Dominique Allen, *Periodic Peaks of Progress: Applying Bell's Interest Convergence Theory to the Mabo Decision*, 26 U. TASMANIA L. REV. 63, 79–80 (2007).

<sup>101</sup> See *Calder v. Attorney-General of British Columbia* [1973] S.C.R. 313 (Can.); Kathleen Lickers, *Looking Forward, Looking Back: Canada's Response to Land Claims*, CULTURAL SURVIVAL, <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/canada/looking-forward-looking-back-canadas-response-land-c> (last visited Feb. 27, 2014).

<sup>102</sup> See *Lobato v. Taylor*, 71 P.3d 938 (Colo. 2002).

<sup>103</sup> See generally GOV'T ACCOUNTABILITY OFFICE, TREATY OF GUADALUPE HIDALGO: FINDINGS AND POSSIBLE OPTIONS REGARDING LONGSTANDING COMMUNITY LAND GRANT CLAIMS IN NEW MEXICO (2004).

<sup>104</sup> See RACE AND RACES, *supra* note 92, at 320–21 (discussing this episode); see also PETER NABOKOV, TIJERINA AND THE COURTHOUSE RAID (2d ed. 1973).

So far, I have provided examples of how previous scholars and actors have deployed critical tools to help discern moments that are rife with possibilities for action. None of this is easy or self-evident. Barriers, including lack of knowledge, the challenge of spotting relationships between disparate events, failure of courage, sheer inertia, and the problem of interpreting events while living through them burden the would-be change agent. And technology, though promising much, proves to be a mixed blessing. Granted, it enables making easy connections, but, according to author Nicolas Carr, we are becoming ever more adept at scanning and skimming. In exchange, we are losing our capacity for concentration, contemplation, and reflection.<sup>105</sup>

Critical theory can sometimes help, as can close observation of what your adversaries have been up to. In general, oppressed people turn out to be better at spotting critical moments than those who are satisfied with the current order. As Georg Hegel pointed out, the slave tends to know the master better than the other way around.<sup>106</sup>

## CONCLUSION

All this could easily have lain behind Derrick Bell's realization that his visiting semester at Stanford offered an opportunity not to slink away, but take forceful action—just as he and early race-critics, activist historians, and students leaders at two law schools, confronting different challenges, had done a few years earlier. One carries around a mental checklist that includes such questions as: Is this, in fact, a critical moment? Are the interests of a subordinate group and the ones of those in power lined up, even if the overlords do not yet realize it, so that change will be in the interest of both? Can I point out historical precedents that will show unwitting bystanders that it is time for action? Could an interracial coalition form in support of the injustice I am seeing? How could a current event or trial come out differently if subjected to critical analysis?

Recognizing critical moments is essential to reform. Familiarity with critical themes and examples can help identify moments that are laden with potential, as well as heighten one's ability to see patterns of past discrimination. What about taking action? This of course requires a different set of tools, including decisiveness, courage, and initiative. But I suspect that a strong intuition, based on a checklist of factors, many of which one locates in the current situation, can strengthen resolve and enable one to take forthright action when others, less well informed, will equivocate or remain faint of heart.

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<sup>105</sup> NICHOLAS CARR, *THE SHALLOWS: WHAT THE INTERNET IS DOING TO OUR BRAINS* 134–43 (2010).

<sup>106</sup> See GEORG HEGEL, *THE PHENOMENOLOGY OF MIND* 229–40 (J.B. Baillie trans., 1967) (1807).