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Richard Delgado

University of Alabama - School of Law, rdelgado@law.ua.edu

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ESSAY

RODRIGO'S EIGHTH CHRONICLE: BLACK CRIME, WHITE FEARS—ON THE SOCIAL CONSTRUCTION OF THREAT

*Richard Delgado**

INTRODUCTION: IN WHICH I LEARN ABOUT AN EVENT AT RODRIGO'S INSTITUTION

I was staring disconsolately at the flashing light on the vending machine in the student lounge, where I had gone in search of a much-needed late afternoon pick-me-up, when I heard a familiar voice from behind me:

"Professor, do you need some help?"

"Rodrigo!" I said. "It's good to see you." To tell the truth, I felt slightly uncomfortable at being surprised while trying to satisfy my physical needs on someone else's turf, but I was glad to see a person who might help me out of my predicament. Rodrigo, a brilliant LL.M. student of African-American heritage, was enrolled at the famous law school across town.¹ He had sought me out for

* Charles Inglis Thomson Professor of Law, University of Colorado. J.D. 1974, University of California at Berkeley (Boalt Hall).

¹ See Richard Delgado, *Rodrigo's Chronicle*, 101 *Yale L.J.* 1357, 1357-59 (1992) [hereinafter *Chronicle*] (introducing Rodrigo Crenshaw, my fictional interlocutor and alter ego) (book review); Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 *Mich. L. Rev.* 1183 (1993) [hereinafter *Second Chronicle*] (reporting Rodrigo's return to the United States and admission to the LL.M. program uptown). Rodrigo is the younger half-brother of famed American civil rights activist Geneva Crenshaw. Geneva was created by Derrick Bell in *Derrick Bell, The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 *Harv. L. Rev.* 4, 13 (1985); see also Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (1987) [hereinafter *Not Saved*] (recounting the story of Geneva Crenshaw). Further information about Rodrigo appears at various points in this article. See, e.g., *infra* notes 5, 7-9, 16, and accompanying text.

career advice a year earlier, during his return trip from Italy.² Despite our age difference, we had become good friends, discussing affirmative action,³ the U.S. racial scene,⁴ welfare politics,⁵ law and economics,⁶ and a number of other subjects over the course of the year.⁷ I always looked forward to our meetings; indeed, I felt that I learned as much from them as did my young protégé. Raised in Italy, the son of an American serviceman and an Italian mother, Rodrigo saw the United States with fresh eyes. His pungent, highly original observations concerning the American racial and political scene had sparked many a responsive idea in my aging mind and provided grist for lecturing and writing assignments I would have found much more arduous without his help.⁸

“What’s the problem, Professor? Out of change?”

I stumblingly tried to explain the dilemma that just minutes ago had caused me to curse my fate. “As luck would have it, I have exactly fifty cents in change.” I held out my palm with the quarter, two dimes, and a nickel. “But the Diet Pepsi I desperately need to keep going costs fifty-five cents. I also have this dollar bill. As you can see, the machine takes dollars, but it won’t take mine. It keeps rolling right out. ‘Use exact change,’ it says. So I’m stuck. Would you have a nickel, by any chance?”

“I wish I did, Professor, but the subway took my last dime. But let me try something. Could I have all that money?”

² Chronicle, *supra* note 1, at 1359 (describing Rodrigo’s return to the United States to investigate graduate law programs and discuss career plans with the professor).

³ *Id.* at 1361-64.

⁴ See, e.g., *id.* at 1361-79; Second Chronicle, *supra* note 1, at 1187-1201.

⁵ Richard Delgado, Rodrigo’s Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race, 81 Cal. L. Rev. 387, 391-415 (1993) [hereinafter Third Chronicle].

⁶ Second Chronicle, *supra* note 1, at 1187-1201.

⁷ See Richard Delgado, Rodrigo’s Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law, 45 Stan. L. Rev. 1133 (1993) [hereinafter Fourth Chronicle] (discussing law reform); Richard Delgado, Rodrigo’s Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial, 45 Stan. L. Rev. 1581 (1993) [hereinafter Fifth Chronicle] (discussing civic republicanism); Richard Delgado, Rodrigo’s Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform, 68 N.Y.U. L. Rev. 639 (1993) [hereinafter Sixth Chronicle] (discussing the relation of small outsider groups to one another and to law reform).

⁸ Like Rodrigo, “the Professor” is a fictional character, a rough composite of many persons I have known and not to be identified with any particular individual. As I have created him, the Professor is a man of color teaching in a law school located in a large American city, and in the late stages of his career.

"Sure," I said, handing it over. "What are you going to do?"

Rodrigo first inserted all my change. Nothing happened. Then, muttering something to himself, he inserted my dollar bill and pressed the button.

Jackpot! The machine disgorged both the Diet Pepsi I had been waiting for and a great clatter of change. Scooping it up, Rodrigo counted it out. "Ninety-five cents, just as I thought."

"How did you know to do that?" I asked appreciatively.

"It's simple, Professor. The machine doesn't have the right change. That's why it can't take your dollar. But if you put everything in, the machine then has enough money to make change for you. And since it's honest—has a simple computer that remembers how much you've put in—you get your change back. And your Diet Pepsi."

"Thanks!" I said. "At my age, I've learned I really need to take an occasional break, especially in the afternoon."

Rodrigo smiled. "Maybe it's a metaphor for all of life, Professor. Sometimes if you put in more than anyone expects, you get more in return."

"My, you are getting upbeat in your old age," I retorted, "especially for someone trained in Bologna and steeped in neo-Marxism and economic-determinist analyses of race.⁹ But what brings you around? It's good to see you—it's been a while."

"I was hoping you could give me a few minutes. I tried calling, but your line was busy. I need to run some ideas past you. They're about black crime."

"I'd be happy to talk with you about that. As you know, there's already a burgeoning Critical literature, including the piece by Regina Austin we talked about last time.¹⁰ And, of course, there are the three Chronicles by Derrick Bell."¹¹

⁹ See Chronicle, *supra* note 1 (describing Rodrigo's university training, the circumstances of its having taken place in Italy, and some of the complications all this posed for his plans to become a law professor in the U.S.).

¹⁰ Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 *UCLA L. Rev.* (forthcoming 1994) [hereinafter *Seventh Chronicle*] (discussing Regina Austin, "The Black Community," *Its Lawbreakers*, and a *Politics of Identification*, 65 *S. Cal. L. Rev.* 1769 (1992) (analyzing the relation of the black community to its offenders, particularly those who are young)).

¹¹ Not Saved, *supra* note 1, at 162-77 (*Chronicle of the Amber Cloud*), 215-35 (*Chronicle of the Slave Scrolls*), 245-58 (*Chronicle of the Black Crime Cure*).

"I'm familiar with all those. What I'm really interested in pursuing is the cultural phenomenon itself. I'm intrigued by the way the whole issue tends to be framed."

"What got you started thinking about this?" I asked. "I hope the INS is not on your trail again."¹²

"No, nothing so personal. I'm thinking of adding a section to my dissertation on society's treatment of black crime. Did you hear about the professor at my school who got mugged and sent to the hospital?"

"My God!" I said. "I did. It was just in the paper. There was a lot of talk about it here. Do you know him? How is he doing?"

"No, I don't know him, and he is much better. He had a lot of bruises and a cracked rib or two. But he's back from the hospital now and it looks like he'll recover completely."

"I'm relieved. We were all shocked. Some of us talked about getting more safety features and lighting in the parking lot. I think the administration is going to do something."

"I'm glad, Professor. Not that I think you couldn't outrun most thieves. You look pretty fit for a man your age. I imagine you run every day."

"Most days," I replied modestly. "But I don't have the speed I once had. I went running with Professor Bollicker the other day, and immediately regretted it. He's much faster."

"You and I should go jogging one day, Professor. I've started up again. Giannina says it makes me less hyper, and it does help me sleep."

"Maybe sometime. Now, what are your thoughts on black crime? I gather the professor's mugger was black?"

"Well, as it happened, he was. And the professor, as you probably know, is white. He's also a much-loved figure—a veritable institution—around the law school. Everybody admires him and was furious when he got robbed and sent to the hospital."

"A natural reaction," I replied. "And so where does all this lead you? Are you surprised by the amount of crime you find in this

¹² At the conclusion of *Chronicle*, *supra* note 1, at 1379, Rodrigo is deported. At the beginning of *Second Chronicle*, *supra* note 1, at 1183-86, he solves his immigration problem and returns to the U.S.

country? I imagine it's greater than when you left. You were a teenager then. It was a safer era."

"I guess it's not the amount of crime that surprises me. I had read about that in Italy. Every major industrialized society has crime. Italy has some, too, although a little less than here—of the violent, interpersonal variety, at any rate. What surprises me more is the way it's perceived. The reaction at my law school is a prime example."

I drew myself up in mock horror. "I can't think of a worse crime than mugging a professor," I said. "It's like desecrating a cathedral. Besides, I have so few brain cells left functioning, I fear it would take just one good knock and I'd be finished."

"I agree," Rodrigo said, then blushed. "Not about you, but about what happened to the other professor. It *was* a despicable act. Yet what surprised me was the way some people generalized the event. I heard snatches of conversation—things like, 'those people'; 'something has to be done'; 'they're out of control.' Even white folks I had come to think of as liberals were talking about the 'breakdown of the black family,' and so on. Some of us African-American students felt distinctly uncomfortable, as though people were looking at us, wondering why we didn't do something, wondering if we were going to mug *them*. There was even graffiti in the bathroom: 'Bernhard Goetz was right.'"¹³

"Ugly," I commiserated. "But not exactly new. Every widely publicized black crime seems to bring out the same reaction. I'm sure all this strikes you as shocking, coming from a more peaceful, sunny clime."¹⁴ The U.S. has changed in the last ten or twenty years. You're seeing it with new eyes."¹⁵

"Maybe so," Rodrigo replied. "And maybe you'll think my vision is a little skewed. That Diet Pepsi is getting warm, Professor." Rodrigo looked in the direction of the unopened can in my

¹³ Bernhard H. Goetz, a white man, shot four black teenagers he thought were going to rob him on a New York subway train on Dec. 22, 1984. Some saw the shooting as motivated by racism. See Ronald Sullivan, Goetz Is Given One-Year Term on Gun Charge, N.Y. Times, Jan. 14, 1989, § 1, at 1.

¹⁴ Rodrigo has been living in Italy since his teen years. See Chronicle, supra note 1, at 1359 (giving an account of Rodrigo's upbringing); Second Chronicle, supra note 1, at 1183 n.1 (describing Rodrigo's move to Italy as a 17-year-old).

¹⁵ Rodrigo recently returned to the U.S. after attending high school and college abroad. See supra text and notes 1-7, and 9; Second Chronicle, supra note 1, at 1183-86.

hand. "Can I take you somewhere for a drink, or were you in the middle of something? There's a health food bar Giannina and I discovered the other day. It's only a short walk from here. They have fresh fruit juices, salads, and organic soft drinks."

"Organic soft drinks?" I said. "I'll try anything once. Maybe my doctor will approve. She's been trying to get me to cut down on caffeine."

"They also have snacks. I could use one if you have the time."

I recalled my young friend's famous appetite. "Okay," I said. "This will be on me. You paid for the espresso last time."

I. ON THE SOCIAL CONSTRUCTION OF BLACK CRIME

A few minutes later, we were comfortably seated in the health food bar Rodrigo had recommended.

"I never go to places like this, although I should," I said, patting my stomach. "I gained a couple of pounds when I visited your homeland earlier this summer.¹⁶ What are you having?"

The waiter arrived and stood by expectantly. "I'm having their Avocado Supreme. It reminds me of something I used to have back at Bologna."

"I'll have the same," I said. After the waiter disappeared with our orders, Rodrigo continued:

"Have you noticed, Professor, how your society—I mean, our society—virtually equates crime and the black underclass, as though they were practically one and the same thing?"

¹⁶ See Rodrigo's Seventh Chronicle, *supra* note 10 (manuscript at 2) (discussing the brief period the Professor spent in northern Italy at a study center operated by a U.S. foundation).

"I have," I answered. "The conservatives want to crack down on it,¹⁷ build walls around their communities,¹⁸ more prisons,¹⁹ and get tougher on what they call 'career criminals.'²⁰ The liberals, for their part, lament it and want to do something about what they see as the causes of black crime—poverty, lack of jobs, and so on."²¹

"We talked a little about these things before," Rodrigo replied.²² "But my thinking has taken a slightly different turn since then. The reaction to the professor's mugging got me thinking. What's common to both the liberals, who want to attack the problem at its roots, and the conservatives, who want to solve it with harsher punishment, is that both construct black criminality as *a problem*."

"But it *is* a problem," I insisted. "Rodrigo, I hope you're not going to put me through another one of your postmodern tours-de-force and try to make something that everyone knows exists disappear. Black crime, especially among young black men—your age, I might add—is a serious problem. About one-quarter of young African-American males are caught up in the criminal justice sys-

¹⁷ See, e.g., S. 1356, 103d Cong., 1st Sess. (1993); GOP Crime Bill Calls for More Cops on Street, Prisons, Denver Post, Aug. 5, 1993, at 7A [hereinafter GOP Crime Bill]; James Q. Wilson, *Thinking About Crime* 3 (2d ed. 1983) (describing the conservative position on crime as emphasizing enforcement and punishment). For a discussion of the efficacy of police crackdowns, see Lawrence W. Sherman, *Police Crackdowns: Initial and Residual Deterrence*, in *12 Crime and Justice: A Review of Research* 1 (Michael Tonry & Norval Morris eds., 1990).

¹⁸ See *Memphis v. Greene*, 451 U.S. 100 (1981) (concerning litigation over an affluent white community that built a wall to discourage the entry of cars from a nearby lower-class black area).

¹⁹ See, e.g., Molly Ivins, *States Keep Locking 'Em Up and the People Keep Paying*, Boulder Daily Camera (Colorado), Apr. 19, 1993, at 2C (opinion column); S. 1356, supra note 17, at Subtitle B; GOP Crime Bill, supra note 17; see also Marc Mauer, *Americans Behind Bars: A Comparison of International Rates of Incarceration* (1991) (observing that the United States has the highest rate of incarceration in the world); Marc Mauer, *Young Black Men and the Criminal Justice System* (1990) [hereinafter *Young Black Men*] (tracing the effect on blacks).

²⁰ For examples of the focus on recidivists and career criminals, including the young, see *Criminal Careers and "Career Criminals"* (Alfred Blumstein, Jacqueline Cohen, Jeffrey A. Roth & Christy A. Visher eds., 1986); Wilson, supra note 17, at 145-61; Marvin E. Wolfgang, Robert M. Figlis & Thorsten Sellin, *Delinquency in a Birth Cohort* 65-74, 88-99, 269-71 (1972).

²¹ For sympathetic treatment of the problems of the African-American community, see Andrew Hacker, *Two Nations: Black and White, Separate, Hostile, Unequal* (1992).

²² *Third Chronicle*, supra note 5, at 394, 406 (discussing and proposing solutions for problem of black misery and crime).

tem.²³ The jails are about forty-five percent black.²⁴ Homicide is the leading cause of death for young black men.²⁵ Drugs and gangs run rampant in the inner city.²⁶ I hope you're not going to deny the very real pain our community suffers as a result of the criminal activity of its own youth. Nothing could bring you quicker disrepute."

"Not at all," Rodrigo replied mildly. "I know the problems exist. In fact, they touched me just the other day. I was shopping in a men's clothing store, looking for a tie, when the house detective asked me to empty my pockets and book bag. He seemed disappointed when all he found was lecture notes and a leftover apple from my lunch."

"I'm relieved you concede that our young—some of them, at any rate—commit crimes. But you said that you found something about society's perception of those crimes interesting?"

"Yes." Rodrigo stopped for a moment while the waiter put down our plates and asked us if we'd like anything to drink.

"Just a refill," I said, pointing at my water glass.

"Do you have espresso?" Rodrigo asked. He ordered a double and then continued.

"I've been looking at some of the statistics, Professor, and I don't think black criminality is a more serious problem than many other forms of criminality. But it's interesting to see how we came to think that it is. I believe that, in conjunction with other sociocultural developments, four or five books and a couple of well-known reports played a major role in creating our modern conception of black crime. Before then, there was simply crime. Some of it was committed by white people, and some by blacks. Then, beginning in the mid-1960s with three national reports,²⁷ the Moynihan

²³ Young Black Men, *supra* note 19, at 3.

²⁴ Hacker, *supra* note 21, at 180; U.S. Dep't of Commerce, Bureau of the Census, Statistical Abstract of the United States 1992, at 197 [hereinafter Statistical Abstract].

²⁵ Hacker, *supra* note 21, at 188; Statistical Abstract, *supra* note 24, at 83; Social Science and Modern Society, Jan./Feb. 1992, at 3 ("Homicide is the leading cause of death among black youths. In 1988, black males were 6.6 times more likely to die of homicide than white males.").

²⁶ On the cities' troubles, see Diane Francis, Bill Clinton's New Headache: Urban Decay, *Maclean's*, Feb. 8, 1993, at 13.

²⁷ Nat'l Advisory Comm'n on Civ. Disorders, Report of the National Advisory Commission on Civil Disorders (1968) [hereinafter Kerner Report]; Nat'l Comm'n on the

study,²⁸ the Blumstein article,²⁹ and three or four books that I'm sure you're familiar with,³⁰ the whole thing changed. Now, crime became identified with us—people like you and me, I mean. Before this time, crime was no more identified with us than, say, playing the trombone, having a cold, or any other human activity that crosses racial lines. Everyone knew that many of us were poor and sometimes took things. But so did people of other colorations—it was not seen as a peculiarly black problem.”

“I'm not sure that's literally true, Rodrigo,” I cautioned. “I have seen some studies of ethnic stereotyping and imagery that seem to indicate the opposite.³¹ In certain periods, blacks, Mexicans, and other minority groups of color were depicted as lascivious, immoral, bent on raping white women, and so on.³² It's a control device. The authors say the images change from period to period, according to whether society needs to justify control, repression, or yet some third position vis-à-vis the group.³³ But the image has

Causes and Prevention of Violence, To Establish Justice, To Insure Domestic Tranquility (1969); President's Comm'n on Law Enforcement and Admin. of Justice, *The Challenge of Crime in a Free Society* (1967).

²⁸ U.S. Dep't of Labor, Office of Pol'y Planning and Res., *The Negro Family: The Case for National Action* (1965) [hereinafter Moynihan Report].

²⁹ Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 *J. Crim. L. & Criminology* 1259 (1982) (arguing that the high black crime rate is real and not the product of discriminatory enforcement).

³⁰ See, e.g., Mickey Kaus, *The End of Equality* (1992); Daniel Patrick Moynihan, *Family and Nation* (1986); Charles Murray, *Losing Ground: American Social Policy, 1950-1980* (1984); William Julius Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (1987).

On the general process by which “truth” becomes linked with power, and through that, social consensus, see, e.g., Albert Memmi, *The Colonizer and the Colonized* 78-89 (1965); Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (Colin Gordon ed., 1980). On the role of majoritarian storytelling in creating and reinforcing racial reality, see, e.g., Not Saved, *supra* note 1; Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 *Mich. L. Rev.* 2411 (1989). On the role of the public media in shaping what we see, see, e.g., Edward W. Said, *Covering Islam: How the Media and the Experts Determine How We See the Rest of the World* (1981).

³¹ Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 *Cornell L. Rev.* 1258, 1261-75 (1992) [hereinafter *Images*] (reviewing two centuries of racial depiction in popular culture); Adeno Addis, “Hell, Man, They Did Invent Us”: *The Mass Media, Law, and African Americans*, 41 *Buff. L. Rev.* 523, 553-58 (1993).

³² *Images*, *supra* note 31, at 1262-75.

³³ *Id.* at 1275-77.

been negative in virtually every period, and criminality is often part of it.”

“It’s the violent, interpersonal type of crime that intrigues me,” Rodrigo explained. “Because *that* part of our image has not always been there. In the thirties and forties, for example, everyone knew that young black kids sometimes stole hubcaps. But white kids did, as well. The extraordinarily negative depiction of our people as violent inuggers and burglars who might break into your house at night and surprise you with a knife at your throat—that’s relatively new.”

“Hmmm,” I said. “You’re not saying it doesn’t happen, are you?”

“Not at all. But some people wake up at night, and the burglar is white. Other crimes are committed predominantly by whites, and they’re just as devastating as those our people, our kids, perpetrate. At one time in history everyone knew the Irish did one sort of thing, and blacks another.³⁴ Then the hubcaps became more serious stuff. It became a problem. Then their problem. Then our problem. Which is where we are today. Everyone wants to crack down on their—I mean our—problem, Professor.”

“Rodrigo, as you know, I’m not a great fan of your poststructuralist theories. I’m just an earnest plodder trying to work in my own way for racial justice. It seems to me that society could not, as you put it, construct an image of our people as criminal if there were not a grain of truth to it. Some of our young people do commit crimes—violent, interpersonal ones, like the one that laid your professor low.³⁵ I’m not sure what utility there is in focusing on the social construction angle. If the media were lying, that would be one thing. But there *is* a problem. And isn’t it up to us to do something about it? I hope you’re not trying to whitewash a serious social problem.”

“Not at all, Professor.” Rodrigo was silent for a minute. “Can I give you an illustration from another area?”

“Of course.”

³⁴ See *infra* notes 42-47 and accompanying text (discussing ethnic crime).

³⁵ See U.S. Dep’t of Justice, Federal Bureau of Investigation, *Uniform Crime Reports: Crime in the United States 1991*, at 231-33 (1992). The Professor was thinking of some of the dismal statistics on black crime he had seen recently in a book by a liberal author sympathetic to African Americans. See Hacker, *supra* note 21, at 180-90.

"Consider a different example, namely that of the teenager. In some ways teenagers are the opposite of blacks. They are a relatively favored segment of our society. Everyone tolerates their foibles. They have a lot of free time. Marketers are always trying to sell them things.³⁶ They have allowances, and so on."

"Well, that's the social image," I replied. "Although the reality is often quite different. Some teenagers are troubled, work twenty hours a week, take care of their younger brothers and sisters, and so on."

"I'm not denying any of that. I'm just asking you to question where the concept came from. Today, it's part of the culture. But it was not always there."

"It wasn't?"

"The flesh-and-blood humans were always there, of course. People between the ages of twelve and twenty or so, who stand about three-fourths to four-fifths of their final height and have been or are going through puberty—those have always been there. But that's not to say there have always been 'teenagers.'"

"You mean no special term for them?"

"Exactly. They were just human beings who happened to be between those two ages. They had no more special status than people between the ages of five and twenty-two, or thirty-seven and forty-eight."

"No special name for them," I said. "No category of their own."³⁷

"Nor any special clothes, magazines, marketing strategies, or musical groups. Before the category was created, teenagers were just medium-high people who went through the daily tasks of life. Some mowed lawns. Most went to school. And so on."

³⁶ Carrie Goerne, *Marketers Try to Get More Creative in Researching Teens*, *Marketing News*, Aug. 5, 1991, at 2 (calculating that teens spend or influence the spending of \$248.7 billion per year); see also Karen N. Peart, *Hard Facts on the Hard Sell*, *Scholastic Update*, May 7, 1993, at 4 (calculating that \$126.4 billion was spent in 1991 on advertising to capture the teen market); Steven Manning & Tod Olson, *Sells Like Teen Spirit*, *Scholastic Update*, May 7, 1993, at 9 (stating that in 1990 teens spent more than \$55 billion for clothes, entertainment, CDs, cosmetics, and other personal items).

³⁷ On the role of *naming*, or categorizing, a problem, see Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 *Stan. L. Rev.* 207 (1989).

"I see what you're saying," I said. "A self-conscious interest group, whose main purpose is to consume things—such a category would be wonderful for the economy."

"I'm not so sure I'd be quite that deterministic, Professor. But the category does serve certain purposes. In that sense, it didn't just happen. By the same token, there were periods in history when blacks were not seen as particularly criminal. Hapless, perhaps. Carefree, musically talented, lazy, happy-go-lucky—you name it, the many sides our image takes on from time to time, none of them particularly flattering."³⁸

"But you think the criminal image whites imposed upon blacks came about as a response to some social need, perhaps for repression?"

"It would certainly serve that purpose," Rodrigo replied. "A group that is criminal, vicious, animal-like, with designs on white people's lives and pocketbooks—such a group would need to be controlled. At other periods such an image would not serve society's purposes, for example when blacks (or members of other racial groups) were needed for their labor or for service during wartime."³⁹

The waiter arrived to take our dessert orders. "Would you like something?" I asked. "Please go ahead. I'm thinking of trying their *gelato*."

"It *is* good here," Rodrigo replied. "Giannina and I had some last time. It's not quite like what we have back in Italy. But it's the next best thing."

In a moment, the waiter had taken our orders and disappeared. I looked at Rodrigo expectantly.

"The social construction of us as criminal did not come about by accident," he continued. "There were black breakthroughs and

³⁸ Images, *supra* note 31, at 1262-67 (describing the images of blacks that proliferated during various periods: the Tom, the Coon, the Jemima, and the superstud).

³⁹ For a discussion of this functional view of ethnic stereotyping, see *id.* at 1260, 1266.

successes in the 1960s and early 1970s.⁴⁰ The need for repression set in shortly afterward as a way of limiting our gains."⁴¹

The waiter set down our desserts. "That looks good," I said. "What kind are you having?"

"Mandarino," he replied. "What's yours?"

"Lime. I'm counting calories. But back to your point. Other ethnic groups had crime, too: Irish ruin-running,⁴² Italian numbers rackets.⁴³ Mayor Daley's machine in Chicago.⁴⁴ Tammany Hall.⁴⁵ And others that come to mind, as well.⁴⁶ What's the difference between the social construction of these other groups, and ours?"

"There are two or three differences," Rodrigo said. "First of all, the kind of crime we associated with these other groups was often relatively harmless. At any rate, we winked at it, tolerated it,

⁴⁰ For an account of this period see, e.g., Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (1976); Juan Williams, *Eyes on the Prize: America's Civil Rights Years, 1954-1965* (1987).

⁴¹ For a description of the ebb and flow of America's racist depictions of blacks, see *Images*, supra note 31, at 1266-67.

⁴² See, e.g., Peter Collier & David Horowitz, *The Kennedys: An American Drama* 44, 74 (1984); Doris Kearns Goodwin, *The Fitzgeralds and the Kennedys* [hereinafter *Kennedys*] 442-43 (1987); Mark H. Haller, *Organized Crime in Urban Society: Chicago in the Twentieth Century*, *J. Soc. History*, Fall 1971, at 210, 218 [hereinafter *Organized Crime*], reprinted in *17 American Immigration & Ethnicity: Law, Crime, and Justice* 128 (George E. Pozzetta ed., 1991).

⁴³ See, e.g., Francis A.J. Ianni, *Black Mafia: Ethnic Succession in Organized Crime* 14 (1974); Haller, supra note 42, at 219.

⁴⁴ See, e.g., Cynthia Grant Bowman, *Public Policy, "We Don't Want Anybody Anybody Sent": The Death of Patronage Hiring in Chicago*, 86 *Nw. U. L. Rev.* 57 (1991) (detailing the "Golden Age" of the Chicago political machine under Mayor Richard J. Daley (1955-1976) and its subsequent demise); see also John H. Davis, *The Kennedys: Dynasty and Disaster 1848-1983*, at 248-55 (1984) (describing how Mayor Daley's Cook County political machine, helped by organized crime boss Sam Giancana and others, "delivered" the 1960 presidential election to John F. Kennedy); *Kennedys*, supra note 42, at 805-06 (describing Mayor Daley's manipulation of vote counting to deliver Illinois' electoral votes in the 1960 presidential election of John F. Kennedy).

⁴⁵ See, e.g., Sheila Balkan, Ronald J. Berger & Janet Schmidt, *Crime and Deviance in America: A Critical Approach* 154, 187 (1980).

⁴⁶ See, e.g., id. at 155 (discussing Jews); id. at 163 n.5 (discussing Chinese, Australians, and Chileans in San Francisco); Haller, supra note 42, at 210, 217-23 (describing crime among Jewish and Greek immigrants, Irish, Italians, and blacks); Ivan Light, *The Ethnic Vice Industry, 1880-1944*, *Am. Soc. Rev.*, June 1977, at 464, reprinted in *American Immigration & Ethnicity*, supra note 42, at 244 (describing crime among Jewish, Puerto Rican, Chinese, and Mexican immigrants, Italians, and Irish); Robert A. Rockaway, *The Rise of the Jewish Gangster in America*, *J. Ethnic Stud.*, Summer 1980, at 31, reprinted in *American Immigration & Ethnicity*, supra note 42, at 281.

smiled at it, almost. Second, to the extent to which members of these white ethnic groups actually engaged in it, the group benefited. Crime, for many, was a means of upward mobility, a means by which fortunes were amassed and family empires created.⁴⁷ The next generation left crime when their parents sent them to college. They became senators and members of Congress, had country homes, opened or managed legitimate businesses.”

“So crime was a path of upward mobility for other immigrant groups, but one that was denied for us?”

“Correct,” Rodrigo replied. “For African Americans alone this avenue was closed. Society decided to repress, not tolerate, crime from our group.”

I made a mental note to ask Rodrigo about something later, but instead asked, “Why do you think that was so? I assume you have a theory?”

“Nothing especially original,” Rodrigo replied. “We’re a large group numerically, so a great deal was at stake. Moreover, society has more to live down with respect to us. And, of course, there’s the color question. For all these reasons, society decided fairly recently that it did not want us to get ahead in this way. The notion of the sinister, out-of-control black served this purpose admirably.”⁴⁸

“Rodrigo, I hope you’re not saying there was something like a conscious conspiracy. That strikes me as a little paranoid.”

“No,” Rodrigo replied. “Not any more than the creation of the teenager was a conscious conspiracy. No group of executives sat down and said, ‘Let’s see. What group can we create that will have a lot of money to spend and that we can persuade to buy clothes and magazines and makeup and music?’ Yet, the category did get created, and did operate to produce benefits to the merchandising sector. I think that good and bad categories just sort of come about naturally, with little effort or conscious design, when society needs them to appear.”

⁴⁷ See, e.g., Ianni, *supra* note 43, at 13 (citing Daniel Bell as describing “the transfer from one wave of European immigrants to another as a ‘queer ladder of social mobility’ out of the slums that had organized crime as the first few rungs”); see also Martin Kilson, *Whither Integration*, 45 *Am. Scholar* 360, 372 (1976) (noting that corruption played a role in initial social mobility for these groups).

⁴⁸ *Images*, *supra* note 31, at 1264-65, 1267.

"I wish I could be convinced," I said. "It sounds almost too pat."

"Let's walk back to your office, Professor. Do you still have your computer?"

"Yes," I nodded.

"And it's still hooked up to your databases?"

I nodded yes, and Rodrigo gestured for the waiter. "I've been doing some research on just this question."

I wasn't sure what he meant by "just this question," but I wanted to hear what he was looking into, so I said, "Sure, come on over. I have some new art work up in my office. I think I told you last time that I was lucky enough to get a permanent job here, following that one-semester visit.⁴⁹ So now we're neighbors. At least until you go off somewhere else."

"I'd like very much to see your stuff, Professor. I loved that poster you had of the state fair."⁵⁰

As we walked out of the little restaurant, Rodrigo looked at me and said, "I hope you'll be careful, Professor. Even the streets around here aren't one-hundred percent safe. We need to have you around for a while."

I mumbled something about being neither that old nor that hard to replace, and a few minutes later we were walking up the steps of the law building to my office.

II. RODRIGO'S PRINTOUT: THE STATISTICS AND POLITICS OF CRIME

"Say, you've rearranged things. The computer used to be over there."

The alert Rodrigo pointed out my recent redecorating efforts, of which I was proud. "Yes, I moved all the plaques over to that wall, the couch over there, and switched my desk and computer to face the window. What do you think?"

⁴⁹ See Fifth Chronicle, *supra* note 7, at 1595 (explaining the Professor's recent job change).

⁵⁰ The Professor collects racial grotesquerie. Rodrigo is referring to a state fair poster, with a grinning stereotype of an Asian. The poster was discontinued because of the activism of a group of law students and faculty in the region.

Rodrigo ignored my question. His eyes were on my computer. "Do you mind if I sit here, Professor? I should have brought my notes. But this should just take a minute."

"Go ahead," I said, moving to where I could see the screen. As they had done once before, Rodrigo's fingers flew over the keyboard.⁵¹ Accessing databases I did not even know existed, he brought up a wealth of information from articles, book abstracts, the U.S. Census, and FBI annual crime reports. I envied his technological wizardry, and lamented that I had come to computers so late in life.

"See, Professor," Rodrigo said, pointing at the screen. "Here are the figures we talked about before. It was in your footnote, as I recall.⁵² They show that the figure for white-collar crime exceeds the dollar losses from all the crimes associated with African Americans put together. If you just take . . ." Rodrigo punched a few more keys. "See—if you add all the losses from street robbery, including mugging and purse snatching, and add to them this other figure for . . ." Rodrigo interrupted himself briefly while my screen flashed, dissolved, then flashed again—"For all household burglaries, you get . . ."

I squinted, then said: "A lot of money. It looks like almost \$8.3 billion per year."⁵³

⁵¹ See Chronicle, *supra* note 1, apps. at 1381-83 (listing essays, books, and articles that discuss the West's decline in Chronicle, Appendix A, Rodrigo's Printout #1; and listing essays and books that discuss non-Western business, educational, social, and cultural attributes in Chronicle, Appendix B, Rodrigo's Printout #2).

⁵² *Id.* at 1377 n.94 (citing Russell Mokhiber, *Invisible, Expensive Crime*, Wash. Post, Nov. 18, 1991, at A20 [hereinafter *Invisible*]).

⁵³ U.S. Dep't of Justice, Federal Bureau of Investigation, *Uniform Crime Reports for the United States 1991*, at 27, 39, 44 (1992) [hereinafter *Uniform*] (listing disaggregated statistics for robbery, burglary, and larceny-theft); *Invisible*, *supra* note 52; see also Russell Mokhiber, *Corporate Crime and Violence 3* (1988) [hereinafter *Corporate Crime*] (comparing losses due to burglary, street murder, and manslaughter with those due to corporate crime and violence).

"Now, we *could* throw in malicious mischief," Rodrigo muttered, punching some other keys. "Oh, yes, I remember where I got that. It's here.⁵⁴ See, the total for graffiti is about \$600 million."⁵⁵

"That's a lot of losses," I replied. My young friend went on:

"And, oh—here it is. Just as I thought. The figure for white-collar crime is not just higher than the one for street crime. It's . . . let's see . . . *much* higher. I was working on this before but didn't quite finish. I hope you've got a minute, Professor. I have a feeling this will surprise you." *Click, click, click.* I wondered, once again, how Rodrigo had become so proficient at electronic searching while studying world cultures, then law, in Italy. "What are you trying to do?" I asked.

"I'm trying for a total. Does your computer have a split screen? No, too bad. I was trying to make a running tally. Here, let me borrow some paper—can I use that pad? There. Just as I thought. If you divide out by the proportion of the country that is white and the proportion that is black, it looks like . . . the figures for the sorts of crime white people do are greater than the figures for the sorts of crime they associate with us."⁵⁶

"You mean," I said, "that our people commit less crime than people of the majority race?"

"The per person losses are actually a lot lower. I'm assuming, of course, that most white-collar crime is perpetrated by white people—I mean the classic categories of that kind of crime—such as embezzlement, bribery, price-fixing, and insider trading."⁵⁷ Actu-

⁵⁴ See The Bill for Graffiti Is Past Due, L.A. Times, Aug. 8, 1993, at B12 [hereinafter Bill] (reporting that the California Dep't of Transportation estimates overall private and public cost of removing graffiti is \$66 million for California). California has approximately one-ninth of the United States' total population. See Statistical Abstract, supra note 24, at 22. Thus, extrapolation from these two figures gives an estimated national bill of \$600 million for removing graffiti.

⁵⁵ See infra Appendix A.

⁵⁶ See infra Appendix A (setting out Rodrigo's calculation). On white-collar crime in general, see supra notes 52-53 and accompanying text; infra notes 67 & 69 and accompanying text; Eighth Survey of White Collar Crime, 30 Am. Crim. L. Rev. 441 (1993) (providing a comprehensive annual survey, containing discussion of the current treatment of offenses including antitrust violations, bribery, environmental crimes, money laundering, and tax evasion).

⁵⁷ There is no commonly accepted definition of white-collar crime, but most writers conclude that it includes bribery, embezzlement, fraud (other than welfare fraud), price-fixing, and insider trading—in general, nonviolent economic crimes that include some degree of fraud, collusion, or deception, and that lack an element of face-to-face

ally, I'd better check." *Click, click, click.* "Here we are. The crime reports. Just as I thought, mostly white. And when you add in *corporate* misconduct—marketing unsafe autos and dangerous pharmaceuticals, Love Canal, the Dalkon Shield, the savings and loan scandal, the General Electric price-fixing conspiracy . . ." *click, click, click . . .* "the Lockheed fiasco, Three Mile Island, asbestosis, and Agent Orange—you find that almost all the top executives were white."⁵⁸

"That's really interesting," I said.

"This is more or less where I stopped last time. But there's more. This is what I was going to do."

I watched quietly as Rodrigo once again performed feats on my computer, stopping only to scribble a new entry on the rapidly growing list of figures on the yellow pad next to him.

"See, Professor. If you add these other figures to the total of white-collar crime that we got earlier . . ." Rodrigo looked down at his list. "For corporate crime, including defense procurement fraud and bribery,⁵⁹ consumer fraud,⁶⁰ and, let's see, oh yes, the

interpersonal force. See Stanton Wheeler, Kenneth Mann & Austin Sarat, *Sitting in Judgment: The Sentencing of White-Collar Criminals* 5 (1988) [hereinafter *Judgment*]; David Weisburd, Stanton Wheeler, Elin Waring & Nancy Bode, *Crimes of the Middle Classes: White-Collar Offenders in the Federal Courts 9-11* (1991) [hereinafter *Middle Classes*]. A few authorities, such as Mokhiber, *supra* notes 52-53, and Ralph Nader, include the marketing of known dangerous products, toxic dumping, and other acts of corporate irresponsibility as white-collar crimes. On annual losses from white-collar crime, see *infra* notes 59-62 and accompanying text and Appendix A.

⁵⁸ Uniform, *supra* note 53, at 231; *Middle Classes*, *supra* note 57, at 50; see also *Invisible*, *supra* note 52 (noting that all 46 of the individuals convicted of Operation Ill-Wind defense procurement fraud were white males); *infra* note 86 and accompanying text (observing that no chief executive officer of any Fortune 500 corporation is black; thus, most high-level corporate executives are white). For discussion of each of the scandals Rodrigo mentions, see *Corporate Crime*, *supra* note 53. For a discussion of the role of "opportunity" in white-collar crime, see *Middle Classes*, *supra* note 57, at 74-99.

⁵⁹ On the recoveries of some of the losses from defense procurement fraud, see William Barr, *Foreword, Seventh Survey of White Collar Crime*, 29 *Am. Crim. L. Rev.* 169, 171-72 (1992); *infra* Appendix A. On bribery, see *Corporate Crime*, *supra* note 53, at 258-66 (describing the Lockheed bribery scandal). On PACs, honoraria, and other forms of "legalized bribery," see 1992 *Facts on File* 673, 681, 682 (reporting yearly figures close to \$75 million); see also Russell Mokhiber, *Corporate Crime & Violence in Review: The 10 Worst Corporations of 1991*, *Multinational Monitor*, Dec. 1991, at 10 [hereinafter *Ten Worst*] (noting that the individuals convicted in operation Ill-Wind and the vast majority of those convicted in the recent Wall Street insider trade scandals were white males).

⁶⁰ See *Corporate Crime*, *supra* note 53, at 15 (estimating that corporate illegal trade practices cost \$174 billion to \$231 billion a year); see also *id.* at 16, 213-27 (discussing the

savings-and-loan scandals.⁶¹ You have a net figure of . . . hmmm. It looks like many times the per capita figure for black crime.⁶² So, in one way of looking at it, the crime that elite white people do, especially white males, is much more serious than that committed by blacks of all ages and types.”

“Amazing,” I said. “I wonder why this never comes out.”

“It’s inherent in the social construction, Professor. No one focuses on white crime or sees it as a problem. In fact, the very category, ‘White Crime,’ sounds funny, like some sort of debater’s trick.”

“But there it is, right in the crime reports,” I said.

“Yes, but it’s hidden in a mass of statistics where no one focuses on or makes a big production of it. The other kinds, the ones laid out with precise charts in the FBI’s annual compilations, attract all the attention and seem like ‘the problem.’” Rodrigo gestured toward the electronic bookmark he had stuck in my computer, a feature I did not even know I had.

“Oops!” we both said in unison, as the phone rang loudly. I looked at my watch and remembered the journalist I had promised to speak with around this time, half wishing I had not agreed to talk with her.

“Do you need privacy, Professor?”

It was the journalist. I covered the receiver. “No problem. This shouldn’t take long.”

Rodrigo pressed a few buttons, my printer started whirring, then he wandered out into the hallway. I was depressed to learn that the journalist, with whom I had spoken before and was friendly, wanted a comment on hate-speech directed at lawyers. I had done some writing on hate-speech against blacks, and the journalist wanted to know what I thought of a state bar association presi-

approximately \$2 billion cost of the General Electric price-fixing conspiracy and analyzing the General Motors predatory conspiracy).

⁶¹ See *Invisible*, supra note 52 (estimating cost to consumers at \$300 to \$500 billion). On mortgage and escrow abuses, totaling as much as \$5 billion to \$10 billion annually, see Victoria Reid, *Homeowners Challenging Mortgage Escrow Abuses*, *Denver Post*, Aug. 10, 1993, at 3C; Kenneth Harney, *Mortgage Includes ‘Junk’ Fees*, *Denver Post*, Aug. 10, 1993, at 3C.

⁶² See *infra* Appendix A (setting out this calculation); Ten Worst, supra note 59, at 9 (stating that “corporate crime and violence combined inflicts far greater damage on society than all street crime combined”).

dent's suggestion that vilifying an attorney be considered a hate crime.⁶³ I said a few guarded things, tried to explain Harry Kalven's thesis⁶⁴—which the reporter refused to take down as too technical—and after a few minutes hung up. A moment later, Rodrigo walked back in.

"What do you think of my printout?" he asked, gathering up the long, flowing computer sheet my printer had obligingly produced in his absence. "Oh—and what did your journalist friend want to know?"

"I haven't looked at your printout yet, but I will—I'm fascinated by your evidence that white people commit as much crime as our youth. And, as for the journalist, never mind. Talking to the press is both one of the best and worst aspects of this job, as you'll find out soon enough. Some of them are really smart, understand everything, and take their time to get the story straight. Other times, they just want a quick quote—usually something specific they have in mind and try their best to coax you to say."

"Do you generally oblige them?"

"I do. I think it's important to be helpful and forthcoming to the press, despite the occasional disappointments. Maybe when you start teaching, I'll refer calls to you. I'll tell them if you don't know the answer, you can find out anything in less than thirty seconds. You're pretty good with a computer."

Rodrigo beamed. "I've been working on it. Part of my dissertation is going to be statistical. So I've been boning up. You looked like you were going to ask me something."

"I can't remember what it was."

"Did it have something to do with street crime?" Rodrigo asked. "I was pulling up the figures on muggings when you looked like you wanted to interject."

"Oh. That's right. If you are going to make the case that black crime is a social construction, an illusion, or at any rate no worse than white crime—"

"Less bad, actually," Rodrigo interjected quietly.

⁶³ See Victoria Slind-Flor, *A City's "Week of Darkness": Legal Community Mourns Its Dead and Redirects Its Rage*, Nat. L.J., July 19, 1993, at 1.

⁶⁴ See Harry Kalven, *The Negro and the First Amendment* (1965) (arguing that reforms which arise from the cauldron of racial injustice often end up benefiting all of society, not just blacks).

"Then you're going to need to deal with the objection that black crime is scarier. It's violent. When a savings and loan officer carries out a scam or causes an institution to fail, it costs the investors and depositors money.⁶⁵ But losing five hundred or a thousand dollars is not the same as being mugged and sent to the hospital, even if the medical bill turns out to be the same. Embezzling and tax fraud are bad, to be sure. But they're just plain not as terrifying as waking up in the middle of the night and seeing a shadowy figure standing behind a curtain."

"I agree," Rodrigo said.

"And not only that," I continued. "You are going to have to supply at least the outlines of a solution. It's not enough to say that the United States has two kinds of crime, or that there's a lot of it, maybe even more than in Canada, Sweden, or your own homeland. People here think America is great, the most wonderful country on earth. Your criticism will seem like flyspecking. They'll be mad at you for pointing out that there's more crime than they like to think, and especially mad that you're saying their own group—privileged middle-aged white males—are just as bad as young African-American inner-city toughs, walking the streets in packs of four and looking mean."

"So you want to know my thoughts about violent crime, and also my solution. No small challenge, Professor! These parts of my thesis are not fully fleshed out. But I do have some ideas on how to begin to address them. Can I interest you in a bite of real supper? I noticed on the bulletin board just a minute ago that the Latino Law Students are having a feed in the student lounge. And judging from the sinells in the hallway, it's already started. Do you like Mexican food?"

"I love it," I replied a little ruefully. "But I should eat more of the variety that we had before. My doctor's been after me. It is late, though, and she did tell me to have lots of small meals as I go through the day"

"Maybe a corn burrito, Professor?" Rodrigo asked solicitously. "They're not too high in calories or cholesterol."

"Tell you what. If you agree to help me hold the line at just one, I'll help you critique the remaining parts of your paper in return."

⁶⁵ See *supra* note 61 and accompanying text.

"It's a deal," Rodrigo said.

III. IN WHICH RODRIGO EXPLAINS HIS THEORY ABOUT VIOLENT CRIME

Twenty minutes later, as we rode up the elevator, balancing paper plates and munching on the remains of our burritos, Rodrigo continued: "I'm learning to love Mexican food. Italian is my favorite, of course. But for some reason, Mexican is more plentiful in the neighborhood where Giannina and I live. And the prices are a little lower."

"Easier on a student budget," I sympathized, placing my plate on the wooden chair next to my office door while I fished out the key. "Have a napkin," I said once we were inside, indicating a stash on the end of a bookshelf. "I have cold drinks in the mini-fridge. I showed it to you before, right?"

"I think you did. I'm not thirsty, but maybe I'll have one of your famous coffees, if you're up to making some."

"I was just thinking that myself. I got in a new supply of beans. You were going to address my objection about violence. Much black crime is violent, and, while the net losses from white-collar and black-collar crime may be similar, there's no comparison in terms of their *in terrorem* effect."

Rodrigo looked pensive. "You're right, and I would be the last person to try to excuse nuggings or Central Park beatings. Did I tell you I've taken up jogging? Anyway, I think the answer lies in recognizing two things. The one has to do with the construction of reality idea we talked about earlier.⁶⁶ The other has to do with the way these figures look in the new light this analysis reveals."

"I'd love to hear," I said, flicking the switch to "On" and adding the beans. "I assume you want the real kind, with caffeine?"

I knew the answer already. "I love coffee," Rodrigo said. "And it's not too late. Giannina wants me to cut down. She says coffee makes me too hyper. But if I have my last cup before about six p.m., I find I sleep well."

I poured him a cup, then measured out the decaffeinated beans from the other jar.

⁶⁶ See *supra* notes 17-48 and accompanying text.

"Mmmm. This is good. You make some of the best coffee I've had since leaving Italy, Professor."

"So, a new construction of crime and a sharper look at the statistics will yield an answer to our problem?" I prodded.

"Have you ever wondered about all the white people's derelictions that are not crimes at all, but torts or administrative offenses, punishable if at all by fines, but rarely imprisonment?⁶⁷ At the same time, the things that black and poor people do—shoplifting, stealing hubcaps, joy riding, selling or buying marijuana—can net you quite a few years behind bars,"⁶⁸ Rodrigo said.

"I have noticed. It seems to me that society has neatly arranged to have the types of things high-level executives do—even ones that are clearly unethical or antisocial—be handled nonpenally, the same way they handle the youthful indiscretions of clean-cut suburban youth. You rarely hear of a corporate executive going to jail—for long, at any rate—even if the malfeasance is fairly serious, like marketing DES or Ford Pintos once these products are known to be lethally dangerous."⁶⁹

⁶⁷ See *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 *Harv. L. Rev.* 1227, 1368 (1979) [hereinafter *Developments*] (noting and partially endorsing the use of criminal sanctions, although confessing that fines will often be more effective punishments); *Corporate Crime*, *supra* note 53, at 6.

"Crime is a sociopolitical artifact, not a natural phenomenon" We can have as much or as little crime as we please, depending on what we choose to count as criminal. By setting up a system of civil fines, consent decrees, recalls, and other non-criminal controls on corporations, we have chosen to have very little corporate "crime" . . . and by so choosing, we have insulated the corporation from the effective sanctions and stigma of the criminal process. In addition, we have sent the outnumbered and underfunded police who investigate corporate crime—euphemistically known as regulators—up against some of the most powerful lawbreakers in society without access to meaningful sanctions.

Id. (citation omitted).

⁶⁸ Hacker, *supra* note 21, at 195-96; Blumstein, *supra* note 29, at 1278-79.

⁶⁹ See, e.g., Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 *Yale L.J.* 1795, 1802 (1992) (noting and approving of the trend toward civil rather than penal sanctions for white-collar crime). For a more empirical study of the treatment of such offenders, see *Middle Classes*, *supra* note 57, at 150-65, (discussing sentencing, including fines, restitution, and probation); *id.* at 201-02 (listing statutes and corresponding penalties for most frequent categories of white-collar crime); *Corporate Crime*, *supra* note 53, at 4, 130-38, 149-62, 172-80, 205-12, 280-99, 409-17 (discussing the marketing of dangerous automobiles and pharmaceuticals, price-fixing and other crimes against the marketplace, and the generally lenient treatment afforded most offenders); see also Ralph Nader, *Unsafe at Any Speed* (1965) (discussing dangerous automobiles). For a

"No one thinks of these as violent crimes, but of course they are. We treat them as a case of boys-will-be-boys, as ordinary, red-blooded business zeal that got a little out of hand. The perpetrators rarely serve prison sentences. If they do, it makes the news—and then they're out again in a few months."⁷⁰

"I read of one that was quietly released just the other day. He had been sentenced to several years for bilking the public of millions of dollars. A few months later, he was walking the streets again."⁷¹

"Much such misconduct isn't even treated as a crime. For example, I'm sure you've heard of doctors who perform Cesarean sections on women during childbirth, not out of medical necessity but for the doctor's convenience.⁷² Giannina was reading an article the other day on excessive medical procedures—including mammograms and hysterectomies for women and prostate operations for men.⁷³ These cost millions of dollars a year, and result in a

cautionary view, see, e.g., Robert S. Bennett, *supra* note 56, at 451-52 (deploring the use of uncabined prosecutorial discretion because of prosecutor's failure to distinguish between white-collar offenders who are merely "misguided" and those who are "truly criminal"); Abraham S. Goldstein, *White-Collar Crime and Civil Sanctions*, 101 *Yale L.J.* 1895 (1992) (cautioning against uncontrolled use of civil sanctions because they are often more punitive than civil sanctions and afford less procedural protection).

⁷⁰ Gady A. Epstein, *Judge Cuts Milken Jail Time: Ex-Junk Bond King's Term in Prison Ends in March*, *Boston Globe*, Aug. 6, 1992, at 53; Larry Reibstein, *Dody Tsiantar & Rich Thomas, Hail Felons Well Met: Wall Street's Cons Paid Their Debt to Society—But Have Plenty to Spare*, *Newsweek*, Oct. 7, 1991, at 44; *Corporate Crime*, *supra* note 53, at 3-10, 23, 25-38, 220; Christopher Stone, *Where the Law Ends* 57 (1975). On the theory of corporate punishment, see John C. Coffee, Jr., "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 *Mich. L. Rev.* 386 (1981).

⁷¹ See *supra* note 68 and accompanying text; *Judgment*, *supra* note 57, at 15-16 (tbl. 1), 16-22, 46-50; *Corporate Crime*, *supra* note 53, at 20-21, 26-29, 32, 35 (explaining that judges are apt to consider white-collar criminals more sensitive and redeemable than other offenders, hence less appropriate candidates for harsh punishment); see also Russell Mokhiber, *George Bush: White-Collar Criminal Coddler*, *N.J. L.J.*, Sept. 14, 1992, at 15.

⁷² Cf. Lisa C. Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 53 *Ohio St. L.J.* 1205, 1244 n.186 and accompanying text (1992) (asserting that overworked doctors use unnecessary medical procedures); *id.* at 1248-49 (discussing court-ordered medical treatment); *In re Jamaica Hospital*, 491 *N.Y.S.2d* 898 (*N.Y. Sup. Ct.* 1985) (requiring pregnant woman to undergo an unwanted blood transfusion in order to save the life of a mid-term fetus).

⁷³ Steven Findlay, *Medicine by the Book*, *U.S. News & World Rep.*, July 6, 1992, at 68 ("About 20 percent of hysterectomies and coronary bypass, back and prostate surgery, as well as dozens of other medical procedures, are done unnecessarily, often before trying

great deal of pain and, in some cases, deaths,⁷⁴ yet are almost never included in the yearly totals for white-collar crime.”

“I’ve read, too,” I added, “of physicians who refer patients for laboratory tests to facilities in which the doctors have an interest. These result in more unnecessary tests, with all the inconvenience, expense, and in some cases pain that these entail.”⁷⁵

“There are also many deaths each year caused by the marketing of infant formula in Third World countries.”

“Yes. The mother frequently cannot read the preparation instructions, because they are printed in English. Sometimes the mother simply cannot read. Safe water for mixing the formula is almost never available. The result is an expensive but unsafe formula to replace the mother’s perfectly safe and completely free breast milk. Even if the mother eventually realizes that the formula is causing her baby’s illness, she has stopped lactating. Her baby will die.”⁷⁶

“None of this is regarded as a crime,” Rodrigo went on. “And then there is toxic dumping. We’ve already mentioned the sale and marketing of dangerous products. Toxic dumping adds another

more conservative measures.”); *Wasted Health Care Dollars*, *Consumer Rep.*, July, 1992, at 435, 440 (reporting a study finding that 27% of hysterectomies were unnecessary); Judith Randal, *Mammogram*, *New Republic*, Oct. 12, 1992, at 13.

⁷⁴ *Wasted Health Care Dollars*, *supra* note 73, at 435 (“Of the \$817-billion that we will spend this year on health care, we will throw away at least \$200-billion on overpriced, useless, even harmful treatments, and on a bloated bureaucracy.”).

⁷⁵ Jenni Bergal, *How Self-Referral Gives Physicians a License to Steal*, *Chicago Tribune*, Dec. 16, 1992, at 27 (citing study showing that in Florida in 1991, cancer patients were overcharged about \$12 million because of physician self-referral); David Brown, *When Healing, Investing Overlap: “Physician Self-Referral” Divides Medical Community*, *Wash. Post*, Dec. 6, 1992, at A1 (discussing a 1989 study showing that Medicare patients whose doctors had a financial interest in laboratories received 45% more lab tests than did Medicare patients considered as a group); *MacNeil/Lehrer NewsHour: Options for Change* (PBS television broadcast, May 25, 1993) (discussing medical malpractice, including abuse of physician self-referral); Francis J. Serbaroll, *New York’s Tough New Anti-Referral Law*, *N.Y. L.J.*, Jan. 5, 1993, at 1 (discussing law recently signed by Governor Cuomo which prohibits and restricts referrals to labs in which the doctor has a financial interest).

On the “technological imperative”—the tendency of medical professionals to use machinery and facilities that they have in-house, see Fred Bayles, *Study Shows Doctors Will Use Gadgets If They Have Them*, *Boulder Daily Camera* (Colorado), Aug. 19, 1993, at 5A.

⁷⁶ *Corporate Crime*, *supra* note 53, at 307-17.

several thousand deaths a decade."⁷⁷ Rodrigo gestured toward my computer. "Mind if I turn that on again?" I waved no, so he continued. "Let me see, where did I find that figure for dumping? Let's try fulltext and Love Canal. Oh, look, here's the atomic fallout test case, *Allen v. United States*.⁷⁸ Add a few thousand more thyroid cancers" Rodrigo stopped to jot a few more figures down on the yellow pad, rapidly filling up with numbers. "And here's one on children's car seats.⁷⁹ For some reason I didn't bring that one up before. And if you add"

Rodrigo was silent for a moment while he added up a column of figures. "How many white people did we say there are in the country? Okay, divide out and we get . . . Oh, look. Once again, just about the same. Hmmm. Actually a little higher for the whites. And if you add undeclared wars"

"Undeclared wars?" I asked.

"They're illegal, and they kill you just as dead. Every last one violates the War Powers Act,⁸⁰ not to mention the Constitution, which provides that only Congress can declare a war.⁸¹ All the others are technically illegal. Virtually all wars like that also violate international law, including treaties to which the United States

⁷⁷ See *id.* at 6, 267-75 (noting the 22 suicide deaths and numerous injuries caused by Love Canal); *id.* at 87 (observing that 2000 to 5000 deaths and 200,000 injuries resulted from deadly gas leak at the Union Carbide plant in Bhopal, India); *id.* at 383-90 (discussing Reserve Mining dumping of toxic mining waste that endangered the lives of over 150,000 local residents); see also *Who's Poisoning America* (Ralph Nader, Ronald Brownstein & John Richard eds., 1981) (discussing toxic pollution); Michael Weisskopf, *Particles in Air Help Kill 60,000 a Year, Study Says*, *Wash. Post*, May 13, 1991, at A13 (reporting the results of an air pollution study by Douglas Dockery and Joel Schwartz presented to the American Lung Association); Spencer Heinz, *The Glossary of Ecospeak: A Language of Losses and Lessons*, *Sunday Oregonian*, Apr. 22, 1990, (Northwest Magazine), at 10, 12 (reporting that U.S. industry put 22 billion pounds of chemicals into U.S. air, water, and ground in 1987).

⁷⁸ 588 F. Supp. 247 (D. Utah 1984), *rev'd*, 816 F.2d 1417 (10th Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

⁷⁹ See *Deaths Associated with Infant Carriers*, 267 *J. Am. Med. Ass'n* 2586 (1992).

⁸⁰ War Powers Resolution, P.L. 93-148, 87 Stat. 555 (1973) (H.J. Res. 542, adopted over presidential veto on November 7, 1973 (codified as 50 U.S.C. § 1541 (1988))).

⁸¹ U.S. Const. art. I, § 8, cl. 11. For a discussion of the constitutionality of undeclared wars, see John Hart Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 *Stan. L. Rev.* 877 (1990); John Hart Ely, *The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About*, 42 *Stan. L. Rev.* 1093 (1990).

is a signatory, like the United Nations Charter.⁸² Tens of thousands of lives lost, millions if you go back to the two world wars. These are things that elite whites do. They kill and cripple. They are violent crimes, just like rape, homicide, and assault and battery, and but for our social construction of black crime, these white-collar crimes would have the same *in terrorem* effect as street crime currently does.”

“And if you add them in?” I asked.

“I had the figure before, when Giannina and I were doing this back at our place. But I’d better not rely on memory. Let’s see. Wars. Where did I get that. Oh, I know—let’s try this. There we are. Over forty million deaths, if you go back just through the Second World War.⁸³ If you include noncombatants and deaths on the other side Oh, here we are. All wars—over eighty-seven million since the beginning of the century.”⁸⁴

Rodrigo scribbled again while I watched transfixed.

“If you add wars and military excursions, elite whites cause about three times the number, I mean ratio, of deaths and dismemberments, as blacks.⁸⁵ Without wars, they’re only slightly ahead.” Rodrigo turned off my computer. “Well, Professor?”

“You can’t be sure that no African American sat on the board of the corporation that marketed DES or dumped toxic wastes into Love Canal. And a recent Chief of Staff, as you know, was black—Colin Powell.” I quickly realized how lame my challenge sounded, so retracted it.⁸⁶ “On the whole, though, I have to admit, in the United States, at any rate, white folks have caused more death by violence than anyone else. And that’s not even including slavery.”

⁸² See, e.g., T.O. Elias, *The Modern Law of Treaties* 114-18, 138-42 (1974) (discussing limitations on warmaking); U.N. Charter arts. 39-51 (providing international law regarding the use of force).

⁸³ Zbigniew Brzezinski, *Out of Control: Global Turmoil on the Eve of the Twenty-First Century* 9 (1993) (citing total number of deaths from wars and other aggressions during twentieth century).

⁸⁴ *Id.* at 10. See *infra* Appendix B (giving statistics for more recent wars).

⁸⁵ See *infra* Appendix B.

⁸⁶ On the small number of African-American chief executive officers, see Shelly Branch, *America's Most Powerful Black Executives*, *Black Enterprise*, Feb. 1993, at 78, 82 (not a single black CEO in any of nation's top 500 industrial corporations).

"That's at least another seven million to fourteen million deaths⁸⁷—more if you add the Indians," Rodrigo replied soberly. "And of course Amnesty International and other organizations have been after us for years to reduce our number of executions, which in their opinion is far too high.⁸⁸ Higher than in any other nation except the old Soviet Union."

"Not to mention that we alone execute the mentally retarded and the underage,"⁸⁹ I said.

"Death row is disproportionately black, as the Georgia study showed.⁹⁰ Juries convict black men who commit crimes against white victims at a rate more than four times greater than when the victim is black.⁹¹ The jails are nearly half black,⁹² and over 60 percent minority.⁹³ All this is indefensible in the eyes of many international authorities."

"And of course it's not black people who are declaring these wars or operating these criminal justice systems that treat black offenders so harshly."

"In general, no. Studies of race-by-race sentencing show that black offenders are punished more harshly than whites for the same offense, right across the board."⁹⁴

⁸⁷ For various estimates of the number of deaths resulting from slavery, see, e.g., Howard Zinn, *A People's History of the United States* 29 (1980) (estimating 50 million deaths from the institution as a whole); Donna Britt, *The Dimensions of a Number*, Wash. Post, May 28, 1993, at D1 (discussing the controversy over the number of deaths from crossing the Atlantic on their way to slavery in the Americas and concluding that estimates range from 7 million to 40 million); Toni Morrison, *Beloved* (1987) (dedication page, citing the figure of "60 million and more").

⁸⁸ Amnesty Cites Rising U.S. Executions, *Denver Post*, Jul. 9, 1993, at A10 [hereinafter *Rising U.S. Executions*].

⁸⁹ *Stanford v. Kentucky*, 492 U.S. 361 (1989) (approving execution of children aged 16 and 17); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (approving execution of mentally retarded persons); *Rising U.S. Executions*, supra note 88; see generally Victor L. Streib, *Death Penalty for Juveniles* (1987) (discussing the American criminal justice system and its current and historical willingness to execute juveniles).

⁹⁰ *McCleskey v. Kemp*, 481 U.S. 279, 286-87 (1987) (citing David C. Baldus & James W.L. Cole, *Statistical Proof of Discrimination* (1980 & Supp. 1987) [hereinafter *Statistical*]); Hacker, supra note 21, at 183 (reporting that most crime is *intra* racial—that is, whites tend to be victims of other whites and blacks tend to be victims of other blacks).

⁹¹ *Statistical*, supra note 90; *McCleskey*, 481 U.S. at 287.

⁹² Hacker, supra note 21, at 180, 197.

⁹³ *Young Black Men*, supra note 19, at 8; see also *Developments*, supra note 67.

⁹⁴ See *Developments in the Law—Race and the Criminal Process*, 101 Harv. L. Rev. 1472 (1988) (discussing the impact of race on the treatment of offenders); *id.* at 1603-41

"I hadn't realized that," I said. "But it stands to reason."

We were both silent for a minute. "I think neither of us gets much pleasure from these dreary statistics," Rodrigo said. "But I think it's important to get them out, because without them, our people become more and more demonized. Society deems us the source of its miseries, the insecurity of life in the cities, the reason why life today is not as safe, not as sweet as it used to be. These are unfortunate facts, and no one can blink at them."

"But laying them at our doorstep is not fair," I summarized. "The empirical analysis you just conducted showed we should be more fearful of the depredation caused by white-collar crime than by street crime. It's more serious, more common, *and* more hurtful."

"Crime and suffering in the ghetto are serious problems. No reasonable person could dismiss them. Conservatives and progressives alike should be working to ameliorate the pain, the poverty, the blighted lives that occur there. The dropout, infant mortality, and incarceration figures for the poor black community are tragic. But the challenge is to find an approach that recognizes that crime and delinquency are societywide problems, not ours exclusively."

"I gather you've been thinking about that challenge," I said.

"I have some ideas—an outline, nothing more. If you'd like to hear I'd love the feedback. My draft's not due 'til the end of the summer. It doesn't need to be a long chapter, but I think I need to talk about solutions."

"Let's hear what direction your thinking is going in."

IV. IN WHICH RODRIGO PROPOSES HIS SOLUTION TO THE CRIME PROBLEM

Rodrigo reached for the pad of yellow paper. "I hope you don't mind if I take notes. I find that talking with you often stimulates me, Professor."

"No more than it does me," I said. "As I think I mentioned before, I'm participating in a Federalist Society debate next month,

(discussing sentencing and race); cf. Sheri L. Johnson, *Unconscious Racism and the Criminal Law*, 73 *Cornell L. Rev.* 1016 (1988) (discussing unconscious racism in criminal procedure cases and equal protection cases).

and someone is sure to bring up the crime-and-punishment question. This talk is helping me at least as much as you."

"You're a good friend and mentor, Professor. I like the way you push me. This part of my thesis I've told to no one except Giannina. So I really value your opinion."

"Please go on," I said.

"I think the key lies in getting a handle on white-collar crime, including the corporate variety. It would help, too, if we could cut down on military crimes—mainly all those undeclared wars. Defense procurement fraud is a big item, but it's all those young bodies, brains, and bones that bother me. If we could reduce white-collar, corporate, and military crime and adventurism, I think we could make the desert bloom."

"We'd all be safer, surely, but how would that help our people, particularly our youth who are caught up in gangs, crack, drugs, drop out of school, and get pregnant at depressingly early ages?"⁹⁵

"It wouldn't address these issues directly," Rodrigo replied. "Although reducing military adventurism would save some young black lives. Most of the gain would be indirect. If my calculations are right"—Rodrigo looked down at his scratch sheet—"the average American loses between five hundred and a thousand dollars a year to white-collar crimes. If you define the category broadly, to include corporate fraud and misconduct, the figure is even higher."⁹⁶

"That's a lot of money," I replied. "Are you sure of your figures?"

"They're about what I got before," Rodrigo said. "I can leave you this printout, and you can check for yourself."

"Thanks. I appreciated it when you did that before. It made my job easier. So, what do you think we could do to stem the tide of white-collar crime? And even if we did, why do you think society would want to spend any of the savings to relieve the pain and poverty of ghetto youth, rather than apply it for lower taxes, trips to Disneyland, a second car, or that long-delayed family vacation?"

"Let me try to deal with each of those separately," Rodrigo said.

I sat back expectantly.

⁹⁵ See *supra* notes 23-26, 35, 90-93 and accompanying text.

⁹⁶ *Infra* Appendix A.

A. *In Which Rodrigo Explains How He Would Reduce White (-Collar) Crime*

"To reduce the excess amount of crime white people commit, especially those in the executive suite, I think we have to go to the source of it."

"And that source is . . . ?" I asked.

"The white family," Rodrigo replied.⁹⁷ "That and the crime/tort loophole we discussed a minute ago."⁹⁸ The two work together. White people's peculiar family structure inclines them to commit certain kinds of crimes, engage in certain kinds of antisocial behavior. And the soft treatment they afford each other when they're caught encourages them to act irresponsibly, never to develop a full sense of responsibility for their acts."

"I'd love to hear more about the kinds of family pathology you have in mind. I think I have a pretty good grasp on what you mean by soft treatment of offenders, by coddling of white-collar and corporate criminals. But it's the family dynamics that interest me right now." (I had both a professional and personal interest in the relation of families to crime. As Rodrigo had been speaking, I remembered with a slight pang an incident in our own past when my wife and I had received a call from the neighborhood police station. Our eldest son had been arrested on suspicion of shoplifting. He was only ten at the time, and was later cleared, but the experience had left a deep impression on all three of us.)

"Would you like a cup of coffee first?" I asked.

Rodrigo nodded vigorously, so I got up, motioning him to continue while I prepared the coffee machine for another batch.

⁹⁷ The Professor was at first astonished by Rodrigo's effrontery, but then he thought of the spate of books that had focused on the allegedly dysfunctional black family. See, e.g., *supra* notes 27-30 and accompanying text. Rodrigo's suggestion, the Professor thought, was sure to spark controversy—he thought of the many white folks he knew who were certain that their own family structure was the best in the world and the model for others. But then it struck him—was that Rodrigo's point, namely to show his readers how blacks feel when their family is depicted as socially pathological?

⁹⁸ See *supra* notes 67-68 and accompanying text.

B. *Getting to the Root of the Problem:
The White Family Structure*

As I busied myself measuring out the ingredients, Rodrigo began:

"As we were saying, Professor, white-collar and related crimes are a serious social problem. They are committed mostly by white people, and their net social costs exceed those of street crime by a large margin.⁹⁹ Indeed, if my figures are correct, they exceed those committed by the black population on a per capita, not just a net basis.¹⁰⁰ Many of them go unpunished, even though they cause injury, disfigurement, and death.¹⁰¹ Moreover, the amount of interpersonal violence associated with this type of misdeed is greater, on both bases, than that associated with black crime."¹⁰²

"Here's your coffee."

Rodrigo stirred in some creamer and his trademark four teaspoons of sugar and began slurping his drink. After a short interval, he continued:

"We need a major study of the white family. Social scientists could examine what features are contributing to the large amount of white-collar crime associated with it. Psychologists would study the contribution of child-rearing patterns, punishment, inculcation of attitudes toward authority, TV-watching, and so on. Sociologists would try to figure out whether mobility, changes in jobs and job security, and divorce have anything to do with it. Statisticians would look for correlations—all converging on the central problem of high levels of white-collar crime, particularly ones of stealth and theft."

"And I suppose you have a hypothesis regarding what they will find if they undertake such a study?"

"I do," Rodrigo replied. "I have a hunch that crimes of stealth and theft tend to be associated with small family size."¹⁰³ In Italian

⁹⁹ See *supra* notes 52-55 and accompanying text.

¹⁰⁰ See *supra* notes 59-62 and accompanying text.

¹⁰¹ See *supra* notes 67-85 and accompanying text.

¹⁰² See *supra* notes 68-85 and accompanying text.

¹⁰³ The Professor was aware of the literature on family dynamics and "opportunity" as predictors of crime. See, e.g., Sheldon Glueck and Eleanor Glueck, *Predicting Delinquency and Crime*, 79, 84 (1959) (discussing birth order and family size); Marcus Felson, *Linking Rational Choice, Routine Activities, Informal Control, and Criminal*

culture, for example, families tend to be larger. There are more generations under one roof, with grandparents and aunts living with the nuclear couple and their children. The children get plenty of adult attention.¹⁰⁴ Plus, there's always someone there to watch them. There are very few latchkey children. For all those reasons, there is much less theft, even when you take into account that it is a much poorer country."

"Some American corporate criminals I have read about come from large families."

"I know. Small size is not the only factor. Many American families—upper class, white ones, I mean—are also intensely private. Every child has his or her own bedroom. Children are urged to cover up. There is little nudity, even when the child is very small, and so on. I have a suspicion that this encourages a spirit in which crimes of silence, of secrecy, can flourish. A third element is acquisitiveness. In the U.S., children quickly learn that material things—toys, the latest clothes, musical equipment, and so on—are a measure of their worth.¹⁰⁵ For some, later in school, this takes the form of competition for the highest grades. Little wonder that children raised in such a warped atmosphere grow up committing one of the highest rates of white-collar crime in the world."

"Competitiveness isn't so bad. It enabled us to develop the wilderness, set up a commercial empire, invent new machines, and medical cures."¹⁰⁶

Outcomes *in* *The Reasoning Criminal: Rational Choice Perspectives on Offending* 119, 122-25 (Derek Cornish & Ronald Clarke eds., 1986) (discussing opportunity). And the Professor believed that small family size is linked with introversion and a preference for solitary activities. The Professor thought all of this made Rodrigo's hypothesis plausible, though he knew of no study that corroborated it directly. Was it possible, the Professor wondered, that this was so because few criminologists entertain the possibility that the dominant culture's preferred family structure may be a source of pathology?

¹⁰⁴ On Italy's approach to child-raising and early education, see, e.g., E. M. Standing, *Maria Montessori: Her Life and Work* (1957); Carolyn Edwards, Lella Gandini & George Forman, *The Hundred Languages of Children: The Reggio Emilia Approach to Early Childhood Education* (1993).

¹⁰⁵ On the materialism of our culture, see, e.g., John K. Galbraith, *The Affluent Society* 126-33 (4th ed. 1984); Thorstein Veblen, *The Theory of the Leisure Class: An Economic Study of Institutions* 60-80 (1953) (MacMillan 1899).

¹⁰⁶ Cf. *Chronicle*, *supra* note 1, at 1368, 1371-72, 1376 (providing the Professor's defense of Western rationalist thought in response to an earlier attack by Rodrigo).

"But not when it spreads over into the realm of crime," Rodrigo retorted, "as it too often does. For example, in my law school, one of the librarians told me that books disappear all the time.¹⁰⁷ Imagine—stealing a book! In some societies this would be unthinkable. And one of my fellow students, who is in the J.D. program, told me that during exam and moot court times, people scissor pages and whole articles out of bound volumes.¹⁰⁸ The library has to Xerox or buy a replacement sheet or article, and glue it back into place. This looks funny—I've seen them—and must cost a fortune."

"I'm sure it does."

"And then this attitude spreads into the world of work," Rodrigo continued. "Corporations have learned that they can make more money by taking over each other, by issuing fraudulent or near-fraudulent junk bonds, and so on, much more easily than they can by working hard to sell better products or services.¹⁰⁹ I ran into an old friend who is now working for the mergers and acquisitions department of a major law firm on the other side of the river. He says they have a saying: 'We make money the old fashioned way—we take it.'"

"Even when legal, there's obviously a limit to how long American business can go on simply buying and selling and taking over each other," I said.

"But hardly anyone thinks to ask that question. The prevailing ethic and family structure tell all who grow up in the culture that if you can get away with taking something—if no one sees you or the law doesn't flatly pronounce it criminal—it's okay to do it. There is no ethics, no social network of caring or responsibility. It all goes back to the family structure."

"Of course, that's the same accusation they make against us—that our families are pathological, too many single mothers, gangs, irresponsibility, and so on."¹¹⁰

¹⁰⁷ On the problem of theft in American libraries, see, e.g., Lawrence W. Towner, *An End to Innocence*, 19 *Am. Libraries* 210 (1988); Alan J. Lincoln, *Crime in the Library: A Study of Patterns, Impact, and Security* 33-35, 47-50 (1984).

¹⁰⁸ Interview with Jean Stefancic, Research Associate and Documents Law Librarian, in Boulder, Colorado (July 26, 1993).

¹⁰⁹ Kevin Phillips, *The Politics of Rich and Poor: Wealth and the American Electorate in the Reagan Aftermath* 96, 114, 217 (1990) [hereinafter *Politics of Rich and Poor*].

¹¹⁰ See *supra* note 94.

"There is some of that," Rodrigo acknowledged. "But the black family is the strangest possible scapegoat for America's social ills today. The real causes of our economic downturn, of our festering cities, and soaring unemployment rate, are white-collar crime and corruption."

"You think it's that pervasive?"

"I do. But leaving that aside, the train of abuses I just documented for you on your computer is largely the source of our business downturn. Today the U.S. has only the world's fifth strongest economy.¹¹¹ It used to be first by a large margin. And to return to your question, yes, I think the solution to blacks' problems is interconnected with the solution to whites' problems."

"You mean in the sense that any general benefit redounds to the improvement of all?"

"In more than that 'trickle-down' sense, Professor.¹¹² I believe the connecting link is the great middle class and its sense of what we can and cannot do as a nation."

I probably looked puzzled, for Rodrigo stopped for a moment, drained his coffee cup, and continued:

"The white middle class has most of the votes. And currently, they will not vote for, or tolerate, costly programs that benefit the black poor. And the reason is not hard to understand: The members of the middle class are themselves hurting. Both parents in many families are already working, yet the families are barely able to make ends meet. Their own children are exhibiting social pathology because of the inattention they receive at home. And

¹¹¹ U.S. Gets Less Competitive as Japan Stays on Top, Annual Survey Indicates, *Atlanta J. & Const.*, June 22, 1992, at A10 (asserting that the American economy is now fifth in world, and its workforce only seventh best); see also *Top 10 Countries for Quality of Life*, *Wash. Post*, Nov. 5, 1991, Health section (magazine insert), at 5 (placing the United States in seventh place, behind Japan, Canada, Iceland, Sweden, Switzerland, and Norway, on quality-of-life measurements such as life expectancy, income, and infant mortality).

¹¹² Touted by the Reagan administration, "trickle-down economics" rested on the belief that stimulating investment and economic activity by the wealthy sector would create new jobs and thus ultimately benefit the poor. For an assessment of the effects of this program, see *infra* note 117 and accompanying text. For a more general discussion of governmental favoritism toward friends and elite groups, see Richard Delgado, *Inequality "From the Top": Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice*, 32 *UCLA L. Rev.* 100 (1984).

the economic indicators show that things are unlikely to get better soon."¹¹³

"In an atmosphere like that, no one is likely to feel generous toward outgroups, toward people even poorer, more desperate than oneself."

"No, but if we could get a grip on white-collar crime, there would be an immediate improvement in everyone's situation. Look at the figures we jotted down earlier—five hundred dollars per year per American citizen, not even counting the costs of wars and other military aggressions.¹¹⁴ If every family had that much more in their pocket, they might be more generous toward those who have even less. We could help young black men in trouble. We could have Head Start programs and pediatric care for every black youngster. We could turn things around, reduce the amount of pain and desolation in our inner cities—not overnight, but in relatively short order."¹¹⁵

"We could even give some of the white people's land back to the Indians," I said.

Rodrigo shot me a sharp look. "I'm serious," I said. "It's not a minor issue."

"I'm glad," Rodrigo replied. "Because it's a serious issue with me, too. Our indigenous tribes have poverty, drop-out, and suicide rates that are some of the worst in the world. It's time society took making amends seriously."¹¹⁶

"And you think that by encouraging white folks to get a grip on their own criminality, rein in the malefactors and malefactors-to-be in their midst, all this would become possible?"

¹¹³ On the problems of today's middle class, see, e.g., Stephen Koepp, *Is the Middle Class Shrinking?*, *Time*, Nov. 3, 1986, at 54; Lance Morrow, *Voters Are Mad as Hell*, *Time*, Mar. 2, 1992, at 16, 19-20.

¹¹⁴ See *supra* notes 80-85 and accompanying text; *infra* Appendix A (calculating losses due to white-collar crime to be \$395 to \$790 per U.S. citizen, an amount that would be considerably higher if corporate misconduct were included).

¹¹⁵ On the needs of the black poor, see, e.g., Hacker, *supra* note 21; Marian Wright Edelman, *Families in Peril: An Agenda for Social Change* (1987); Marian Wright Edelman, *The Measure of Our Success: A Letter to My Children and Yours* (1992).

¹¹⁶ See, e.g., Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 *Wis. L. Rev.* 219; Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 *Ariz. L. Rev.* 237 (1989).

"Five hundred dollars per person is a lot of money. Right now, neither the money nor the spirit is there.¹¹⁷ The money has flowed into the pockets of the corporate elite, which is richer and more confident than ever before, while the middle class of all colors is hurting.¹¹⁸ If we clamped down on the tax cheats, procurement fraud artists, and so on, the average American taxpayer would have a lower bill, would see higher returns on his or her money, and would be less reluctant to vote for programs that benefit the poor and the black underclass."

"But what makes you think that the extra money will change people's political views? The average conservative middle class voter will attribute the windfall to his own hard work and ingenuity. He will continue to believe that he is comfortable because he deserves it and that the poor are in their position because they have gotten what they deserve. And the wealthier may not even notice the extra money; they may simply notice with disapproval that the law is really cracking down on them, but that the kid who stole their hubcaps has yet to be apprehended."

"I'm sure some will react that way," Rodrigo conceded.

"And even if the extra money is there and if the taxpayers are willing to use that money for the benefit of all society, rather than for their trip to Disneyland or Susie's tuition, I am not sure that they would agree to have that money spent on the underclasses. Many middle class people believe that too much is being spent already on 'those people.' And with the recent emphasis on the deficit and national debt, I'm not sure the middle class wants to raise taxes only to increase spending. They want deficit reduction."

Rodrigo shot me a quizzical look, then replied:

"Yes, and we thought that third-party candidates couldn't have much of an impact on national elections. But I don't guess I'm

¹¹⁷ On the recent decrease in public support for minorities' concerns and civil rights, see Hacker, *supra* note 21, at 50-52, 93-133.

¹¹⁸ See, e.g., Bureau of the Census, U.S. Dep't of Commerce, *Workers With Low Earnings: 1964 to 1990*, Series P-60, No. 178, at 3 (Mar. 1992) (reporting that between 1979 and 1990 the proportion of fulltime workers who earned less than poverty-level wages increased from 12.1% to 18%, resulting in a total of 14.4 million workers in 1990); *The Reagan Experiment* (John L. Palmer & Isabel V. Sawhill eds., 1982) (analyzing effects of the recent trend to emphasize the business sector at the expense of social spending); *Politics of Rich and Poor*, *supra* note 109 (discussing the concentration of wealth and power at expense of the poor and middle class).

saying that the spirit to deal with the oppressive conditions of the inner city will necessarily come with the financial means of doing so. What I am saying is that, in these recessionary times, if we don't come up with the money by cutting waste or crime then the desire to help the plight of the poor will definitely not be there. With the extra money, the will may come."

"That is still a very optimistic view of things for a neomarkist."

"I realize that, Professor, but there is more. Even if the middle class does not see the savings or attribute them to the crackdown on white collar crime, some of the savings will automatically accrue to the poorer classes. Particularly the savings from consumer fraud. Because the poor spend a higher percentage of their income on consumption than do the middle class or the wealthy, they will receive a higher proportion of their income in savings than will the wealthy."

"And with that higher income will come improvements in quality of life, and with that will come less of a need to steal and commit the various other street crimes that we talked about."

"Cracking down on white-collar crime can help two ways. There will be benefits from the savings automatically accruing to the poor as well as to the middle class. And there is a chance that the extra money will help the middle class get out of its own financial bind and enable it to think about others."

"But you would still have what you call the social construction problem, would you not?"¹¹⁹

"I think this would ease as society began to see that our folks do not include the biggest and worst criminals by a long shot. They would see us for what we are: a population that contains many poor—and some desperate—people living lives of danger because of the legacy of slavery, racism, and separate-but-equal treatment. Americans can be generous toward groups they do not see as demonized—flood victims, for example."¹²⁰

¹¹⁹ See *supra* notes 17-48 and accompanying text (in which Rodrigo argues that, whether accurately or not, blacks and other minorities of color are seen as posing the most significant threats of crime in our society).

¹²⁰ See, e.g., Tillie Fong, *Flood Victims Get a Colorado Hand: TV Stations, Charities Accepting Donations of Money, Food and Other Supplies for Midwest*, Rocky Mt. News, July 16, 1993, at 6A; Liz Spayd, *For Volunteers from D.C. Area, Flood Means a Working Vacation*, Wash. Post, July 29, 1993, at A4.

"Or children lost in the bottom of a well," I added.¹²¹

"You have put your finger on an important point, though, Professor, one I'll have to ponder. I've argued that the social need generated the stigma-picture, the stereotype of the black criminal.¹²² The question is: If we could destroy that stereotype, would things reverse—would the repression and cold treatment wither away, or would it return in yet another form and supported by yet another rationalizing structure?"

"That's a tough question," I replied. "It has to do with one's basic attitude to human nature, the fundamental goodness or badness of mankind.¹²³ Some days, I think our people will not overcome, that we will never be saved, that we will be doomed to enjoy at most periodic peaks of progress, followed by a sickening thud as we fall right back where we started from—that white self-interest calls the tune.¹²⁴ When it serves the purpose of elite whites to permit us an occasional 'breakthrough,' then we get a *Brown v. Board of Education* or Civil Rights Act of 1964.¹²⁵ Right now it seems to be in the self-interest of powerful and articulate whites to depict us as criminals. I doubt we'll escape that stereotype until conditions change."

"Some white folks will listen," Rodrigo replied, a little hesitantly. "My thesis advisor is white, and he seems genuinely open."

"But it's the opinion makers who really count," I replied. "And for all his brilliance, your professor really is not an opinion maker in the way the humblest reporter, news broadcaster or assistant city mayor is."

¹²¹ Around the Nation: Rescued Girl's Circulation Improves; Reagans Send Cheer, Wash. Post, Oct. 19, 1987, at A10.

¹²² See supra notes 17-48 and accompanying text.

¹²³ For an exploration of these twin themes of despair and hope in the law of race relations, see, e.g., Richard Delgado, Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved? 97 Yale L.J. 923 (1988) (reviewing Derrick Bell, *And We Are Not Saved* (1987)); Not Saved, supra note 1 (elaborating a pessimistic view); Commentary on *Racial Realism*, 24 Conn. L. Rev. 497 (1992) (collection of views sparked by Derrick Bell, *Racial Realism*, 24 Conn. L. Rev. 363 (1992)).

¹²⁴ The prime exponent of this cyclical view is Derrick Bell. See e.g., Not Saved, supra note 1 at 56-62; Derrick A. Bell, Jr., *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 523-25 (1980) [hereinafter Interest-Convergence] (proposing that society tolerates progress for blacks and other minority groups only when this advances the interest of elite whites).

¹²⁵ See Interest-Convergence, supra note 124.

CONCLUSION

We both sat back in my rapidly darkening office. I knew Rodrigo and I would soon have to return to our respective shelters, I to my nearby apartment, he to his and Giannina's place across town. The coffeepot's red switch glowed faintly in the gathering gloom. I reflected on the powerful case Rodrigo had made, both with statistics and interest-convergence/social-construction-of-reality theory, for why our people are invested these days with such a devastatingly negative image. I wondered if there was any hope for its abatement. Only strong friends with access to and a command of the media, the mechanisms of public information and opinion, could help us, I thought. I reflected on the huge costs of that "other kind" of crime and wondered what chance, if any, our nation had of bringing it under control. Further, if we did, what assurance was there that the gains would be transferred, put to the benefit of poor families in the ghetto?

The phone rang again. I picked it up, and as I feared, Rodrigo stood up and indicated he had to go. "By the way, Professor," he mouthed, "your office looks very nice."

I nodded, listened to the phone for a moment, then smiled broadly. Covering the receiver I told Rodrigo, who was about to disappear out my door: "It's the reporter. She wants to know how to spell 'Harry Kalven'!"¹²⁶

¹²⁶ See *supra* notes 63-64 and accompanying text (discussing Harry Kalven's *The Negro and the First Amendment*).

APPENDIX A

RODRIGO'S THIRD PRINTOUT—WHITE COLLAR AND
STREET CRIME, PROPERTY LOSSES

I. Costs of Street Crime Per Year

| Crime | Cost | Source(s) |
|---------------|---------------|---|
| Robberies | \$562 million | Uniform, supra note 53, at 27. |
| Burglary | \$3.9 billion | Id. at 39. |
| Larceny-Theft | \$3.9 billion | Id. at 44 (providing a figure for larceny-theft category, which includes picking pockets, purse-snatching, theft from cars, bicycle theft, etc.). |
| Graffiti | \$600 million | Bill, supra note 54; Statistical Abstract, supra note 22, at 22 (providing this figure, which was reached through rough calculation of multiplying the figure for California by its proportion of the U.S. population). |
| Total | \$9.0 billion | |

II. Costs of White-Collar/Corporate Crime Per Year*

| <i>A. Individual</i> | | |
|--|--------------------------------|--|
| Crime | Cost | Source(s) |
| Tax fraud | \$100 billion to \$200 billion | Michael Kinsley, TRB from Washington: Accounts Receivable, New Republic, June 8, 1992, at 6. |
| Embezzlement and banking fraud (other than S&L scandal) | \$800 million | Efforts to Combat Criminal Financial Institution Fraud, Hearing Before the Subcommittee on Consumer and Regulatory Affairs of the Senate Committee on Banking, Housing, and Urban Affairs, 102d Cong., 2d Sess. 537, at 53 (1992). |
| Insider trading, anti-trust violations, and securities fraud | \$2 billion | Corporate Crime, supra note 53, at 3; see also Invisible, supra note 50 (estimating a \$3.4 billion loss); Middle Classes, supra note 57, at 24-28 (providing definitions); Drexel Burnham Lambert Files for Bankruptcy, Facts on File, World News Digest, Feb. 16, 1990, at 102 (reporting default of \$100 million in short-term loans). |
| Total | \$100 billion to \$200 billion | |

* See supra note 55 for a description of white-collar crime.

| <i>B. Corporate Crime/Corruption</i> | | |
|--------------------------------------|--|--|
| Crime | Cost | Source(s) |
| Defense procurement fraud | \$230 million | Barr, <i>supra</i> note 59, at 172. |
| Consumer fraud | \$174 billion to \$231 billion | Corporate Crime, <i>supra</i> note 53, at 15. |
| Savings & loan scandal | \$30 billion to \$50 billion | Invisible, <i>supra</i> note 52, at A20. |
| Toxic dumping | \$20 million (\$270 million over a 13-year period) | U.S. Writes Off Cleanup Costs of Toxic Sites, <i>N.Y. Times</i> , June 21, 1993, at A16; Adriel Bettelheim, <i>Munitions Mess on Public Lands</i> , <i>Denver Post</i> , July 9, 1993, at A1; see Ten Worst, <i>supra</i> note 59, at 14-15, 17. |
| Nuclear cleanup | \$13 billion | See <i>Washington Whispers</i> , <i>U.S. News & World Rep.</i> , July 12, 1993, at 24 (reporting \$400 billion in nuclear cleanup costs over a 30-year period). |
| Total | \$217 billion to \$294 billion | |

| <i>C. Total White Collar Crime</i> | | |
|------------------------------------|--------------------------------|--|
| Total | \$317 billion to \$494 billion | |

III. Comparisons

| | | |
|---|---|---|
| Population of the United States | 253 million 84% is white 12% is black | Statistical Abstract, supra note 24, at 1, 16. |
| Ratio of white to black population | Approximately 7:1 | |
| Costs of street crime per U.S. citizen/year | \$35 | |
| Costs of individual white-collar crime per U.S. citizen/year | \$395 to \$790 | |
| Costs of individual white-collar plus corporate crime per U.S. citizen/year | \$1252 to \$1952 | |
| Ratio of cost of individual white-collar to street crime | 11:1 to 22:1 | |
| Ratio of cost of individual white-collar plus corporate crime to street crime | 36:1 to 55:1 | |

APPENDIX B

RODRIGO'S FOURTH PRINTOUT—ANNUAL DEATHS
FROM STREET CRIME, CORPORATE CRIME,
AND MISCONDUCT COMPARED TO
DEATHS FROM WARS AND MILITARY ACTIONS

I. Deaths Resulting Annually from Street Crime

| Cause | Number | Source(s) |
|---------------------------------------|--------|--------------------------------|
| Murder and non-negligent manslaughter | 24,703 | Uniform, supra note 53, at 13. |

II. Deaths Resulting Annually from Corporate Actions

| Cause | Number | Source(s) |
|---|------------------|--|
| Cigarettes | 350,000 | Frank J. Vandall, Real-locating the Costs of Smoking: The Application of Absolute Liability to Cigarette Manufacturers, 52 Ohio St. L.J. 405 (1991). |
| Asbestos-related cancer | 8000 | Corporate Crime, supra note 53, at 284. |
| Dangerous products | 28,000 | Id. at 16. |
| The use of infant formula rather than breast-feeding, worldwide | 1,000,000 | Id. at 4, 307-17 (giving 1,000,000 as the number of deaths for one year: 1986). |
| Employee exposure to dangerous chemicals and other safety hazards | 100,000 | Id. at 16. |
| Total | 1,486,000 deaths | |

III. Deaths Resulting Annually from Military Actions

| Cause | Number | Source(s) |
|--|--|--|
| U.S. military deaths resulting from undeclared wars since 1950 | An average of 2,250 per year (90,000 total deaths) | James Stokesbury, <i>A Short History of the Korean War</i> 254 (1988); Guenther Lewy, <i>America in Vietnam</i> 451 (1978); see also <i>supra</i> notes 83-84, giving totals including deaths of enemy soldiers and noncombatants. |

IV. Comparisons of Annual Death Statistics

| | |
|---|--|
| Corporate and military actions combined | 1,488,250 deaths |
| Ratio of deaths resulting from corporate crimes and undeclared wars to ones resulting from street crime | 60:1 |
| Causes of deaths | One out of 518 Americans will die because of corporate actions. One out of 10,242 Americans will die because of street crime. |

The bottom of Rodrigo's print-out contained the following handwritten note:

Dear Professor:

Much white-collar crime by nature is surrounded by stealth and not discovered, if at all, until much later. Many of my figures are only for successful prosecutions—the actual amount of crime is probably much higher. In a few cases, the figures I've brought up result from a single year's investigation and, in that sense, may be atypically large—i.e., greater than those for surrounding years (see, e.g., Barr, *supra* note 59 (describing successful investigation of defense procurement fraud, Operation Ill-Wind)). Not all my figures are for the same year, although I've tried to make them both as recent and as typical as possible. New information is coming out all the time. I can show you how to program your computer to update automatically, if you like.

Best of luck at the panel discussion, and let me know if I can help.

R—